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TRIAL EVIDENCE

THE RULES OF EVIDENCE

APPLICABLE ON THE TRIAL

OF

CIVIL ACTIONS

INCLUDING BOTH CAUSES OF ACTION AND DEFENSES

AT COMMON LAW, IN EQUITY

AND

UNDER THE CODES OF PROCEDURE

BY AUSTIN ABBOTT, LL.D.

VOL. I

THIRD EDITION

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PREFACE TO THIRD EDITION

In the preface to the first edition of this work Mr. Abbott stated that he assumed that the reader is familiar with the general principles of the Law of Evidence and is concerned with their proper application in actual practice, and that he had accordingly sought to state the most useful, convenient and trustworthy rules as to the mode of proof of each material fact in all the great classes of actions and defenses, and to illustrate and support these rules by a selection of authorities drawn from the decisions and the works of the best text-writers. He further stated that if he had laid down these rules with somewhat more conciseness and certainty than is usual in law treatises, it was not because he had consciously deferred too much to the authority of reported cases but because he believed that the main rules of proof now administered by our courts are capable of clear and precise statement upon authority which will usually be controlling at *nisi prius*.

Nearly forty years have elapsed since this was written, during which time the work has been in daily use by the legal profession in the preparation of cases for trial and in the actual trial of issues in court, and it seems that this test has proved the correctness of the author's belief that the main rules of proof are capable of clear and precise statement.

This long use and approval by the courts in both the trial and appellate branches has resulted in a practical crystallization of the principles governing the subject treated which gives the text itself a tone of authority which could not be claimed for a newer work. It has accordingly seemed that the preparation of this new edition should be made rather upon the basis of an annotation of an authoritative text than the revision of a treatise. But few changes have been made in the text and the additional authorities in-

troduced in the notes are those which tend not only to confirm or criticise the rules stated, but to aid in their application.

As this work does not state merely the rules and principles of evidence but the substantive law involved in the trial of a particular action, the field of examination has, of necessity, included practically the entire field of judicial opinion during the period covered. The process of selection of cases from this great mass of material has been attended with difficulty and, of necessity, cannot be governed by any fixed or definite rule other than the attempt to occupy the position of the reader and select those cases which seem to guide his course in the work in hand. In spite of the most drastic process of elimination, a very large number of cases have been cited, and still it has been deemed necessary to state the point decided with sufficient fullness to avoid ordinarily forcing the reader to have recourse to the report itself. The large number of cases in the various jurisdictions, with the incidental difficulty of access to many of the volumes cited, has seemed to render such a course imperative notwithstanding the resulting expansion of the volume of the work.

It is felt that the cases which have been selected and those which are pointed out in the opinions referred to, will, when further reference is desired, furnish as complete a clue to the authorities as can be brought within the compass of a single work, absolute completeness of citation being physically impossible.

The former omission of a Table of Cases Cited has been here remedied, and its use will furnish another ready clue to the desired authorities upon the point treated, which may prove useful by way of cross-reference in view of the necessary separation of analogous cases which fall in different chapters under the classification in the work.

James MacGregor Smith.
John Kenneth Byard.

New York, October, 1918

PREFACE TO SECOND EDITION

Abbott's Trial Evidence has long enjoyed the reputation of being one of the most useful law books ever published. In writing it, Mr. Abbott had constantly in mind the needs of the trial lawyer, and selected and arranged his material in such a way as to make it readily available in the course of a trial, or in the preparation for trial. This arrangement I have not in any way disturbed. The book has become so generally recognized as an authority that I have deemed it proper to make my additions mostly in the way of foot notes, only altering the text where there have been changes in the law. In a few cases, where the modification was statutory, and the former rule still prevails in some jurisdictions, I have left the text in its original form, and called attention to the change by a note. In the twenty years since the last edition was issued, many decisions of the greatest importance have been rendered, and the cases reiterating points previously decided are almost innumerable. To have added all of these would have been impracticable, and would have greatly increased the size, without adding anything to the value, of the work. I have, however, endeavored to cite all the cases in which new points have been decided, and such recent cases affirming or applying old rules as will give the practitioner a clew to the latest authorities on those subjects. Even under this system the new citations will be found to number several thousands. In many cases, in order to avoid the citation of an unnecessary number of cases, I have substituted recent authorities for those originally cited.

JOHN J. CRAWFORD.

30 Broad Street, New York, March 9th, 1900.

PREFACE TO FIRST EDITION

In this volume I assume that the reader is familiar with the general principles of the Law of Evidence, and is concerned with their proper application in actual practice. I have accordingly sought to state the most useful, convenient, and trustworthy rules as to the mode of proof of each material fact in all the great classes of actions and defenses; and to illustrate and support these rules by a selection of authorities drawn from the decisions of all the American and English courts, and from the works of the best text-writers.

Recent changes in procedure, accompanying or resulting from the Code practice, have had far-reaching consequences in respect to the mode of dealing with the subject of evidence. The abolition of formal distinctions affecting actions and suits, the new methods of pleading, the abrogation of former disqualifications of witnesses, and the advance in assimilating the practice in the United States courts to that in the State courts, have silently effected many radical changes in the mode of proof, and have had a wide and powerful influence upon the practical application of the general principles of evidence. In consequence of these modifications of the law, most of the questions as to competency of witnesses and the effect of the pleadings, which formerly occupied so much attention, have dropped out of notice, and questions of the relevancy and competency of particular facts relating more or less directly to the issue, and of the weight and cogency of evidence, have been brought into new importance. Since the law has given to the trial courts increased freedom in the admission of evidence, the appellate courts justly use increased care in scrutinizing questions of evidence, that they may relieve against all substantial errors which transcend the limits of

that freedom. And there has also been a general advance in the development of the rules by which appellate courts (in proper cases) re-weigh the evidence on which facts have been found in the trial courts.

Hence discussions on questions of evidence, in our appellate courts, are now more important and more frequent than ever before; and careful practitioners are more than ever accustomed to include in their preparation for trial, an examination of the authorities as to the mode in which, in the present condition of the law, the cause of action or defense should be proven.

Each class of actions has its peculiar rules of proof. These are the result of experience, adapting the general principles discussed in the text-books to the exigencies of justice in each kind of litigation. It is not enough to know the general principles which are to be applied. It is necessary to know also how they are to be applied and limited in the particular action on trial. Such special rules, though less artificial and technical than formerly, have become, under the new procedure, more numerous and important than ever. On questions of evidence the conflict apparent among text-writers and decisions, often arises from supposing that general principles have similar application and effect in all classes of cases. The method here pursued aims to give, in successive chapters, under the title of each principal cause of action and defense, the characteristic rules now applied by our courts in that class of cases, together with an indication of the general principles on which these special rules rest, and by which they are to be extended or limited, in new instances.

The method chosen for the statement of these rules is that which seemed to promise the best practical assistance to counsel and to the court, in the trial of issues; to the practitioner generally in preparing for trial and selecting witnesses; and also to the pleader in framing issues.

The order of topics pursued first disposes of questions connected with the character of Particular Classes of Parties, as likely to arise in actions of almost any kind, and then

proceeds with Particular Causes of Action, taking first those in which the main proof is usually of facts raising an implied contract or legal duty; followed by those involving writings unsealed, sealed, or of record; then those turning on negligence or tort; then those seeking specific relief, founded on either of these kinds of transactions; and finally those which, in a greater degree, depend on statutes, &c. Defenses which are common to several classes of actions are not treated in connection with each cause of action, but in the third and last part of the volume.

The arrangement under each subject requires the reader to analyze closely his cause of action or defense; and thus warns him, in preparing his proofs, not to overlook any element which the case may involve. He should remember that he is necessarily assumed to have already decided that his action will lie or his defense avail, and that whatever may here be said upon that point is subordinate and incidental to the main object, viz., to aid him in proving or disproving whatever allegations in the pleading before him may be material, and to indicate the various phases of the subject under which the evidence adduced may or may not be admissible. The practitioner will find that such a close analysis of the probative facts of a cause of action or defense, is of the utmost value in giving him a mastery of the details of the case; and the student will find it equally useful in leading him to an understanding of the law.

If the rules I lay down are stated with somewhat more conciseness and certainty than is usual in law treatises, it is not because I have consciously deferred too much to the authority of reported cases, but because I believe that the main rules of proof now administered by our courts, are capable of clear and precise statement, upon authority which will usually be controlling at *nisi prius*. I have endeavored to present them thus in the text: rules that are doubtful or of secondary value, I have sought to indicate suitably in the notes.

Discussion of the cases cited, and their relative authority,

has therefore been omitted; my purpose being to cite those of importance and value, and to state concisely and with certainty the resulting rules; and to cite cases of minor authority so far as they justly serve to extend, qualify, or apply the doctrine of the leading authorities: otherwise to omit them or refer to them as *contra* to the rule stated. In a work covering so extended a field, it would be impracticable to cite all the cases examined, and I have not sought to multiply but rather to sift and select authorities.

Upon those questions on which the adjudications or statutes of different States are at variance, I have stated the rule which I understand to prevail in New York, calling attention, however, to questions on which there is a serious general difference of opinion: such, for instance, as the burden of proof as to contributory negligence,[1] the competency of admissions and declarations of an assignor to impair the claim of his assignee,[2] the effect of irregular indorsement,[3] and the like. In cases of minor importance it is generally assumed that the reader will notice any peculiar rule prevailing in his own jurisdiction.

Discussion of general principles has been out of place, except rarely and in a limited degree, where it has seemed necessary, either to show how those principles are now administered in the American courts somewhat differently than indicated in the books, or to aid the reader to meet vexed and unsettled questions.

In reviewing the work on which I have been so long engaged, and the preparation for which has so constantly connected itself with professional practice, I am not unconscious of imperfections and inequalities in its execution; but to the kindly consideration of the profession I submit it, in the hope that it may often aid and seldom mislead.

AUSTIN ABBOTT.

Times Building, New York, May, 1880.

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[1] Pages 1569–1578. [2] Pages 46–54. [3] Pages 1114–1121.

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PART I

EVIDENCE AFFECTING PARTICULAR CLASSES OF PARTIES

CHAPTER I

ACTIONS BY AND AGAINST ASSIGNEES

1. Rules Applicable to Assignees.

To avoid repetition when discussing rules applicable to particular classes of actions, we will first consider certain rules which are common to many classes of actions, because applicable generally to peculiar classes of parties.

The rules thus applicable to the assignees are not limited to transferees by formal deed, but, with qualifications to be indicated as we proceed, apply generally to all transferees of non-negotiable things in action.

2. Allegation of Assignment Material.

If plaintiff seeks to recover upon a cause of action which accrued to another person, and became the plaintiff's by assignment, the allegation of assignment is essential. Under an allegation of a cause of action accruing to the plaintiff, proof of a cause accruing to his assignor is not admissible; [1]

[1] The term "assignment" does not, like the term "deed" or "specialty," signify an instrument under seal. Barret *v.* Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. Rep. 863.

An assignee of an open account cannot recover without averring the assignment. Peirce *v.* Closterhouse, 96 Mich. 124, 55 N. W. Rep. 663.

A petition, of an assignee of a chose in action, which does not allege that the assignment, when required to be in writing, was in writing, is demurrable. Foster *v.* Sutlive, 110 Ga. 297, 34 S. E. Rep. 1037; Hartford F. Ins. Co. *v.* Amos, 98 Ga. 533, 25 S. E. Rep. 575.

Where the complaint shows by implication that the plaintiff claims ownership of the assigned claim at the time of the commencement of the action, that is sufficient as against a general demurrer. Krieger *v.* Feeny, 14 Cal. App. 538, 112 Pac. Rep. 901.

Proof of assignment is essential in an action by an assignee of a claim for damages. Hoppes *v.* Des Moines City R. Co., 147 Ia. 580, 126 N. W. Rep. 783.

An assignment is not an executory instrument; it is completed by the delivery of the assignment. Hull *v.* Hull, 172 App. Div. 287, 158 N. Y. Supp. 743.

A mere litigious right cannot be assigned. Cooper *v.* Hillsboro Garden Tracts, 78 Ore. 74, 152 Pac. Rep. 488.

A contract involving the relation of personal confidence cannot be assigned. Central Brass & Stamping Co. *v.* Stuber, et al., 220 Fed. Rep. 909, 136 C. C. A. 475.

"Contracts embodying liabilities or duties which in express terms or by fair intendment from the nature of the liabilities themselves import reliance on the character, skill, business standing, particular experience or capacity of the parties cannot be assigned by one without the consent of the other." Walker Electric Co. *v.* N. Y. Shipbuilding Co., 241 Fed. Rep. 569.

A purchaser of land cannot assign to another the right to sue for

and under an allegation of an assignment, proof of an assign-

a rescission of the contract. Cooper *v.* Hillsboro Garden Tracts, 78 Ore. 74, 152 Pac. Rep. 488.

The right of the assignor to recover any damages which accrued by reason of the breach of a contract for support is assignable and the action may be maintained in the name of the assignee. Bryne *v.* Dorey, 221 Mass. 399, 109 N. E. Rep. 146.

A covenant or obligation binding the seller to refrain from engaging in a like business within specified territorial limits is assignable. Graca *v.* Rodrigues (Cal.), 165 Pac. Rep. 1012; Bennett *v.* Carmichael Produce Co. (Ind. App.), 115 N. E. Rep. 793.

Claims against railroad companies for injuries to property may be assigned in writing and each successive assignee thereof may sue thereon in his own name. Ala. Code, § 5159, declared constitutional. Parnell *v.* Southern Ry. Co. (Ala.), 74 So. Rep. 437.

Causes of action for personal injuries are properly subject to sale, barter, contract or gift. McCloskey *v.* San Antonio Traction Co. (Tex. Civ. App.), 192 S. W. Rep. 1116.

An assignment of a claim must be alleged and proved. Buffalo Ice Co. *v.* Cook, 9 Misc. 434, 29 N. Y. Supp. 1057; Vestner *v.* Findlay, 10 Misc. 410, 31 N. Y. Supp. 138; McKnight *v.* Lowitz, 176 Mich. 452, 142 N. W. Rep. 769.

Failure to allege assignment of a replevin bond is fatal to plaintiff's complaint. Gallup *v.* Licther, 4 Colo. App. 296, 35 Pac. Rep. 985.

Demurrer sustained for failure to allege assignment of account. S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. Rep. 135.

Demurrer sustained for failure to allege assignment of claims. City Bank of New Haven *v.* Thorp, 78 Conn. 211, 61 Atl. Rep. 428; Bozarth *v.* Mallett, 11 Ind. App. 417, 39 N. E. Rep. 176.

An allegation that a claim was "duly" assigned is a sufficient averment of assignment. Levy *v.* Cohen, 103 App. Div. 195, 92 N. Y. Supp. 1074; Buffalo Tin Can Co. *v.* E. W. Bliss Co., 118 Fed. Rep. 106.

An assignee of a claim for goods sold and delivered does not state a cause of action if he does not allege non-payment. Packard *v.* Automobile Club of America, 90 Misc. 642, 153 N. Y. Supp. 942.

Where a transfer is valid without a written assignment none need be alleged. Hobart *v.* Andrews, 21 Pick. (Mass.) 526.

It is not necessary to allege assignment in a declaration of trover. Warren *v.* Dwyer, 91 Misc. 414, 51 N. W. Rep. 1062.

Vague and uncertain averments of assignment are not sufficient. Caven-Williamson Ammonia Co. *v.* Ice Mfg. Co., 27 Pa. Super. Ct. 381.

A contract for the construction of a building being entire, an assignee of a subcontractor cannot recover for part of the work done

by the subcontractor. LaTour *v.* Hibbler, 188 Mich. 140, 155 N. W. Rep. 69. No particular form of words is required to constitute a valid assignment of a chose in action. Any act showing an intention to transfer a party's interest is sufficient. Macklin *v.* Kinealy, 141 Mo. 113, 41 S. W. Rep. 893. A debt or claim may be assigned by parol as well as by writing. Hooker *v.* Eagle Bank, 30 N. Y. 83; Fryer *v.* Rockfeller, 63 N. Y. 268; Risley *v.* Bank, 83 N. Y. 318; Greene *v.* Ins. Co., 84 N. Y. 574; Riker *v.* Curtis, 17 Misc. Rep. (N. Y.) 134.

Assignment of part of chose in action for valuable consideration is good in equity, and may be made either by direct transfer, or by an order drawn upon the particular fund. *Contra*, at common law, so as to give the assignee a right of action upon it. Harris County *v.* Campbell, 68 Tex. 22, 2 Am. St. Rep. 467, 3 S. W. Rep. 243.

The nineteenth section of the New Jersey Practice Act (Revision 1903) which permits an assignee to sue in his own name does not extend to a case where the claim assigned is a portion of the assignor's wages to be earned in the future.

Strenberg & Co. *v.* Lehigh Valley R. Co., 78 N. J. L. 277, 73 Atl. Rep. 39, affirmed in 80 N. J. L. 468, 78 Atl. Rep. 1135.

To the same effect, Otis *v.* Adams, 56 N. J. L. 38, 29 A. 1092.

If part of an obligation or demand has been assigned, the assignee can maintain an action to recover his share by joining the assignor and assignee as plaintiffs; or, if the former does not join, by making him a defendant, so that the whole controversy may be settled in one suit. Schilling *v.* Mullen, 55 Minn. 122, 43 Am. St. Rep. 475, 56 N. W. Rep. 836; O'Neil *v.* N. Y. Central R. R. Co., 60 N. Y. 142. But the court had power to allow an amendment at the trial. Ib. 143. The assignment of a demand to several people for the purpose of paying a certain debt is an assignment of certain parts of the debt to each assignee. Dudley *v.* Barrett, 66 W. Va. 363, 66 S. E. Rep. 507. Where the cause of action originally accrued to plaintiff, and has been assigned and reassigned, proof of the assignment and reassignment is not necessary to sustain the action. Washoe *v.* Hibernia Fire Ins. Co., 7 Hun, 75; Zany *v.* Rawhide Gold Mining Co., 15 Cal. App. 373, 114 Pac. Rep. 1026. And where the plaintiff was entitled, both as the real party in interest, and as assignee of his trustee, he may recover on proof of either title. Pitney *v.* Glen's Falls Ins. Co., 65 N. Y. 6, 18. Assignments of claims made by foreign executors and administrators in their own jurisdiction to residents of the State of New York qualified to sue, and by guardians of infants, if sufficient to pass a legal title to the claim in the place where the assignments are made, will be recognized in the State of New York. Guy v. Craighead, 6 N. Y. App. Div. 463.

Where a complaint simply avers

that a contractor sold, assigned, transferred and set over to the plaintiff assignee certain school district warrants and all of his rights thereunder, without alleging an assignment of the contract, it is demurrable. Seattle National Bank *v.* School District, No. 40, 20 Wash. 368, 55 Pac. Rep. 317.

A declaration alleging that a note was transferred to the plaintiff assignee is sufficient to permit the suit in his own name. Jordan *v.* John Ryan Co., 35 Fla. 259, 17 So. Rep. 73.

If the assignee of an account attaches the assignment to the account and annexes them to the declaration by which the suit is commenced, and serves this upon the defendant, he need not aver the assignment in his declaration. Morrill *v.* Bissell, 99 Misc. 409, 58 N. W. Rep. 324.

If defendant city claims that the assignment sued on is not operative as to it, it must set that fact up as new matter of defense; a general denial of the assignment cannot raise such question. Burke *v.* City of New York, 7 N. Y. App. Div. 128, 40 N. Y. Supp. 81.

Objection that the complaint does not allege an assignment must be raised by demurrer. Phipps *v.* Bacon, 183 Mass. 5, 66 N. E. Rep. 414.

An assignment cannot be attacked for fraud where the answer contains only a general denial. Midler *v.* Lese, 45 N. Y. Misc. 637, 91 N. Y. Supp. 148.

A denial of the allegation that a receiver's fees were duly assigned, when such assignment actually took place prior to the time when such fees were earned, will be sufficient to raise the issue of the legal effect of the assignment. Colonial Bank *v.* Sutton, 79 N. Y. Misc. 244, 139 N. Y. Supp. 1002.

A copy of the assignment must be filed with the writ in accordance with Maine R. S., chap. 82, § 130, to sustain an action in his own name by the assignee of a non-negotiable chose in action. National Shoe & Leather Bank *v.* Gooding, 87 Me. 337, 32 Atl. Rep. 967.

In Arkansas a complaint is fatally defective which does not allege that the contract assigning to the plaintiff (an attorney) an interest in a cause of action, was acknowledged, filed with the papers in the case and noted of record, unless the complaint alleges that defendant had actual knowledge of the assignment. Kansas City, etc., R. Co. *v.* Joslin, 74 Ark. 551, 86 S. W. Rep. 435.

A copy of an assignment of a corporation bond to the plaintiff assignee is not required to be attached to his complaint; a demurrer on such ground will not lie. Hayes *v.* Mantua Hall Market Co., 12 Pac. Co. Ct. Rep. 441.

Indorsement of a written instrument emanating from defendant is sufficient proof of assignment to plaintiff. Carpenter *v.* Historical Pub. Co. (Tex. Civ. App.), 24 S. W. Rep. 685.

Assignees of a patent are not required to annex a copy of the assignment to the complaint; the allegation of assignment is suffi-

ment after suit is brought is insufficient.[2] If a written assignment produced bear date before the commencement of the action, the date is presumptive evidence that it was then made; but if it bear no date, some evidence should be given indicating that it was in fact made before the action was commenced.[3]

cient. Thayer *v.* Pressey, 175 Mass. 225, 56 N. E. Rep. 5.

Under an allegation of assignment by "E. G. Church & Co." plaintiff was not allowed to prove assignment by E. G. Church, alone. Kibler *v.* Brown, 114 Fed. Rep. 1014.

Under an allegation of an assignment by a corporation, an assignment by the receivers of such corporation may be proved. Toplitz *v.* King Bridge Co., 20 N. Y. Misc. 576, 46 N. Y. Supp. 418.

An allegation by plaintiff of an assignment by an executor is sufficient without allegation of executor's authority from the probate court to make the assignment. Keen *v.* Brooks, 19 Colo. App. 165, 73 Pac. Rep. 1092.

It is not necessary to allege that the assignor sues for the use of the assignee, in an action by the assignor of a chose in action. Bentley *v.* Standard Fire Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

[2] Garrigue *v.* Loescher, 3 Bosw. 578. Ratification of an unauthorized assignment of a cause of action made after suit is brought will not relate back to the date of such assignment, and thereby support the action. Read *v.* Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. Rep. 555. But variance in the mode of assignment is disregarded, if not prejudicial. Bowman *v.* Keleman, 65 N. Y. 598.

Demurrer will lie where suit is brought on a non-assignable claim. Wilson *v.* Shrader (W. Va.). 79 S. E. Rep. 1083.

[3] Barrick *v.* Austin, 21 Barb. 241. Compare paragraph 35 below.

If the complaint contains an allegation of assignment it need not set forth the date of such assignment, nor expressly state that a cause of action for its breach had accrued at the time of the assignment, in order to defeat a demurrer. Buffalo Tin Can Co. *v.* Bliss Co., 118 Fed. Rep. 106.

Where the date of assignment is not stated in the complaint, a motion to make the complaint definite and certain by stating the date is proper. Worden *v.* Ranger, 136 N. Y. App. Div. 936, 121 N. Y. Supp. 271.

The proper way to prove assignment is to produce the assignment and prove its execution. Hartley *v.* Cataract Steam Engine Co., 64 Hun (N. Y.), 634, mem., 19 N. Y. Supp. 121.

An undated assignment of an agreement signed after suit on the agreement has been begun cannot be admitted in evidence. Liberty

3. Requisite Proof of Assignment.

If no writing passed, the assignment of a debt may be proved by parol,[4] even though there was an agreement un-

Wall Paper Co. *v.* Stoner Wall Paper Co., 178 N. Y. 219, 70 N. E. Rep. 501.

[4] Hooker *v.* Eagle Bank, 30 N. Y. 83.

A chose in action may be assigned orally and is it not necessary that there be written evidence of such assignment. Hyatt *v.* Foster, 195 Ill. App. 428.

A chose in action arising out of contract is assignable by parol and the assignee may sue thereon in his own name. Jemison *v.* Tindall, 89 N. J. L. 429, 99 Atl. Rep. 408.

An oral assignment of a chose in action not capable of manual delivery is sufficient if there is a consideration and a constructive delivery. Howe *v.* Howe, 97 Me. 422, 54 Atl. Rep. 908.

An assignment of a debt may be by parol and may be inferred from the acts and conduct of the party. Forsyth *v.* Ryan, 17 Colo. App. 511, 68 Pac. Rep. 1055.

But in order to recover, the plaintiff must show that the parol assignment was completed. A mere parol promise to transfer when certain things should transpire would not give the plaintiff a right against the debtor. Seymour *v.* Aultman, 109 Ia. 297, 80 N. W. Rep. 401.

In an action by an alleged assignee through a written assignment, parol evidence of the assignor in regard to the assignment should be excluded. Robbins *v.* Bank of M. & L. Jarmulowsky, 90 N. Y. Supp. 288. See paragraph 16 below.

A parol assignment of a claim for the recovery of wagers in the hands of a stakeholder is valid. But the mere testimony by the assignor that he assigned the claim to the plaintiff is not proof that the plaintiff is the owner of the claim. The plaintiff may have assigned it since he purchased it. Proof of ownership in the plaintiff at the time of the action is essential. Bernstein *v.* Horth, 85 N. Y. Supp. 263.

Oral assignment of threshing machine profits to the vendor as payment for the machine held good. Hurley *v.* Bendel, 67 Minn. 41, 69 N. W. Rep. 477.

An agreement to assign in the future, or a parol promise to transfer when certain things should transpire, will not give the intended assignee a right of action. A verbal agreement to turn over and deliver certificates when they are issued in the future cannot be enforced in a court of law.

If the assignment was not in writing, a completed parol assignment must be shown. Seymour *v.* C. Aultman & Co., 109 Iowa, 297, 80 N. W. Rep. 401.

Parol evidence will be admitted to prove assignment of a chose in action. Standifer *v.* Bond Hard-

performed to give a written transfer.[5] It is sufficient proof of a parol assignment that some evidence of the debt—such as a bond or mortgage,[6] or a transcript of judgment,[7] or a

ware Co. (Tex. Civ. App.), 94 S. W. Rep. 144.

[5] Doremus *v.* Williams, 4 Hun, 458.

A minor, living with, and supported by, his father cannot legally assign his wages. Written agreement to that effect held void. Lockerby *v.* O'Gara Coal Co., 147 Ill. App. 311.

A verbal assignment of an open account in consideration of future credit and merchandise sold and delivered is a good equitable assignment, although not afterward reduced to writing as promised. Kenneweg *v.* Schilansky, 45 W. Va. 521, 31 S. E. Rep. 949.

For considerations of public policy, a public official is not permitted to make an assignment of his wages or salary until the time arrives when he is entitled to collect them, or at least until they have been completely earned. Trow *v.* Moody, 27 Cal. App. 403, 150 Pac. Rep. 77.

An assignment of moneys to be collected is valid and takes effect upon the fund or property when collected or received. Hofferberth *v.* Duckett, 175 App. Div. 498, 162 N. Y. Supp. 167.

An assignment of wages executed prior to the time a person obtains employment is void as to wages earned under such employment. Draeger *v.* Wisconsin Steel Co., 194 Ill. App. 440.

In Wisconsin the statute inhibits the assignment of wages for more than sixty days and of all exempt wages unless the assignor's wife joins in the contract of assignment. Porte *v.* Chicago & N. W. Ry. Co., 162 Wis. 446, 156 N. W. 469.

The law recognizes no assignment of future earnings unless such earnings are based on an existing contract of employment. Porte *v.* Chicago & N. W. Ry. Co., 162 Wis. 446, 156 N. W. 469; First National Bank of Houston *v.* Campbell (Tex. Civ. App.), 193 S. W. 197.

[6] Runyan *v.* Mersereau, 11 Johns. 534; and see 17 Ida. 284; Kamend *v.* Huelig, 12 Am. Law Reg. N. S. 61.

A good assignment of a mortgage is made by delivery only. Curtis *v.* Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506; Fryer *v.* Rockefeller, 63 N. Y. 268.

Assignment of a mortgage is shown by offering the mortgage in evidence. Burgwyn Bros. Tobacco Co. *v.* Bentley, 90 Ga. 508, 16 S. E. Rep. 216.

The mortgage is admissible in evidence as proof of its assignment. Trulock *v.* Donahue, 85 Iowa, 748, 52 N. W. Rep. 537.

[7] Mack *v.* Mack, 3 Hun, 323.

See Greene *v.* Republic Fire Insurance Co., 84 N. Y. 572, as to ownership of a judgment obtained by assignee of a policy which was assigned by parol and a delivery.

An assignment of a *contract* by

note held for the debt, or part of it—[8] was delivered to the assignee by the assignor, with intent to transfer the title to the demand; and the declarations of the assignor accompanying the delivery may be proved by a witness as part of the *res gestæ*. It is not essential to call the assignor. But, on the other hand, neither the mere production of a non-negotiable security,[9] nor proof of mere words of intention

parol is sufficient to transfer the same. Liberty Wall Paper Co. *v.* Stoner Wall Paper Co., 59 N. Y. App. Div. 353, 69 N. Y. Supp. 355, Re Rogers Construction Co., 79 N. Y. App. Div. 419, 79 N. Y. Supp. 444.

An *insurance policy*, being a chose in action, can be assigned by parol and a delivery, where there is a valuable consideration. Leinkauf *v.* Calman, 110 N. Y. 50, 17 N. E. Rep. 389.

Mere possession of school warrants by plaintiff is not enough to show ownership. School District No. 7 *v.* Reeve, 56 Ark. 68, 19 S. W. Rep. 106.

Transcript from City Comptroller's book showing city certificates listed in name of a transferee is not proof of title in such transferee. Wadsworth *v.* New Orleans, 46 La. Ann. 545, 15 So. Rep. 202.

The assignee of a non-negotiable chose in action cannot maintain an action in his own name unless the assignment be in writing. New England Cabinet Works *v.* Morris (Mass.), 115 N. E. Rep. 315.

[8] Armstrong *v.* Cushney, 43 Barb. 340; Billings *v.* Jane, 11 Ida. 620. For the more strict common-law rule see Palmer *v.* Merrill, 6 Cush. 282.

[9] Barrick *v.* Austin, 21 Barb. 241.

The mere possession of a policy of life insurance together with proof that the insured and beneficiary were indebted to the holder thereof, does not in any way establish that the policy was pledged or assigned to secure such indebtedness. Richardson *v.* Moffitt-West Drug Co., 92 Mo. App. 515, 69 S. W. Rep. 398.

The assignment of a chose in action will be held sufficient where the assignor testifies that he intended to transfer his title thereto, as he is thereby estopped from claiming differently, and the debtor is protected from a subsequent action by the assignor. Crocker *v.* Muller, 40 N. Y. Misc. 685, 83 N. Y. Supp. 189.

Mere evidence of intention by partners to assign their assets to a corporation does not show that any legal title ever vested in the corporation, unless such intention was consummated. Werner *v.* Finley, 144 Mo. App. 554, 129 S. W. Rep. 73.

Assignment of a chose in action is sufficiently shown where the assignor testifies that he intended to transfer his title thereto. Crocker

on the part of the alleged assignor, are enough. Nor can the plaintiff prove his title by mere evidence of oral declarations of the assignor, that he had at a previous time assigned the demand to the plaintiff,[10] unless such declarations were made in the defendant's presence, in which case they may be proved as laying a foundation for his admission of an assignment, or for a presumption thereof from his silence.

4. Implied Assignment.

In some cases where there was no express assignment, the court will, upon equitable grounds, presume an assignment from the fact that the plaintiff, being entitled to relief, and with intent to enforce the claim for his own reimbursement, paid the one who was legally entitled.[11] And in case of negotiable paper "taken up," even by a stranger, at ma-

v. Muller, 40 N. Y. Misc. 685, 83 N. Y. Supp. 189.

[10] Worrall *v.* Parmelee, 1 N. Y. 521.

The assignment of a cause of action on an open account by a former plaintiff may be proved by oral evidence as well as by a written instrument; if it is in writing, however, oral testimony will be rejected. The written assignment of a cause of action on an open account by a former plaintiff does not belong to that class of documents which under article 313 of the Texas Revised Statutes of 1895 prove themselves. Some evidence must be given of its execution. Standifer *v.* Bond Hardware Co. (Tex. Civ. App.), 94 S. W. Rep. 144.

The mere use of the terms "assigns" and "heirs" does not make an unexecuted personal contract assignable. Central Brass & Stamping Co. *v.* Stuber, 220 Fed. Rep. 909, 136 C. C. A. 475.

An action brought by and in the name of the assignee who is not the proper legal plaintiff cannot be maintained even though the fact of the assignment is admitted. Shaffer *v.* Federal Cement Co., 225 Fed. Rep. 893.

[11] See O'Neil *v.* N. Y. Central R. R. Co. above; Smith *v.* Miller, 25 N. Y. 619; Vail *v.* Tuthill, 10 Hun, 31.

An agreement to pay a debt out of a certain fund does not operate as an equitable assignment of the whole or any part of it. Provine *v.* First National Bank (Tex. Civ. App.), 180 S. W. Rep. 1107.

A mere agreement to pay out of a fund is not sufficient to create a specific equitable lien on the fund for the payment of the debt involved. Title Guaranty & Surety Co. *v.* State, 61 Ind. App. 268, 109 N. E. Rep. 237.

turity, on dishonor, an assignment has been implied from its delivery to him uncanceled. In this class of cases, the question whether paying the creditor was a satisfaction of the demand or a purchase, is ordinarily a question of intention of the parties, which may be proved by parol.[12] But the plaintiff should be prepared not only to show that it was his intent to acquire the right of action, but to give some evidence that it was the intent of the creditor to transfer it to him. The creditor's delivery to him of the evidence of debt, uncanceled, is ordinarily sufficient to sustain a finding on this point, as against the debtor.[13] But where the payer was bound under seal or by judgment to pay the debt, his action must ordinarily be for money paid.[14]

5. Statute of Frauds.

When no consideration for the assignment is shown, and no delivery, the assignment, if for the price of $50, or more,[15]

[12] Compare Champney *v.* Coope, 32 N. Y. 543; Sheldon *v.* Edwards, 35 N. Y. 279, and cases cited; Edgerly *v.* Emerson, 23 N. H. 555, 565, 570, 55 Am. Dec. 207; and chapter on *Actions for Money Paid.*

See also Houseman *v.* Bodine, 122 N. Y. 158, 25 N. E. Rep. 255; Wadsworth *v.* Lyon, 93 N. Y. 201, 45 Am. Rep. 190; McFadden *v.* Allen, 134 N. Y. 489, 32 N. E. Rep. 21, 19 L. R. A. 446; Curtis *v.* Moore, 152 N. Y. 159, 46 N. E. Rep. 168, 57 Am. St. Rep. 506.

[13] Compare Freedman's Savings, etc., Co. *v.* Dodge, 93 U. S. 382; Union Trust Co. *v.* Monticello, 63 N. Y. 314; Lancey *v.* Clark, 64 Ida. 209; Shumway *v.* Cooley, 9 Hun, 131.

The failure of the plaintiff or his assignor to obtain the consent of the owner prior to the assignment of a building contract which provides that the contractor shall not assign the same without the consent of its owner, is fatal to the plaintiff's right of recovery. Reisler *v.* Cohen, 67 N. Y. Misc. 67, 121 N. Y. Supp. 603.

An order given as security for a present indebtedness operates as an assignment. An assignment is not the less an assignment of a present indebtedness even if it is qualified by some condition, contingency or limitation depending upon the happening of a future event. O'Connell *v.* Worcester, 225 Mass. 159, 114 N. E. Rep. 201.

[14] Champney *v.* Coope, Sheldon *v.* Edwards, above.

[15] N. Y. Personal Property Law, § 85, as added by L. 1911, c. 571; People *v.* Beebe, 1 Barb. 379.

or when no price was fixed, if of a chose in action clearly proven to be worth that sum,[16] must have been evidenced by a note or memorandum in writing. But a written assignment, unless involving an interest in land,[17] need not be under seal, even though the thing assigned be a specialty.[18]

6. Presumptive Evidence.

Direct proof of an assignment is not always essential. The title to an incidental or collateral security which is exclusively applicable to the principal debt or obligation, is presumed to have been assigned with the principal debt or obligation, unless the contrary is shown; hence an assignment of the collateral may be presumptively shown by proof of an assignment of the principal obligation.[19] But an assignment

[16] Buskirk *v.* Cleveland, 41 Barb. 610; Crookshank *v.* Burrell, 18 Johns. 58, 9 Am. Dec. 187, *Contra*, Duncuft *v.* Albrecht, 12 Sim. 189, 35 Eng. Ch. 162, 59 Reprint, 1104; Johns *v.* Johns, 1 Ohio St. 350. An oral assignment of ten shares of stock worth $900 was held unenforcible against the assignor. Orr *v.* Hall, 75 Nebr. 548, 106 N. W. Rep. 656.

[17] Other than a lease not exceeding one year. N. Y. Real Property Law, § 242, §§ 6, 7; Bissell *v.* Morgan, 56 Barb. 369. An assignment of a lease for a term of years need not be acknowledged. American Savings Bank & T. Co. *v.* Mafridge, 60 Wash. 180, 110 Pac. Rep. 1015.

[18] *E. g.*, a judgment. Ford *v.* Stuart, 19 Johns. 342. Or a bond or covenant. Morange *v.* Edwards, 1 E. D. Smith, 414; Dawson *v.* Coles, 16 Johns. 51; Greene *v.* Republic Fire Ins. Co., 84 N. Y. 572. Or an insurance policy. Leinkauf *v.* Calman, 110 N. Y. 50, 17 N. E. Rep. 389. Or a contract. Liberty Wall Paper Co. *v.* Stoner Wall Paper Co., 59 N. Y. App. Div. 353, 69 N. Y. Supp. 355; Re Rogers Construction Co., 79 N. Y. App. Div. 419, 79 N. Y. Supp. 444.

[19] Thus, an assignment of the mortgage may be presumed from proof of an assignment of the bond or note. Jackson *v.* Blodgett, 5 Cow. 202; Green *v.* Hart, 1 Johns. 580; and assignment of a guaranty of a bond and mortgage may be presumed from the assignment of the bond and mortgage by the guarantee. Cady *v.* Sheldon, 38 Barb. 103; and see 40 N. Y. 181. So the assignment of a judgment carries the right to any further remedy subsisting for the debt on which the judgment was recovered. Pattison *v.* Hull, 9 Cow. 747; Bowdoin *v.* Coleman, 3 Abb. Pr. 431, s. c. 6 Duer, 182.

Where a warehouse corporation has an equitable lien upon cer-

of the principal obligation cannot be inferred from the mere fact of an assignment of a collateral security or other incident.[20] Since the change in the law allowing assignees to sue in their own names, it has been much questioned whether an assignment of property or things in action will carry, by implication, incidental causes of action for fraud, mistake and the like, which cannot subsist independent of the principal right. At first these were thought not to pass unless expressly included; but the better opinion is that the question is usually one of intent, and that an assignment of a thing in action may carry the right to those remedies inseparable from it which might have been expressly assigned.[21]

tain goods in its possession for money advanced to its debtor, such equitable lien is impliedly assigned when the corporation becomes insolvent and assigns all its assets. Cincinnati Tobacco Warehouse Co. *v.* Leslie, 117 Ky. 478, 78 S. W. Rep. 413, 64 L. R. A. 219.

[20] Thus, intent to transfer the bond cannot be inferred from an assignment of the mortgage alone. Merritt *v.* Bartholick, 36 N. Y. 44, affi'g 47 Barb. 253, s. P., 26 N. Y. 404; Syracuse Sav. Bank *v.* Merrick, 182 N. Y. 387, 75 N. E. Rep. 232.

An order drawn on a specific fund may operate as an assignment of such fund, but the burden is upon the assignee to prove that the intention had been to assign to him and that the assignor parted with control over the fund. Wakefield, Fries & Co. *v.* Parkhurst, 84 Ore. 483, 165 Pac. Rep. 578.

A check is not the assignment of the fund on deposit to the credit of the drawer *pro tanto*, and the holder is merely the agent of the drawer for the purpose of collecting it. Chrzanowska *v.* Corn Exchange Bank, 173 App. Div. 285, 159 N. Y. Supp. 385.

To the same effect, see Tallapoosa Co. Bank *v.* Salmon, 12 Ala. App. 589, 68 So. Rep. 542.

As against the drawer, the giving of a check for value on an ordinary bank deposit should be considered as an assignment of the fund *pro tanto*. Elgin *v.* Gross-Kelly & Co., 20 N. M. 450, 150 Pac. Rep. 922, L. R. A. 1916 A. 711.

[21] Bentley *v.* Smith, 1 Abb. Ct. App. Dec. 126; Bolen *v.* Crosby, 49 N. Y. 183. Thus, it has been held that where a right arising out of contract involves a remedy for fraud or deceit, the right to prove the tort follows the original cause of action, and vests in the assignee. Westcott *v.* Keeler, 4 Bosw. 564.

See as to loss of wife's inchoate right of dower through fraud inducing a conveyance, Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

So the right of a *cestui que trust*

7. Consideration.

For the purpose of enabling the assignee to maintain an action against the debtor, proof of a consideration for the

to enforce a power has been held, on a view of the design and intent, to pass by his deed of the title. Clark *v.* Crego, 47 Barb. 599. So the assignment of a usurious security carriest the right of action on the original valid consideration. Gerwig *v.* Sitterly, 56 N. Y. 214, affi'g in effect 64 Barb. 620. So of the right to have a contract reformed for mistake. Bentley *v.* Smith, above. As to new promise, compare Stearns *v.* Tappin, 5 Duer, 294; Hoyt *v.* Dusenbury, 53 N. Y. 521.

An assignment by a customer of his right, title and interest in stock converted vests in the assignee the right of action for the conversion of the stock, although it makes no mention of the right of action. Rothschild *v.* Allen, 90 N. Y. App. Div. 233, 86 N. Y. Supp. 42, affirmed in 180 N. Y. 561, 73 N. E. Rep. 1132.

The legal title to shares of stock held by an executor will be transferred by a written assignment thereof, signed by him simply with his individual name, and such assignment carries with it a right of action for the conversion of the stock. Mahaney *v.* Walsh, 16 N. Y. App. Div. 601, 44 N. Y. Supp. 969.

The assignee of a contract of guaranty or any chose in action is the real party in interest and may sue in his own name under Cal. Code Civ. Pro., §§ 367, 368, Cal. Civ. Code, §§ 953, 954, 1458, 1459. Reios *v.* Mardis, 18 Cal. App. 276, 122 Pac. Rep. 1091; Milliken-Helm Commn. Co. *v.* C. H. Albers Commn. Co., 244 Mo. 38, 147 S. W. Rep. 1065.

While the law of Illinois permits the prosecution in his own name by an assignee of a non-negotiable chose in action, he is not precluded from bringing the action in the name of the assignor. Surface *v.* Chicago, M. & St. P. Ry. Co., 191 Ill. App. 261.

The assignee of a contract is the real party in interest and may sue in his own name under Mo. R. S. 1909, § 1729.

In North Carolina, as every action must be prosecuted in the name of the real party in interest, the assignee of a chose in action must sue in his own name, and not in the name of the assignor. Vaughn *v.* Davenport, 159 N. C. 369, 74 S. E. Rep. 967.

Where the assignment gives the right to sue in the name of the assignor the assignee may do so. Salt Fork Coal Co. *v.* Eldridge Co., 170 Ill. App. 268.

The assignee of part of a cause of action pending an appeal has the right to prosecute the claim to final judgment in the name of the assignor, inasmuch as all right and opportunity to make himself a party is gone when the cause has reached the appellate court. Seiter *v.* Smith, 105 Tex. 205, 147 S. W. Rep. 226.

assignment is not essential (unless the statute of frauds requires it), for an absolute assignment transfers the legal title.[22] The consideration, however, may be material in

An agreement, made in consideration of a loan, to pay over all rents derived from various properties, less costs of repairs, expenses, etc., is not an assignment. It is a mere promise to pay. In re Clark Realty Co., 234 Fed. Rep. 576, 148 C. C. A. 342.

[22] Cummings *v.* Morris, 25 N. Y. 625; Guy *v.* Craighead, N. Y. 6 App. Div. 463. Whether the action is on contract. St. John *v.* Mutual Life Ins. Co., 13 N. Y. 31; or for a wrong. Merrick *v.* Brainard, 38 Barb. 574, 34 N. Y. 208.

The assignment of a claim carries with it the right to maintain the action irrespective of the question of the consideration for such assignment. Rosenthal *v.* Rudnick, 65 N. Y. App. Div. 519, 72 N. Y. Supp. 804; Forsyth *v.* Ryan, 17 Colo. App. 511, 68 Pac. Rep. 1055; Robinson Reduction Co. *v.* Johnson, 10 Colo. App. 135, 50 Pac. Rep. 215.

An assignment of a judgment under seal imports a consideration. But any evidence which impeaches the *bona fides* of the transaction will put the assignee to full proof of the consideration. Rettig *v.* Becker, 11 Pa. Super. Ct. 395.

The defendant will not be permitted to enter into the question whether the assignee paid a consideration for his transfer of a claim from the assignor. Toplitz *v.* King Bridge Co., 20 N. Y. Misc. 576, 46 N. Y. Supp. 418; Chamberlain *v.* Fernbach, 118 Ill. App. 145; Wallace *v.* Leroy, 57 W. Va. 263, 50 S. E. Rep. 243, 110 Am. St. Rep. 777; Hicks *v.* Steel, 126 Mich. 408, 85 N. W. Rep. 1121.

A consideration for a deed is presumed and the burden of proof is upon the party assailing it to show lack of consideration. In the absence of fraud, the amount of consideration is immaterial, and no specific consideration is required to support a voluntary transfer. Driscoll *v.* Driscoll, 143 Cal. 528, 77 Pac. Rep. 471.

Want of consideration is a good defense in an action brought by an assignee to foreclose a mortgage, especially so where the assignee fails to prove that he is a *bona fide* assignee. Hill *v.* Hoole, 116 N. Y. 299, 22 N. E. Rep. 547, 5 L. R. A. 620.

The assignee of a mortgage takes it subject to the legal and equitable defenses available to the mortgagor at the time of the assignment, and therefore want of consideration might be a defense to the action of the assignee for foreclosure. Schlitz *v.* Koch, 138 N. Y. App. Div. 535, 123 N. Y. Supp. 302.

Proof of consideration is not essential. Henderson National Bank *v.* Lagow, 3 Ky. L. 173; Robinson Reduction Co. *v.* Johnson, 10 Colo. App. 135, 50 Pac. Rep. 215; Norton *v.* McCarthy, 10 N. Y. Misc. 222, 30 N. Y. Supp. 1057.

Consideration is immaterial if

respect to defenses. If a consideration is not expressed, where the assignment is in writing, it will be presumed.[23] Indeed, it is no longer necessary in all cases to prove such an assignment as passes the legal title, in order to enable the assignee to sue in his own name. Whether his title be legal or equitable, if he have the whole interest he may maintain the action.[24] But the defendant may prove that

the assignment is sufficient to pass title. Guy *v.* Craighead, 6 N. Y. App. Div. 463, 39 N. Y. Supp. 688.

Proof that plaintiff paid nothing for the assignment of a contract will be rejected as immaterial. Wardner, etc., Co. *v.* Jack, 82 Iowa, 435, 48 N. W. Rep. 729.

If the rights of creditors are affected the amount and kind of consideration for an assignment are material. Barnett *v.* Ellis, 34 Neb. 539, 52 N. W. Rep. 368.

To constitute an *equitable* assignment a valuable consideration is essential and indispensable. Moffatt *v.* Bailey, 22 N. Y. App. Div. 632, 47 N. Y. Supp. 983.

[23] Eno *v.* Crook, 10 N. Y. 60; Richardson *v.* Mead, 27 Barb. 178. Where the extinguishment of a precedent debt was relied on, it was held that there must be evidence of actual extinguishment. 34 Barb. 629. But doubted; compare 56 Id. 362.

A seal is conclusive evidence, in the absence of fraud, of a sufficient consideration. It is not necessary that an assignment shall contain a recital in its body that it is under seal. Chamberlain *v.* Fernbach, 118 Ill. App. 145.

A party is not required to rely upon the presumption of consideration until rebutted, but may prove actual consideration. Loftus *v.* Benjamin, 122 N. Y. Supp. 275.

Consideration for an assignment will be presumed under Cal. Civ. Code, §§ 1614, 1615. Driscoll *v.* Driscoll, 143 Cal. 528, 77 Pac. Rep. 471.

[24] Thus the holder of a non-negotiable note indorsed in blank may recover on it. Hastings *v.* McKinley, 1 E. D. Smith, 273, aff'd in Seld. Notes, No. 4, 19.

Under the Statutes of Connecticut, the assignee of a non-negotiable chose in action cannot sue on it in his own name unless he shows that he is its owner in his own right and for his own benefit, without accountability. Uncas Paper Co. *v.* Corbin, 75 Conn. 675, 55 Atl. Rep. 165.

Under the Rev. Laws of Mass., c. 173, § 4, the assignee cannot sue in his own name if the chose in action sued on has not been assigned in writing. Rogers *v.* Abbot, 206 Mass. 270, 92 N. E. Rep. 472, 138 Am. St. Rep. 394.

In Illinois, since the Act of July, 1907, the assignee of a judgment may sue thereon in his own name. Thomson *v.* Caverley, 148 Ill. App. 295.

No informality which a written

the assignee paid and took assignment as trustee or agent for one who has no right to enforce the claim—for instance,

assignment itself discloses will justify the court in holding, as a matter of law, that it is not adequate for the purposes claimed by the plaintiff assignee, if the assignment vested in him the real beneficial interest and gave him the right to maintain the action in his own name. Bank of New Haven *v.* Thorp, 78 Conn. 211, 61 Atl. Rep. 428.

The party holding the legal title of a note or instrument may sue on it, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery, but he is open in such case to any defense which exists against the party beneficially interested. Salmon *v.* Rural Independent School Dist., 125 Fed. Rep. 235.

In New York, where a decree, made upon the judicial settlement of the accounts of an administratrix, directs the payment of an assigned claim to the assignor thereof, the assignee may, under § 2607 of N. Y. Code of Civil Procedure, maintain an action in his own name upon the official bond of the administratrix to recover the money. Bamberger *v.* Amer. Surety Co., 48 N. Y. Misc. 221, 96 N. Y. Supp. 665, affirmed in 109 (N. Y.) App. Div. 917, 96 N. Y. Supp. 665.

Where an action was brought in New York upon an assignment of an Illinois judgment, the validity of which was not questioned, the assignee was the real party in interest and authorized by New York Code of Civil Procedure, § 1909, to bring the action in his own name. Waters *v.* Spencer, 44 N. Y. Misc. 15, 89 N. Y. Supp. 693.

An assignee under an assignment which is valid against the assignor is the real party in interest and the proper party to bring the action. Chase *v.* Dodge, 111 Wis. 70, 86 N. W. Rep. 548.

The assignee of a chose in action may maintain suit thereon in his own name before a justice of the peace. Forsyth *v.* Ryan, 17 Colo. App. 511, 68 Pac. Rep. 1055.

Where the name of the assignor in the instrument assigned is fictitious, the assignee may sue upon it, irrespective of whether the assignor himself could have sued thereon. Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. Rep. 783.

On grounds of public policy the sale or assignment of actions for injuries to the person is void. The assignee can neither maintain the action in his own name nor in the name of the assignor for the use of the assignee. Chicago Gen. Ry. Co. *v.* Capek, 82 Ill. App. 168.

A judgment which is assigned to a partnership becomes an asset, and if the firm subsequently takes in a new partner no further assignment of the judgment to the new firm is necessary. Baumert *v.* Daeschler, 65 N. Y. Misc. 526, 120 N. Y. Supp. 957.

A right of action against a rail-

a principal debtor or a joint debtor.[25] The defendant cannot be allowed to prove that the consideration was inadequate, or even that there was none.[26] Even proof that a stranger paid the consideration for the assignment is not enough to defeat the action. If the plaintiff is a mere trustee for a third person, the burden is on the defendant to show it,[27] and then it must be shown that he is not the trustee of an express trust within the statute.[28] It is enough, in the

road company for firing premises may be assigned to one holding a binding contract for the purchase of the land. Bultman *v.* Atlantic Coast Line Ry. Co., 103 S. C. 512, 88 S. E. Rep. 279.

[25] Ten Eyck *v.* Craig, 62 N. Y. 416, affi'g 2 Hun, 452; Arnott *v.* Webb, 1 Dill. C. Ct. 362.

[26] Mills *v.* Fox, 4 E. D. Smith, 220; Daby *v.* Ericsson, 45 N. Y. 786; Stone *v.* Frost, 61 Ida. 614, affi'g 6 Lans. 440.

The defendant is not entitled to inquire into the consideration. Livingston *v.* Spero, 18 N. Y. Misc. 243, 41 N. Y. Supp. 606.

Where an assignment is actually made the defendant cannot question it on the ground that there was no consideration. Levins *v.* Stark, 57 Ore. 189, 110 Pac. Rep. 980.

The amount of consideration for the assignment is immaterial. Barnett *v.* Ellis, 34 Neb. 539, 52 N. W. Rep. 368.

Inadequacy of consideration is no defense. Wallace *v.* Leroy, 57 W. Va. 263, 50 S. E. Rep. 243, 110 Am. St. Rep. 777.

Evidence of want of consideration or of a different consideration, is not admissible for the purpose of varying, contradicting or defeating covenants by which rights are expressly vested. Burkett *v.* Doty, 32 Cal. App. 337, 162 Pac. Rep. 1042.

"For value received" held to be sufficient as against demurrer on ground that consideration was not specifically stated. Viguerie *v.* Hall, 107 La. 767, 31 So. Rep. 1019; Coe *v.* Hinkley, 109 Mich. 608, 67 N. W. Rep. 915 (gratuitous assignment).

The burden of proof of consideration where the same is put in issue is on plaintiff assignee. Bersch *v.* Sander, 37 Mo. 104.

[27] Eno *v.* Crooke, 10 N. Y. 60.

The law presumes an assignment to have been made upon a good consideration until the contrary appears affirmatively; and that it is fair rather than fraudulent. Belden *v.* Meeker, 47 N. Y. 307; Castle *v.* Lewis, 78 N. Y. 131.

[28] N. Y. Code Civil Procedure, § 449.

The assignee of a promissory note holds the legal title and may sue, though the equitable ownership may be in another. Continental Oil & C. Co. *v.* Van Winkle Gin, etc., Works (Tex.), 131 S. W. Rep. 415.

first instance, for the plaintiff to prove either that he is the real party in interest, or that he is the trustee of an express trust, sufficiently to show that his recovery will bar the right of the assignor.[29]

8. Gift.

If plaintiff claims under an oral gift, there must be proof not only of words of gift, but of delivery of the evidences of the thing in action, sufficient to transfer the dominion to the

[29] See Gardner *v.* Barden, 34 N. Y. 433, and cases cited; Allen *v.* Brown, 51 Barb. 86, 44 N. Y. 228.

If there is an actual *bona fide* assignment of a claim, then the plaintiff acquired title, even though he may have paid no consideration. Kenedy Town & Imp. Co. *v.* First Nat. Bank (Tex. Civ. App.), 136 S. W. Rep. 558; Pearce *v.* Wallis, Landes & Co. (Tex.), 124 S. W. Rep. 496.

A general denial that the plaintiff is the real party in interest will put the question in issue, but it will not be sufficient to allow defendant to examine plaintiff before trial. Ketcham *v.* Rowland & Shafto, 71 N. Y. Misc. 439, 128 N. Y. Supp. 695; Henley *v.* Evans, 54 Neb. 187, 74 N. W. Rep. 578.

The assignee must be the equitable and *bona fide* owner of the cause of action. If it was assigned without consideration for the sole purpose of allowing the assignee to bring the action in his name for the benefit of the assignor, the assignee is not a *bona fide* owner. Muller *v.* Witte, 78 Conn. 495, 62 Atl. Rep. 756.

Where the assignee under a written assignment makes an oral agreement with the assignor to pay the full amount recovered over to the assignor, the assignee is not the real party in interest. Stewart *v.* Price, 64 Kan. 191, 67 Pac. Rep. 553, 64 L. R. A. 581.

See note to this case in 64 L. R. A. 581, as to who is the real party in interest within the meaning of the statutes defining the parties by whom an action must be brought.)

Assignee, without consideration and merely for purpose of bringing the suit for the benefit of the assignor, has no title (only colorable) and cannot maintain the suit in his own name. Coombs *v.* Harford, 99 Me. 426, 59 Atl. Rep. 529.

The question of the transfer, being only colorable, is material if the rights of creditors are involved or if some defense or counterclaim was cut off by the assignment. Chase *v.* Dodge, 111 Wis. 70, 86 N. W. Rep. 548.

That the plaintiff assignee is not the real party in interest is a proper defense. Henley *v.* Evans, 54 Neb. 187, 74 N. W. Rep. 578.

The defense that plaintiff is not the real party in interest must be pleaded. Lesh *v.* Meyer, 63 Kan. 524, 66 Pac. Rep. 245.

plaintiff; [30] and this rule is equally applicable whether the

[30] Johnson *v.* Spies, 5 Hun, 471. An indorsement of intent to give, without proof of delivery, is not enough. Zimmerman *v.* Streeper, 75 Pa. 147.

An order given by a decedent upon a tenant for the delivery of the possession of personal property does not establish a gift; the person receiving such property pursuant to such order is merely a bailee. Rathgeb's Estate, 125 Cal. 302, 57 Pac. Rep. 1010.

Where the borrower of a sum of money executed a receipt containing an agreement to pay the money to a designated person upon the death of the lender, there is no gift, *causa mortis*, because there is no delivery. Ragan *v.* Hill, 72 Ark. 307, 80 S. W. Rep. 150.

Where money is deposited in bank to the credit of the depositor's wife and himself with the provision that in event of death of either, the survivor is to draw it, it constitutes a gift to the wife, if she survives. A delivery of the passbook is unnecessary to perfect the gift. McElroy *v.* Nat. Sav. Bank, 8 N. Y. App. Div. 192, 40 N. Y. Supp. 340.

Delivery is necessary to effect a gift either *causa mortis* or *inter vivos*. A letter written by donor stating that the subject-matter belongs to donee is insufficient evidence of delivery. Re Miller, 64 N. Y. Misc. 232, 119 N. Y. Supp. 52.

In order to constitute a present gift the delivery must be absolute and unconditional. Taylor *v.* Harmison, 179 Ill. 137, 53 N. E. Rep. 584.

Delivery is necessary to a valid gift and until the delivery is made in the manner stated by the donor, the transaction amounts to nothing more than a promise to give. Ross *v.* Walker, 44 Fla. 704, 32 So. Rep. 934.

Delivery of certificates of stock together with a written assignment is held sufficient delivery of the stock to constitute a valid gift. Talbot *v.* Talbot, 32 R. I. 72, 78 Atl. Rep. 535, Ann. Cas. 1912, C. 122.

The mere form of a bank account will not be sufficient evidence of intent on the part of the person making the deposit to give the individual whose name is associated with that of the depositor a joint interest in the deposit. In re Myers Estate, 129 N. Y. Supp. 194.

Delivery to a third person as agent is as effectual as manual delivery directly to donee. Jones *v.* Nicholas, 151 Ia. 362, 130 N. W. Rep. 125; In re Bell's Estate, 150 Ia. 725, 130 N. W. Rep. 798.

The law will not presume a gift if any other presumption is open. Leask *v.* Hoagland, 144 N. Y. App. Div. 138, 128 N. Y. Supp. 1017, citing Grey *v.* Grey, 47 N. Y. 552.

Delivery by the insured of an insurance policy payable to him if living at the end of 40 years is sufficient to sustain a gift, made

gift was in view of death or not.[31] According to some au-

six years after the policy was issued, of all his rights, title and interest therein. Sheldon *v.* Chemung Canal Bank, 67 Misc. 631, 122 N. Y. Supp. 1057, affirmed in 140 N. Y. App. Div. 938, 125 N. Y. Supp. 1144.

It is incumbent on the plaintiff donee to prove that the donor did voluntarily transfer to donee the title and deliver the possession of the *res* of the gift. Miles *v.* Monroe, 96 Ark. 531, 132 S. W. Rep. 643.

[31] Bedell *v.* Carll, 33 N. Y. 581.

Delivery to the donee is an essential element of a gift, whether *inter vivos* or *causa mortis*. Death of principal terminated agent's authority; hence the delivery by the agent after such death was ineffective. Wittman *v.* Pickens, 33 Colo. 484, 81 Pac. Rep. 299.

A gift *inter vivos* of personal property must be perfected by delivery. Wilson *v.* Edwards, 79 Ark. 69, 94 S. W. Rep. 927; Barnhouse *v.* Dewey, 83 Kan. 12, 109 Pac. Rep. 1081, 29 L. R. A. N. S. 166.

To establish a gift *causa mortis* the law requires clear and unmistakable proof of an actual gift perfected by as complete a delivery as the nature of the property will admit. Farnsworth *v.* Whiting, 106 Me. 430, 76 Atl. Rep. 909.

Where the subject of a gift *causa mortis* remains under the apparent dominion of the donor, the gift can be sustained only upon satisfactory proof that the donor did not concur in such dominion. Parker *v.* Copland, 70 N. J. Eq. 685, 64 Atl. Rep. 129.

Causa mortis: The gift must be in contemplation of the near approach of death to take effect absolutely upon death; there must be a delivery to donee or someone for him. *Inter vivos:* The gift must be absolute and irrevocable, taking effect immediately; there must be delivery to donee or someone for him. Calvin *v.* Free, 66 Kan. 466, 71 Pac. Rep. 823.

The same amount of proof is required to support a gift *inter vivos*, when not asserted until after the death of the donor, as is required in gift *causa mortis*. To establish a gift alleged to have been made by a deceased person, the burden is on the person claiming the gift to show by proof, clear and convincing, that the subject-matter had passed to him by valid and effective gift. Thomas *v.* Tilley, 147 Ala. 189, 41 So. Rep. 854.

Delivery of keys of a safe deposit box held sufficient delivery in a gift *causa mortis* of the contents of the box. Foley *v.* Harrison, 233 Mo. 460, 136 S. W. Rep. 354.

Delivery is essential to a gift *causa mortis*, as well as *inter vivos*. Scott *v.* Union, etc., Bank, etc., Co., 123 Tenn. 258, 130 S. W. Rep. 757, citing Johnson *v.* Stevens, 22 La. Ann. 144; Hanson *v.* Millett, 55 Me. 184; Egerton *v.* Egerton, 17 N. J. Eq. 419; Hatch *v.* Atkinson, 56 Me. 324, 96 Am. Dec. 464;

thorities, there must be a written transfer;[32] but while there may be reason for this rule when the gift is set up against the alleged donor, or his successors or representatives, the better opinion is that a gift by delivery is sufficient to enable the donee to enforce the chose in action against the debtor.[33] But bare possession of the evidences of debt is not ordinarily enough to raise a presumption of a gift.[34] Where the party

and many other authorities on gift *causa mortis*.

[32] Johnson *v.* Spies, above; Gray *v.* Barton, 55 N. Y. 73, 2 Kent's Com. 439.

In the case of a gift of a chose in action the law requires a written assignment or some equivalent to effect the transfer. Shepard *v.* Shepard, 164 Mich. 183, 129 N. W. Rep. 201.

[33] Mack *v.* Mack, 3 Hun, 323. See page 196 of this vol.

Uncontroverted evidence of gift consummated by delivery will enable claimant to enforce claim. Moore *v.* Cline, 115 Ga. 405, 41 S. E. Rep. 614.

Statement made by donor that he had indorsed certain notes, contained in his pocket book, to donee, and then told donee where the pocket book was and requested him to bring it to the donor, and donee brought it and donor told him to put it out of sight—held sufficient to establish delivery. Royston *v.* McCulley (Tenn. Ch. App.), 59 S. W. Rep. 725, 52 L. R. A. 899.

A note which is a mere promise to make a gift in the future cannot be enforced against the estate of the maker. There must be delivery. Tyler *v.* Stitt, 127 Wis. 379, 106 N. W. Rep. 114.

A gift of a mortgage by delivery of it to a third party designated by the donee and a subsequent depositing of said mortgage in a box containing papers belonging to the testator is a valid gift *causa mortis*. In re Van Derzee, 66 N. Y. Misc. 399, 121 N. Y. Supp. 662.

A parol gift of land without more, is ineffectual to pass title to the donee. Thaggard *v.* Crawford, 112 Ga. 326, 37 S. E. Rep. 367.

Proof of parol gift of land and entry thereunder will sustain claim of possession accompanied by a *bona fide* claim of right, which could ripen into ownership. Ellis *v.* Dasher, 101 Ga. 5, 29 S. E. Rep. 268.

Where a gift *inter vivos* is perfected by delivery of possession of the thing or delivery of a deed of gift, it is complete, although made without any consideration. Burkett *v.* Doty, 32 Cal. App. 337, 162 Pac. Rep. 1042.

[34] Grey *v.* Grey, 47 N. Y. 552, rev'g 2 Lans. 173; Bedell *v.* Carll, 33 N. Y. 581.

The mere possession of certain notes is insufficient to establish a gift either *inter vivos* or *causa*

claims title to the cause of action by such a disposition, he is not required to show affirmatively, and with minuteness, the circumstances under which the alleged gift was made; nor that the donor was of sound disposing mind and memory when he made the gift, and that delivery of the subject was his free and voluntary act. These are matters of defense, equally in cases of gifts *inter vivos* and gifts *causa mortis*.[35]

mortis unaccompanied by proof of delivery. Smith *v.* Zumbro, 41 W. Va. 623, 24 S. E. Rep. 653.

The execution and delivery of a deed vests the grantee with an interest in the land even if the grantor retakes possession of the deed. Foreman *v.* Archer, 130 Iowa, 49, 106 N. W. Rep. 372.

Before a parol gift of land will be recognized the donee must have taken possession of it under the gift and held it adversely for the statutory time or made substantial improvements on the land. Kelly *v.* Kelly (Ia.), 130 N. W. Rep. 380; Wilkerson *v.* Chars (Tex.), 133 S. W. Rep. 481.

Possession of a ring by the donor until her death is not conclusive that she did not give it away during her lifetime. Garrison *v.* Union Trust Co., 164 Mich. 345, 129 N. W. Rep. 691, 32 L. R. A. N. S. 219.

While a complete and unconditional delivery is essential to the validity of a gift a constructive or symbolic delivery will meet the requirements of the law; and where there is a delivery the fact that the property may be redelivered to the donor as agent of the donee, or for safe-keeping, will not nullify or affect the gift. Hess *v.* Hartwig, 83 Kan. 592, 112 Pac. Rep. 99.

The mere possession and use of a horse by the donor after having made a gift of it, will not divest or even impair the title of the donee. Swindell *v.* Swindell, 153 N. C. 22, 68 S. E. Rep. 892.

It is settled law that a valid gift of money in a savings bank may be effected by the delivery to the donee of the depositor's passbook. Union Trust, etc., Bank *v.* Tyler, 161 Mich. 645, 126 N. W. Rep. 713, 137 Am. St. Rep. 523.

But the donor must give up all dominion over the book. Kelly *v.* Perkins (N. J.), 78 Atl. Rep. 14.

[35] Bedell *v.* Carll, 33 N. Y. 581.

Where the subject-matter is not susceptible of a physical delivery, the acts of the donor ratifying and acknowledging the ownership of the donee will be sufficient to sustain a verdict in favor of the donee. McMullen *v.* Stripling, 120 Ga. 658, 48 S. E. Rep. 115.

Where the donor is a widow enfeebled in mind by disease and old age, and the person benefited is her son, with whom she makes her home, the presumption is that the gift was brought about by undue influence, and the burden is upon the party benefited to prove affirmatively that the transaction was fairly conducted. Smith *v.*

9. Object, when Material.

If the transfer was valid as between the parties to it, the defendant cannot question it by proof that it was made for the purpose of enabling the suit to be brought, because the assignor could not bring it,[36] or for the purpose of enabling the assignor to be a witness.[37] And even proof of fraud on

Smith, 84 Kan. 242, 114 Pac. Rep. 245, 35 L. R. A. N. S. 944.

The burden of proof is upon the assignee to show that an assignment made by a very aged person, was made without duress or undue influence. Schanck *v.* Hopper, 160 N. Y. Supp. 627.

Donee of a check cannot recover the amount of it from the estate of the deceased donor, as the death of the donor before the check was presented for payment or paid has the effect of revoking the gift. If, however, the check was given not as a gift, but as compensation for services rendered plaintiff can recover. Cox *v.* Walker, 140 Ky. 172, 130 S. W. Rep. 984, 140 Am. St. Rep. 367.

[36] As where the assignor and debtor were both foreign corporations. McBride *v.* Farmers' Bank, 26 N. Y. 450, affi'g 25 Barb. 657; or the assignor was a foreign executor or administrator. Petersen *v.* Chemical Bank, 32 N. Y. 21.

Under the statute the defendant has the right to insist that the action shall be brought by the real party in interest, but the purpose of the statute is obtained if the defendant is not prevented from setting up all defenses and is fully protected against future suits for the same cause. Rullman *v.* Rullman, 81 Kan. 521, 106 Pac. Rep. 52.

In Arkansas the assignee of the claim growing out of the breach of supersedeas bond has the right to sue in his own name under § 5999 of Kirby's Digest. Love *v.* Cahn, 93 Ark. 215, 124 S. W. Rep. 259.

The assignee of a claim is the real party in interest and the proper party to sue thereon; and the fact that such transfer is colorable only is immaterial unless the rights of creditors are involved or the right to interpose some defense is cut off by the assignment. Chase *v.* Dodge, 111 Wis. 70, 86 N. W. Rep. 548.

Where a claim has been assigned by an instrument under seal, the adverse party is not entitled to show, by the assignor, that the latter is still interested in the claim. Livingston *v.* Spero, 18 N. Y. Misc. 243, 41 N. Y. Supp. 606.

Where the defendant denies the assignment to the plaintiff a further allegation that the plaintiff assignee is not the real party in interest is not good as a separate defense, as the claim can be fully investigated under the denial of the assignment. Smith *v.* N. Y. Cooperage Co., 35 N. Y. Misc. 203, 71 N. Y. Supp. 479.

[37] Gardner *v.* Barden, above; and

the part of the parties to the assignment, such as would enable creditors to avoid it, will not avail the debtor.[38] But evidence that the assignment was positively illegal, as, for example, that it was made to an attorney for the purpose of his bringing an action, is competent.[39] In other words, it

see Westervelt *v.* Allcock, 3 E. D. Smith, 243.

An assignment by a party to a controversy, made only for the purpose of enabling him to sustain the suit by his testimony, is not made in that good faith which the statute intends, and is ineffectual to accomplish the purpose. Verstine *v.* Yeaney, 210 Pa. 109, 59 Atl. Rep. 689.

In Kansas the assignee of an administrator is not an incompetent witness under § 320, Code of 1909, prohibiting an administrator from testifying. John T. Stewart Estate *v.* Falkenberg, 82 Kan. 576, 109 Pac. Rep. 170.

[38] Osborne *v.* Moss, 7 Johns. 161; Waterbury *v.* Westervelt, 9 N. Y. 598.

The validity of an assignment cannot be attacked by the debtor in an action by the assignee on the ground that it was an assignment for the benefit of creditors, and void because of a failure to comply with the statutory requirements, as such assignment is subject only to attack by the creditors. Blackford *v.* Westchester Fire Ins. Co., 101 Fed. Rep. 90, 41 C. C. A. 226.

A *bona fide* contract for the assignment of a claim in suit is not rendered invalid because the ulterior motive of one of the parties is to prevent a compromise, or to prolong the suit, in order to annoy or embarrass the defendant therein. Rucker *v.* Bolles, 80 Fed. Rep. 504, 25 C. C. A. 600.

[39] 2 Rev. St. 288, § 71; Mann *v.* Fairchild, 3 Abb. Ct. App. Dec. 152; Moses *v.* McDivitt, 2 Abb. N. Cas. 47. Formerly the mere purchase was evidence of intent. 3 Wend. 120. It is now only a necessary circumstance with others to show intent. See Bristol *v.* Dann, 12 Wend. 142; Williams *v.* Mathews, 3 Cow. 252.

A fictitious transfer of a claim to a nominal party, to confer jurisdiction on a court of a certain county, the original claimants being the real parties in interest, is insufficient for the purpose designed. Douglas *v.* Walker, 42 Tex. Civ. App. 213, 92 S. W. Rep. 1026.

A person who has sustained injuries may, in consideration of legal services rendered and to be rendered, assign a part of his claim for damages to his attorney, who is a proper party to the action. A. K. McInnis Lumber Co. *v.* Rather, 111 Miss. 55, 71 So. 264.

Under the Louisiana law, an injured employee may assign his claim for damages to his employer, and in the event of his death resulting from such injuries, his

is enough for the plaintiff to show an assignment which bound the assignor, but the defendant may show that it was illegal on the part of the plaintiff to receive it.

10. Best and Secondary Evidence.

If it appears that the assignment of the cause of action was made by a written instrument, the writing is the best evidence, and must be produced or accounted for.[40] And, in general, wherever the nature or extent of plaintiff's interest in property is material under the issue, the written instrument of transfer under which he claims may be called for as the best evidence.[41] But a distinction is made in this rule, between a writing which is the vital instrument of transfer, such as a bill of sale, and a writing which is merely an incidental or collateral memorandum of a transfer made verbally, such as a bill of parcels stating price, and receipted.

widow may assign her claim for such damages to the attorney whom she employs for its collection. Shreveport *v.* Southwestern Gas and Electric Co., 140 La. 1078, 74 So. Rep. 559.

[40] Gilmore *v.* Bangs, 55 Ga. 403.

The assignment of a bank account being in writing, it cannot be proved by oral testimony. Robbins *v.* Bank of M. & L. Jarmulowsky, 90 N. Y. Supp. 288.

Where there is no evidence of loss of a note, or that an alleged assignment thereof was in the handwriting of payee, parol evidence is incompetent to show the assignment. Stancill *v.* Spain, 133 N. C. 76, 45 S. E. Rep. 466.

[41] Epping *v.* Mockler, 55 Ga. 376.

The bill of sale is the best evidence of a transfer of personalty. Fischer *v.* Johnson, 106 Iowa, 181, 76 N. W. Rep. 658.

Where claims are reduced to writing and recorded, the writing is the best evidence. Hirsch *v.* Beverly, 125 Ga. 657, 54 S. W. Rep. 678.

But where no legal objection is interposed oral evidence of assignment is sufficient to sustain a verdict even though there is a written assignment which is not produced. Dorais *v.* Doll, 33 Mont. 314, 83 Pac. Rep. 884.

It is not competent to prove by parol any facts tending to establish an agreement contrary to the terms of a written assignment conveying a present interest or title in property to a third person, although it may be only an interest in a future estate. Burkett *v.* Doty, 32 Cal. App. 337, 162 Pac. Rep. 1042.

Where the former is shown to exist it must be produced; but the latter is not primary evidence, and need not be produced.[42]

11. Proof of Execution.

The execution of a written assignment may be proved by having it acknowledged by the assignor, or proved by a subscribing witness, before an officer authorized to take acknowledgment and proof of deeds; [43] and this may be done even after the action has been commenced, and at any time before the actual offer of the document in evidence.[44] Unless this is done, the assignment, whether under seal or not,[45] if attested by subscribing witness, must be proved by the witness or his handwriting.[46]

12. Delivery and Acceptance.

Delivery of a written assignment is presumed when the instrument is proved to have been executed by the assignor, and is actually produced by the plaintiff at the trial; [47] and

[42] Dunn *v.* Hewitt, 2 Den. (N. Y.) 638.

Unsigned schedule accompanying signed letter. Coe *v.* Tough, 116 N. Y. 273, 22 N. E. Rep. 550. Telegrams used in corresponding. Beach *v.* Raritan, etc., R. R. Co., 37 N. Y. 457.

[43] N. Y. Code Civ. Pro., § 937. Add county clerk's certificate where required.

A person doing business under a corporate name sufficiently assigns an account if he adds after such corporate name his own signature prefixed by the word "by." German Investment & Securities Co. *v.* Rock Falls Mfg. Co., 193 Ill. App. 229.

[44] Holbrook *v.* N. J. Zinc Co., 57 N. Y. 616.

An instrument, executed several years before trial but to which the certificate of acknowledgment is not affixed until the moment before it is offered in evidence, is complete and is admissible without further proof. Wetterer *v.* Soubirous, 22 N. Y. Misc. 739, 49 N. Y. Supp. 1043.

[45] 1 Greenl. Ev. § 569; King *v.* Smith, 21 Barb. 158.

[46] 1 Greenl. Ev., § 569; Jones *v.* Underwood, 28 Barb. 481.

The assignment of a cause of action by a former plaintiff in a suit does not prove itself. Standifer *v.* Bond Hardware Co. (Tex. Civ. App.), 94 S. W. Rep. 144.

[47] Story *v.* Bishop, 4 E. D. Smith, 423; North *v.* Turner, 9 Serg. & R.

affirmative proof of the acceptance of an assignment which appears to be beneficial to the assignee, is not required from the party propounding it, but the party impeaching it must disprove acceptance.[48]

13. Assignment with Schedules.

If plaintiff claims under a general assignment with a schedule of the articles transferred, general words in the assignment, with nothing in it to indicate that the schedule is to control, will pass the right of action, though it be omitted from the schedule; and parol evidence that it was not intended to pass it, has been held incompetent as varying the assignment.[49] But evidence that it was in fact in-

244; Burkett *v.* Doty, 32 Cal. App. 337, 162 Pac. Rep. 1042.

Executing an assignment of a life insurance policy as security for a loan and exhibiting the policy, with such assignment attached, to the lender is sufficient to give to lender the security. Richardson *v.* White, 167 Mass. 58, 44 N. E. Rep. 1072.

The delivery of the written assignment of a bond to the assignee is a sufficient delivery to pass the equitable title to the bond, and the bond itself need not be delivered. Tatum *v.* Ballard, 94 Va. 370, 26 S. E. Rep. 871.

To be effectual, the delivery of a written instrument must be intentionally made with the purpose that the instrument shall become operative. Erickson *v.* Kelly, 9 N. Dak. 12, 81 N. W. Rep. 77.

[48] Van Buskirk *v.* Warren, 4 Abb. Ct. App. Dec. 457.

The assignor of a judgment cannot subsequently sue on the judgment because the assignee has failed in a prior action to prove acceptance of the assignment. Crum *v.* Stanley, 55 Neb. 351, 75 N. W. Rep. 851.

Where a husband assigns a building contract to his wife and records the assignments and then proceeds with the work and purchases materials, all without her knowledge, her subsequent acts in assigning sums due under the contracts to materialmen, amount to a total ratification of all her husband's acts and render her liable. In re Berkebile, 144 Fed. Rep. 572.

Subsequent payments by the assignee to the assignor upon an assignment of a claim are evidence of the assignee's acceptance. Wilson *v.* Kiesel, 9 Utah, 397, 35 Pac. Rep. 488.

[49] Cram *v.* Union Bank, 1 Abb. Ct. App. Dec. 461. *Contra*, Platt *v.* Thorn, 8 Bosw. 574. Compare Nims *v.* Armstrong, 31 Md. 87, 2 Whart. Ev. § 944.

Parol evidence is incompetent

serted in the schedule by a designation partially false or inapplicable is competent.[50]

14. Assignment by Corporation.

If plaintiff claims as assignee of a corporation, evidence of the existence of the corporation is admissible without any allegation of that fact other than such as is implied in the mention of the corporate name in the complaint.[51] The plaintiff is not held to make, as against the debtor, so clear proof of a valid assignment by the corporation as he might be required to in a contest with the creditors or stockholders of the corporation. As against the debtor, an assignment of the cause of action is presumed valid, although, having been made by a moneyed corporation, a vote of the board was necessary to its legality, and there is no evidence thereof.[52]

to enlarge the scope of a written contract. Kessler *v.* Perilloux, 132 Fed. Rep. 903, 66 C. C. A. 113.

See paragraph 16 below.

[50] Commercial Bank *v.* Clapier, 3 Rawle, 335, 339. The inventory or schedule is to be read in connection with the assignment and as part of the transaction. Roberts *v.* Vietor, 130 N. Y. 585, 29 N. E. Rep. 1025. See also Turnipseed *v.* Schaefer, 76 Ga. 109, 2 Am. St. Rep. 17.

But see Roberts *v.* Buckley, 145 N. Y. 215, 39 N. E. Rep. 966, in which the court distinguished Roberts *v.* Vietor and sustained the correcting of mistakes and defects in the inventory.

[51] Kennedy *v.* Cotton, 28 Barb. 9. An assignment for the benefit of creditors, made in New York by an insolvent foreign corporation, valid under the law of its domicile, will be recognized as valid here. Vanderpoel *v.* Gorman, 140 N. Y. 563, 35 N. E. Rep. 932. In the absence of any statute or of a by-law of the corporation providing otherwise, such an assignment may be executed by the president and secretary under authority of its board of managers. Id.

Under N. Y. Code Civ. Pro., § 1776, the plaintiff, assignee of a corporation, need not prove the existence of the corporation unless the answer is verified and contains an affirmative allegation that it is not a corporation. Crocker *v.* Muller, 40 N. Y. Misc. 685, 83 N. Y. Supp. 189.

The assignee of a corporation which has failed to pay its license fee to the State cannot sue in the State. Kinney *v.* Reid Ice Cream Co., 57 N. Y. App. Div. 206, 68 N. Y. Supp. 325.

[52] Belden *v.* Meeker, 47 N. Y. 307, affi'g 2 Lans. 470, 9 Moak's

But where there is evidence that the transfer was made without a vote of the board, the burden is on the assignee to show that he took it for value, and without notice.[53] This he may always show in support of his title, whether he took directly from the corporation or through a third person.[54] The fact that plaintiff himself,[55] or even one of several plaintiffs,[56] was a director at the time of such an illegal transfer, is sufficient evidence of notice to defeat the action.

15. Authority of Officer or Agent.

To show the authority of the officers of the corporation to make the transfer, their official character may be proved either by the corporate minutes, or by witnesses testifying

Eng. 255, n. Compare to the contrary, Houghton *v.* McAuliffe, 2 Abb. Ct. App. Dec. 409.

The seal of a corporation attached to a written instrument is sufficient evidence of authority of the officer who signs the name of the corporation. Collier *v.* Alexander, 142 Ala. 422, 38 So. Rep. 244.

A parol assignment may be made by the members of a board of directors of a business corporation, for a sufficient consideration moving to it which, when acquiesced in and satisfied, will be enforced by a court of equity. Hofferberth *v.* Duckett, 175 App. Div. 498, 162 N. Y. Supp. 167.

[53] Houghton *v.* McAuliffe, above. *Contra,* Caryl *v.* McElrath, 3 Sandf. 176.

In order to be entitled to sue, the holder of commercial paper must have the right of possession and must be the legal owner. Hays *v.* Hathorn, 74 N. Y. 486; Sheridan *v.* New York, 68 N. Y. 30.

[54] Curtis *v.* Leavitt, 15 N. Y. 9. Proof of payment of value raises a presumption, according to Warner *v.* Chappel, 32 Barb. 309, that plaintiff took without notice.

See also Merillat *v.* Hensey, 221 U. S. 333, 3 Super. Ct. 575, 56 L. ed. 758, 36 L. R. A. N. S. 370, Ann. Cas. 1912, Div. 497.

[55] Gillet *v.* Phillips, 13 N. Y. (3 Kern.) 114; Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. Rep. 178. See also Lake *v.* Lake, 136 N. Y. App. Div. 47, 119 N. Y. Supp. 686.

[56] Smith *v.* Hall, 5 Bosw. 319; Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. Rep. 178.

Where an officer induces a corporation to convey property to him, and he himself casts the carrying vote, the corporation may file a bill in equity to have such transfer set aside. Mobile Land Imp. Co. *v.* Gass, 142 Ala. 520, 39 So. Rep. 229.

to the fact of their habitually acting as such, and without producing the books,[57] and the jury may infer the authority of the officer to do the particular act from evidence of the exercise by him of the same general power, with the knowledge and acquiescence of the directors.[58]

[57] Partridge *v.* Badger, 25 Barb. 146. An assignment of a claim by a corporation, executed by its president in the presence of its secretary and attested by its corporate seal, is sufficient to protect the debtor in paying the amount of the claim to the assignee. Purdy *v.* Nova Scotia Midland Ry. Co., 8 Misc. Rep. (N. Y.) 510. Authority of the secretary to make an assignment of the indebtedness due to the corporation will not be presumed; it must be proved. Read *v.* Buffum, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. Rep. 555.

Where the corporation seal is affixed the presumption is that the executing officer had authority. Carr *v.* Georgia Loan & Trust Co., 108 Ga. 757, 33 S. E. Rep. 190; Collier *v.* Alexander, 142 Ala. 422, 38 So. Rep. 244.

Where the seal is not affixed the officer's authority must be gathered from some other source. Degnan *v.* Thoroughman, 88 Mo. App. 62.

Where the president of a corporation which holds a chattel mortgage on certain property consents to the sale of that property by the owner, it will be presumed that such consent was authorized by the corporation, in the absence of contrary proof. Anderson *v.* South Chicago Brew. Co., 173 Ill. 213, 50 N. E. Rep. 655.

Under an allegation of assignment by a corporation, proof of authority of the officer making it is admissible. University of Chicago *v.* Emmert, 108 Iowa, 500, 79 N. W. Rep. 285.

[58] Merchants' Bank *v.* State Bank, 10 Wall. 604. Compare Jackson *v.* Campbell, 5 Wend. 572; Hoyt *v.* Thompson, 5 N. Y. 320.

Assignment of a street-assessment claim is sufficiently proved where it is shown that it was made by the general manager of the corporation which did the work, and that he was in the habit of executing assignments for the corporation with the knowledge and acquiescence of the board of directors. Reid *v.* Clay, 134 Cal. 207, 66 Pac. Rep. 262.

Where the statute authorizes conveyance of property by a corporation by deed executed by the president or vice president thereof when given such power by its by-laws, a deed so executed is presumptively valid. American Exch. Nat. Bank *v.* Ward, 111 Fed. Rep. 782, 49 C. C. A. 611, 55 L. R. A. 356.

Where the evidence shows that the agent is referred to in the minutes of the corporation as "general manager" and there are

16. Parol Evidence to Vary a Writing.

The rule excluding parol evidence, when offered to vary a contract, has often been applied against assignees of a contract, and against a debtor seeking to explain or vary an assignment of his debt.[59] But the later authorities recognize the qualification that in actions between a stranger to the instrument and a party to it, as well as between strangers, either may give parol evidence to vary it.[59a] Hence

letters offered written by him to the corporation, it is sufficient to take the case to the jury. Clarke *v.* Lexington Stove Works, 24 Ky. Law Rep. 1755, 72 S. W. Rep. 286.

Proof of the official position of the officer of a corporation executing the assignment of a contract is competent. Univ. of Chicago *v.* Emmert, 108 Iowa, 500, 79 N. W. Rep. 285.

The president, being the head of a corporation acts for the body, and executes its contracts and agreements; and when his name appears to an instrument the law will presume that it is executed by sufficient authority from the body.

Under no theory of the implied or *exofficio* powers of the president can he assign property for debts or for the benefit of creditors, as this is not a disposition of it in the ordinary course of business. Wagg-Anderson Woolen Co. *v.* Lesher, 78 Ill. App. 678, which case see generally as to authority of officers.

Where the holder of a note knows that it has been indorsed for accommodation by an officer of a corporation not authorized to do so, the holder cannot recover against the corporation. Farmer & Co. *v.* Humboldt & Co., 27 N. Y. Misc. 314, 57 N. Y. Supp. 821.

[59] Parol evidence cannot be introduced to vary written assignment of a life policy. Doty *v.* Dickey, 29 Ky. Law Rep. 900, 96 S. W. Rep. 544.

A written instrument being unambiguous, parol evidence is inadmissible to explain its terms. Flynn *v.* Butler, 189 Mass. 377, 75 N. E. Rep. 730.

Where an assignment by a debtor for the benefit of creditors is clear and unambiguous, no parol evidence can be admitted to prove that the consideration for the assignment was the discharge of the indebtedness. Hammond *v.* Pinkham, 149 Mass. 356, 21 N. E. Rep. 871.

Where the plaintiff assigns all his remaining interest in a judgment in partition, which interest was a balance due after sale, it cannot be proved by parol evidence that he intended to include rents subsequently accruing pending an appeal from the judgment and before the sale. Kalteyer *v.* Wipff (Tex. Civ. App.), 65 S. W. Rep. 207.

[59a] McMaster *v.* President, etc., of Ins. Co. of N. A., 55 N. Y. 222;

the rule, as now understood, forbids neither the assignee nor the debtor to give parol evidence to vary either the contract sued on or the assignment, unless they are both parties to the same instrument, or have come under the obligations of parties, or the agreement is one which the law requires to be in writing.[60] Thus, a person not a party to a policy of in-

Coleman *v.* First Nat. Bk., 53 N. Y. 388; Badger *v.* Jones, 12 Pick. 321; Railroad Co. *v.* Trimble, 10 Wall. 367.

Where a principal by a written assignment duly assigns certificates of stock to his agent, parol evidence as to admissions made by the agent tending to prove that the stock was the principal's property which the agent had appropriated to his own use without the principal's consent, is admissible if there is no evidence that the agent paid anything for the stock or that it was a gift to him. McDonald *v.* Danahy, 196 Ill. 133, 63 N. E. Rep. 648, affi'g 96 Ill. App. 380.

Where there is a parol agreement of employment, and a written resolution of the board of directors of the employer is merely a step in such agreement, parol evidence is admissible. Rochester Folding Box Co. *v.* Browne, 55 N. Y. App. Div. 444, 66 N. Y. Supp. 867, appeal dismissed 166 N. Y. 635, 60 N. E. Rep. 1120.

Plaintiff assigned in writing his part interest in a claim to defendant. At the time of the assignment they had a verbal understanding that if the defendant collected more than the part interest shown in the assignment the defendant would return the excess to the plaintiff. Oral evidence was admitted against the objection that it may vary a written instrument. Martin *v.* Stone, 15 Cal. App. 174, 113 Pac. Rep. 706.

The consideration of a deed may always be inquired into if the principles of justice require it. Shackelford *v.* Orris, 135 Ga. 29, 68 S. E. Rep. 838.

Where there is a secret agreement in violation of the conditions of an assignment for the benefit of creditors and in violation of law, all the evidence and circumstances in the case may be considered by the jury. Badgett *v.* Johnson-Fife Hat Co., 29 C. C. A. 230, 85 Fed. Rep. 408.

[60] Furbush *v.* Goodwin, 25 N. H. 425, 446; Dempsey *v.* Kipp, 61 N. Y. 462, and cases cited. But see paragraph 20 below.

Oral evidence is admissible to prove additional consideration for an unconditional written transfer of notes and credits. Martin *v.* Rotan Grocery Co. (Tex. Civ. App.), 66 S. W. Rep. 212.

Oral evidence is admissible to show that an assignment of shares of stock, however absolute in form, is merely a pledge; and the consideration and the purpose of the transaction may be shown in the same way. Riley *v.* Hampshire

surance, but holding it by assignment, or as one to whom, in case of loss, it is payable, may adduce evidence to explain it, in his action against the company.[61]

17. Equities against the Assignee.

The assignee of a non-negotiable chose in action, as distinguished from the *bona fide* transferee of negotiable paper, takes it subject to all equities, whether known or unknown to the assignee,[62] existing against the assignor at the time

Co. Nat. Bank, 164 Mass. 482, 41 N. E. Rep. 679.

[61] McMaster *v.* President, etc., of Ins. Co. of N. A., 55 N. Y. 222, 234.

Oral evidence is admissible to prove who was intended to be the beneficiary of a life insurance policy. Rudershauer *v.* Met. Life Ins. Co., 18 Ohio Cir. Ct. Rep. 609, 10 Oh. Cir. Dec. 258.

The fact that an assignment by a husband and wife of their interest in a policy of life insurance is absolute in form is immaterial, and the consideration and purpose of the transaction may be shown by oral evidence. Kendall *v.* Equitable Life Assur. Soc., 171 Mass. 568, 51 N. E. Rep. 464.

[62] Evertson *v.* Evertson, 5 Paige, 644.

The assignee of a chose in action takes it subject to all the defenses which could have been set up against it in the hands of the assignor. Williams *v.* Neely, 134 Fed. Rep. 1, 66 C. C. A. 171, 69 L. R. A. 232; Third Nat. Bank *v.* W. & A. R. R. Co., 114 Ga. 890, 40 S. E. Rep. 1016; Gillette *v.* Murphy, 7 Okla. 91, 54 Pac. Rep. 413.

The assignee of a claim for damages for street opening takes it subject to a contract of retainer of the attorney who conducted the proceedings, the retainer operating as a prior assignment of a percentage of the award. Flannery *v.* Geiger, 46 N. Y. Misc. 619, 92 N. Y. Supp. 785.

The assignee of a claim is chargeable with any notice or knowledge of fraudulent acts on the part of the debtor affecting the collection of the debt which the original debtor possessed. Fuller *v.* Horner, 69 Kan. 467, 77 Pac. Rep. 88.

Assignee of a bill of costs takes it subject to all offsets existing against it at the time of the assignment. Northwestern, etc., Bank *v.* Rauch, 8 Ida. 50, 66 Pac. Rep. 807.

The acceptance of an assignment of a balance due on a building contract by a materialman does not preclude him from asserting his rights under the contract in establishing his claim against the fund due the contractor. Independent School Dist. *v.* Madris, 106 Iowa, 295, 76 N. W. Rep. 794.

In New York it has been held that an assignee can be bound by

of the assignment, in favor either of the debtor,[63] or of any person who had succeeded to his right at the time of the assignment,[64] and even latent equities n favor of third persons.[65]

an arrangement which is made by the assignor with a third party subsequent to the assignment, when such arrangement is based upon a valuable consideration and the third party has no notice of the prior assignment. Smith *v.* Kissel, 92 N. Y. App. Div. 235, 87 N. Y. Supp. 176, affirmed in 181 N. Y. 536, 73 N. E. Rep. 1133.

The application of the rule that an assignee of a non-negotiable contract takes subject to all equities, is illustrated in Miers *v.* Charles H. Fuller Co., 167 Ill. App. 49; Edson *v.* Gates, 44 Mich. 253, 6 N. W. Rep. 645; National Oil, etc., Co. *v.* Teel, 95 Tex. 586, 68 S. W. Rep. 979; Roberts *v.* Tavenner, 48 W. Va. 632, 37 S. E. Rep. 576; Gillette *v.* Murphy, 7 Okla. 91, 54 Pac. Rep. 413.

At common law the bailee was entitled to all defenses which accrued against the bailor before notice of assignment. Stamford Compress Co. *v.* Ft. Worth Natl. Bank, 105 Tex. 44, 143 S. W. Rep. 1142, 144 S. W. Rep. 1130, Ann. Cas. 1914 D. 1298.

Fraud committee in the inception of a debt is, in its nature, personal between the contracting parties, and does not follow the assignment of the debt. Thwing *v.* Winkler, 13 Okla. 643, 75 Pac. Rep. 1127.

[63] Murray *v.* Gouverneur, 2 Johns. Cas. 438; Clute *v.* Robinson, 2 Johns. 595, and cases cited in 1 Abb. N. Y. Dig., 2d ed. 305.

A release of a claim executed by plaintiff's assignor in favor of the defendant prior to the assignment can be interposed as a defense to the plaintiff's action on the claim. Castor *v.* Bernstein, 2 Cal. App. 703, 84 Pac. Rep. 244. The assignee of an option on an interest in land is not protected against defects which could be asserted against his assignor. Protection extends only to purchasers of the legal title to land for valuable consideration. Nat. Oil, etc., Co. *v.* Teel, 95 Tex. 586, 68 S. W. Rep. 979.

Where the payee of an order is not entitled to payment because he had not completed the work for which it was given, his assignee is in no better position. Van Akin *v.* Dunn, 117 Mich. 421, 75 N. W. Rep. 938.

[64] Hartley *v.* Tatham, 2 Abb. Ct. App. Dec. 333; Frost *v.* Yonkers Savings Bank, 70 N. Y. 553, 26 Am. Rep. 627; Andrews *v.* Gillespie, 47 N. Y. 487.

[65] Green *v.* Warnick, 64 N. Y. 224, and cases cited, overruling Murray *v.* Lylburn, 2 Johns. Ch. 441, and other cases to the contrary.

If a depository of trust funds appropriates them to the payment of his individual debt to the bank, the latter having notice of the character of the fund, is affected with

18. Bona Fide Purchaser.

But the doctrine of equitable estoppel supports the title of a *bona fide* purchaser for value, of a non-negotiable cause of action, from one upon whom the owner has conferred the apparent absolute ownership, when the purchase is made upon the faith of such appearance.[66] Yet evidence showing circumstances sufficient to have put the purchaser upon inquiry will charge him with the same notice that is chargeable to his assignor in respect to the same matters.[67]

19. Notice to Debtor.

If the cause of action was complete against the debtor before the assignment was made, notice to the debtor of the

knowledge of the misappropriation, and may be compelled to refund. Columbia Finance & Trust Co. *v.* First Nat. Bank, 116 Ky. 364, 76 S. W. Rep. 156, 25 Ky. L. Rep. 561.

[66] Moore *v.* Metropolitan Bank, 55 N. Y. 41; Green *v.* Warnick, 64 Id. 224.

The assignee of a non-negotiable bill of lading takes it subject to all the equities existing between the parties whose names appear on it, but not to the equities of third parties not connected with the bill. Bristol Nat. Bank *v.* Baltimore & Ohio R. R. Co., 99 Md. 661, 59 Atl. Rep. 134, 105 Am. St. Rep. 321.

Fraud committed in the inception of a debt is personal between the contracting parties and does not follow the assignment of the debt. Thwing *v.* Winkler, 13 Okl. 643, 75 Pac. Rep. 1126.

[67] Commercial Bank *v.* Colt, 15 Barb. 506; and see Evans *v.* Ellis, 5 Den. 640, affi'g Ellis *v.* Messervie, 11 Paige, 467. The purchaser of a bond and mortgage who fails to require the production of the bond, is chargeable with notice of any defect in the assignor's title thereto. Kellogg *v.* Smith, 26 N. Y. 18. As to appearances of alterations, see Birdsall *v.* Russell, 29 N. Y. 220.

The assignee of a certificate executed by the treasurer of a corporation stating that it holds certain orders is bound to inquire into the circumstances and know all the facts including the authority of the treasurer to issue it, and neglecting to do this he takes it subject to all existing equities. Louisville Water Co. *v.* Fullenlove, 12 Ky. Law Rep. 556.

Where the circumstances are peculiar, it is the duty of the prospective assignee to make inquiries and know the facts. Louisville Water Co. *v.* Fullenlove, 12 Ky. Law Rep. 556.

assignment, need not be proved,[68] except for the purpose of shutting out evidence of subsequent dealings by the debtor with the assignor in reduction of the liability. Notice of an assignment of a demand or obligation, or a part thereof, given to the debtor, fixes the rights of the parties, and pro-

[68] Muir *v.* Schenck, 3 Hill, 228. See also Doughty *v.* Weston, 152 N. Y. Supp. 1035, 90 Misc. 304.

Where accounts received are transferred as collateral security for a loan, notice to the debtors is not necessary to make the transfer effectual as against the creditors of the borrower. Young *v.* Upson, 115 Fed. Rep. 192.

The assignment of future wages under an existing contract is valid if founded on a consideration and if not made to hinder or defraud creditors. Notice to debtor unnecessary. Quigley *v.* Welter, 95 Minn. 383, 104 N. W. Rep. 236.

As to third persons, the assignment of a chose in action is valid without notice to the debtor. Thayer *v.* Daniels, 113 Mass. 129.

Lack of notice to the debtors does not invalidate a transfer of their accounts to third parties. In re Hawley Down-Draft Furnace Co., 238 Fed. Rep. 122, 151 C. C. A. 198.

An allegation that no notice of assignment of a claim by the third party was given to the plaintiff is immaterial. Crosby *v.* Kropf, 33 N. Y. App. Div. 446, 54 N. Y. Supp.76.

As between an assignee of a fraud under an equitable assignment and the receiver of the assignor, an insolvent, notice of assignment to the holder of the fund is not necessary to perfect the title of the assignee. Cogan *v.* Conover Mfg. Co., 69 N. J. Eq. 809, 64 Atl. Rep. 973, 115 Am. St. Rep. 629.

Notice to the debtor of the assignment of a chose in action is not necessary to the validity of the assignment. Virginia, etc., Chemical Co. *v.* McNair, 139 N. C. 326, 51 S. E. Rep. 949.

The rights of an assignee of a chose in action who does not give notice to the debtor until after the assignor dies are not defeated as against the administrator of the assignor. Shepherd *v.* Penn. Ry. Co., 29 Pa. Super. Ct. 291.

An assignment of an account with authority to collect it and apply the proceeds in payment of the debt due from assignor to assignee, is valid without notice to the assignor's debtor, and takes precedence over a subsequent attachment of the funds in the hands of the debtor by a creditor of the assignor. Marsh *v.* Garney, 69 N. H. 236, 45 Atl. Rep. 745.

The defense that a chose in action was assigned without notice to defendant debtor is bad in the absence of any agreement requiring such notice or any allegation of injury arising from want of such notice. Knickerbocker Trust Co. *v.* Coyle, 139 Fed. Rep. 792.

tects the assignee.[69] If the assignee proves such notice, subsequent dealings between the original parties are not relevant against him,[70] but the burden of proving such notice is upon the assignee who seeks to avail himself of it.[71] Proof of

[69] Schilling *v.* Mullen, 55 Minn. 122, 43 Am. St. Rep. 475, 56 N. W. Rep. 586.

Where future wages are assigned, the employer can only interpose such defenses as existed in his favor prior to his receiving notice of the assignment. Peterson *v.* Ball, 121 Iowa, 544, 97 N. W. Rep. 79.

Where a contractor for waterworks for a city gives an order upon the city for payment to a third person of a sum out of money due the contractor, the filing of such order with the proper accounting officer of the city is notice and constitutes an equitable assignment of funds in the possession of the city due the contractor. Dickerson *v.* City of Spokane, 26 Wash. 292, 66 Pac. Rep. 381.

Where a debtor received bills bearing notice of the assignment of the account he could not escape liability by returning purchased goods to the assignor. Eibschutz *v.* Ginsberg, 163 N. Y. Supp. 160.

[70] Myers *v.* Davis, 22 N. Y. 489, rev'g 26 Barb. 367.

A payment by a debtor to his creditor after notice of assignment does not discharge the debt. Ernst *v.* Estey Wire Works Co., 20 N. Y. Misc. 365, 45 N. Y. Supp. 932.

A judgment in a suit, brought by a debtor against his creditor after an assignee of the creditor had begun suit against the debtor, cannot be set up against the assignee as *res adjudicata*. Kahn *v.* Richard L. Walsh Co., 72 Misc. 20, 129 N. Y. Supp. 137.

The payment by an administratrix of an assigned account against the estate of the intestate is a complete defense against a prior assignment of which she had no notice. Monticello Sav. Bank *v.* Stuart, 73 Mo. App. 279.

Where the maker of a non-negotiable instrument pays the same in good faith to the payee, not having notice of any assignment, such payment extinguishes the debt. Chapman *v.* Steiner, 5 Kan. App. 326, 48 Pac. Rep. 607.

Where the insured under a policy of life insurance reserves the right to change the beneficiary with the consent, of the company, and sends notice of a change to the company and dies before the latter gives its consent, which is delayed through the company's negligence, the new beneficiary is entitled to the fund. In re Doringh, 20 R. I. 459, 40 Atl. Rep. 4.

[71] Hermans *v.* Ellsworth, 64 N. Y. 161, 3 Hun, 473, and cases cited. As to the necessity of notice as against third persons, see Thayer *v.* Daniels, 113 Mass. 129.

Evidence by a trustee in bankruptcy that a corporation was technically insolvent during its dealings with a bank is incompetent as proof that the bank had notice

general notoriety is usually admissible as tending to prove notice of a fact, when such notice is a material inquiry, though it is not admissible to prove the fact itself.[72]

20. Assignment for Purpose of Suit.

If plaintiff proves a written assignment absolute on its face, defendant cannot successfully impeach plaintiff's title, by adducing parol evidence to show that it was made upon condition that part of the claim assigned should, when collected, be paid to the assignor.[73]

21. —or as Collateral Security.

Where the plaintiff holds the cause of action as collateral security for a debt due him from a third person, the burden

of it. Bunnell *v.* Bronson, 78 Conn. 679, 63 Atl. Rep. 396.

[72] Woods *v.* Montevallo, etc., Coal Co., 84 Ala. 560, 5 Am. St. Rep. 393, 3 So. Rep. 475; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 13 Am. St. Rep. 84, 6 So. Rep. 277.

General information or a mere suspicion that a creditor might have made an assignment does not render the debtor liable to an assignee. Skobis *v.* Ferge, 102 Wis. 22, 78 N. W. Rep. 426.

The defendant cannot be bound by any assignment which had not been brought to his notice, where there is nothing to show that he had any knowledge of the alleged assignment prior to the trial. Russ *v.* Tuttle, 158 Cal. 226, 110 Pac. Rep. 813.

[73] Durgin *v.* Ireland, 14 N. Y. (4 Kern.) 322. But he may, for the purpose of showing the bias of the assignor, if the assignor has testified for plaintiff. Moore *v.* Viele, 4 Wend. 420. The transfer of the legal title of a claim is sufficient to enable the assignee to maintain an action to recover thereon, even though the assignor expects to share in the recovery. Hecht *v.* Mothner, 4 Misc. Rep. (N. Y.) 536; Curran *v.* Weiss, 6 Misc. Rep. (N. Y.) 138; Sheridan *v.* Mayor, 68 N. Y. 30.

Where a claim has been assigned by an instrument under seal, the adverse party cannot inquire into the consideration nor show, by the assignor, that he is still interested in the claim. Livingston *v.* Spero, 41 N. Y. Supp. 606, 18 N. Y. Misc. 243.

Plaintiff was the assignee for collection of certain claims and as such was entitled to maintain the action. Hankwitz *v.* Barrett, 143 Wis. 639, 128 N. W. Rep. 430, citing Wooliscroft *v.* Norton, 15 Wis. 198; Gates *v.* Northern P. Ry. Co., 64 Wis. 64, 24 N. W. Rep. 494.

is upon the defendant of proving any defense arising out of the state of dealings between the plaintiff and his principal debtor—as for instance that the principal debt has been paid,[74] or is not equitably enforceable as against the defendant.[75]

22. Assignees in Insolvency.

In an action by an assignee in insolvency, as such, on a cause of action which he acquired by the assignment, the plaintiff is bound to prove that he is such assignee, even though the defendant only pleads the general issue.[76] For this purpose an insolvent assignment, in the form of a deed by the insolvent to his assignee, expressing a pecuniary consideration, is admissible in evidence without proving the insolvency proceedings, although it recites their existence and purports to be made pursuant to a judge's order.[77] While

[74] Sheldon *v.* Wood, 2 Bosw. 267.

The defense of payment before notice of assignment must be averred; and there must be a distinct denial of notice before payment. Smith *v.* Orton, 131 U. S. (appendix) xxv, 18 Law ed. 62.

[75] Hogarty *v.* Lynch, 6 Bosw. 138. Parol evidence as to the agreed mode of payment of the debt, admissible. Hildebrandt *v.* Crawford, 6 Lans. 502, 507. For the peculiar application of the rules as to collaterals, in case of negotiable paper, see chapter on *Actions on Bills, Notes and Checks.* One who has assigned a lien as collateral security, may, if he have an existing interest in it, maintain an action for its enforcement, and the assignee is a necessary party to such an action. Ridgway *v.* Bacon, 72 Hun (N. Y.), 211; Selleck *v.* Manhattan Fire Alarm Co., 121 N. Y. Supp. 587.

It is competent to show in an action at law that an assignment set up by defendant and absolute on its face, was made as security. Resort to equity is not necessary unless equitable relief is demanded. Cushman *v.* Family Fund Society, 13 N. Y. Supp. 428.

[76] Best *v.* Strong, 2 Wend. 319. An executor of an assignee for the benefit of creditors is not entitled to be substituted as plaintiff in an action brought by the decedent as such assignee, unless the executor has been substituted as assignee. Steinhouser *v.* Mason, 135 N. Y. 635, 32 N. E. Rep. 69.

[77] Rockwell *v.* Brown, 54 N. Y. 210, rev'g 33 Super. Ct. (1 J. & S.) 380.

See also Rockwell *v.* McGovern, 69 N. Y. 294.

prior fraudulent transfers by the assignor do not necessarily avoid the assignment, they may be considered in determining whether there was any fraud in the assignment in question.[78]

23. —in Bankruptcy.

The title of an assignee in bankruptcy is conclusively proved, alike in a State court as in a court of the United States,[79] by a copy of the assignment, duly certified by the clerk of the court under its seal.[80] But unless he produces such copy, or the original, or accounts for its absence, parol evidence of his title is not admissible.[81] It is not necessary

[78] Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. Rep. 99.

In an action to set aside a sale made within three months of insolvency proceedings, unless the debtor was in fact insolvent, it cannot be held that his grantee had reasonable cause to believe him insolvent. Cutler *v.* Dunn, 68 N. H. 394, 44 Atl. Rep. 536.

Deeds given by the insolvent or recorded during the same year, some before and some after the pretended sale of chattels to the plaintiff, are admissible in evidence, as bearing upon a contemplated insolvency. Stuart *v.* Redman, 89 Me. 435, 36 Atl. Rep. 905.

Whether a homestead right in the insolvent which gives the tenant no right of entry can be relied on, in the case of a writ of entry brought by the assignee in insolvency against a grantee of the insolvent on the ground that the conveyance was made to defraud creditors. Copeland *v.* Sturtevant, 156 Mass. 114, 30 N. E. Rep. 475.

[79] Cone *v.* Purcell, 56 N. Y. 649. The State courts will take judicial notice of the U. S. Bankrupt Act. Wheelock *v.* Lee, 15 Abb. Pr. N.S. 24.

Where the assignee in his complaint alleges his election and that the insolvent's property was assigned to him, in the absence of demurrer, it will be presumed that he had previously qualified and given the statutory bond as a condition precedent to the assignment. Farnsworth *v.* Sutro, 136 Cal. 241, 68 Pac. Rep. 705.

[80] Bump on Bankr. 139; Blumensteil on Bankr. 228.

Properly certified copies of the adjudication and order approving the bond of the trustee are admissible in evidence without proof of service of process on either of the insolvent partners, even where there is evidence to show that one of them had been outside the jurisdiction since prior to the inception of the bankruptcy. Whitson *v.* Farber Bank, 105 Mo. App. 605, 80 S. W. Rep. 327.

[81] Burk *v.* Winters, 28 Ark. 6,

for him to show the steps in the proceedings, nor the jurisdiction of the court over the proceedings or the person of the insolvent,[82] nor a record of the assignment as a deed of lands,[83] nor can the existence or sufficiency of the debt of the petitioning creditor be collaterally drawn in question.[84] The entire proceedings in a bankruptcy c se are not regarded as constituting an integral record; but copies of such papers as in any way relate to the matter in question, certified to be such, are admissible without other parts of the proceedings.[85]

and cases cited; s. c., 15 Bankr. R. 140.

A discharge in bankruptcy bars recovery on an assignment of wages to be earned under a future employment. Draeger *v.* Wisconsin Steel Co., 194 Ill. App. 440.

[82] Bump on Bankr. 139.

[83] Phillips *v.* Hembold, 26 N. J. Eq. 202.

[84] Sloan *v.* Lewis, 22 Wall. 150.

Nor can the court pass upon the priority of claims. Davis *v.* Louisville Trust Co., 181 Fed. Rep. 10, 104 C. C. A. 24, 30 L. R. A. N. S. 1011.

An adjudication of bankruptcy cannot be impeached collaterally on the ground that the petitioner was not a creditor. Huttig Mfg. Co. *v.* Edwards, 160 Fed. Rep. 619, 87 C. C. A. 521.

[85] Michener *v.* Payson, 13 Bankr. R. 50; s. p. Ransom *v.* Wheeler, 12 Abb. Pr. 139.

The verified schedules of a bankrupt are competent evidence on the question of his insolvency, not only when the petition was filed, but also when an alleged preferential conveyance was made. In re Mandel, 127 Fed. Rep. 863, aff'd in 68 C. C. A. 546, 135 Fed. Rep. 1021.

The adjudication in bankruptcy is properly admissible in evidence as showing insolvency and intended preference. Calkins *v.* Farmers', etc., Bank, 99 Mo. App. 509, 73 S. W. Rep. 1098.

Where a trustee in bankruptcy attempts to set aside as fraudulent a conveyance of real estate by the bankrupt to a third person through his wife, and within four months of filing his petition in bankruptcy, the petition and schedule attached to it are inadmissible against the wife without her consent, and they are incompetent to prove insolvency of the bankrupt. Halbert *v.* Pranke, 91 Minn. 204, 97 N. W. Rep. 976.

A judgment in involuntary bankruptcy proceedings that the debtor was not insolvent is not competent evidence to prove his solvency four months preceding the period covered by the judgment. Hibbs *v.* Marpe, 84 Minn. 10, 86 N. W. Rep. 612.

24. Purchaser from Official Assignee.

One claiming as a purchaser from an assignee in bankruptcy should be prepared to prove the assignee's title, by producing the assignment or a duly certified copy, and to prove his own title by producing the written assignment from the assignee, if any, or to account for their absence.[86] A copy of the bankrupt's schedule is held not by itself sufficient evidence to prove the bankrupt's admission of the debt mentioned therein, because but part of the record.[87]

25. Assignees for Benefit of Creditors.

The assignee's title is to be proved by producing the assignment, or a certified copy of it. This evidence is admissible under an allegation of an assignment to plaintiff, without stating that it was in trust for creditors, unless defendant shows that he has been misled to his prejudice.[88] The assent

[86] Files *v.* Harrison, 29 Ark. 307, 316.

A deed of an assignee of a bankrupt is competent evidence of title even though not sealed, where the bankruptcy proceedings show that he had authority to execute it Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. Rep. 823.

Where a person fraudulently conveys property to a grantee and subsequently becomes an involuntary bankrupt, and then the trustee recovers the property and sells it, and the bankrupt indirectly buys it in, whatever title he gets accrues to the benefit of the grantee. He cannot take advantage of his own fraud; his title at first was not good, but later it was cured and the grantee is entitled to it. Hallburton *v.* Slagle, 130 N. C. 482, 41 S. E. Rep. 877.

[87] Wilson *v.* Harper, 5 So. Car. 294. But see paragraph 23.

An allegation of assignment for the benefit of creditors is sufficient to allow proof of such fact. Rollins *v.* Humphrey, 98 Wis. 66, 73 N. W. Rep. 331.

A person cannot maintain a suit in his own name as assignee of a claim for money had and received for the use of another, except where there has been a general assignment to him for the benefit of creditors. Hauze *v.* Powell, 90 Ill. App. 448.

[88] Hoogland *v.* Trask, 6 Robt. 540; Lauve's Case, 6 La. Ann. 530.

The acceptance by the creditors of a deed for their benefit will be *prima facie* presumed, unless within a reasonable time after notice of the grant they disaffirm or refuse to accept the grant. Kingman *v.* Cornell-Tebbetts Mach., etc., Co., 150 Mo. 282, 51 S. W. Rep. 727.

of the *cestuis que trustent* to a valid assignment for their benefit is presumed as matter of law, unless there is evidence to the contrary.[89] And where, as in some States, assent is not presumed, it is not necessary to prove that all assented, unless the assent of all is expressly required by the contract or by local law. The assent of a creditor may be proved by the act of his attorney, and that of a firm by the act of a partner.[90] If the plaintiff's right depends on the power of the

[89] Burrill on Assignments, 3d ed. 381; Van Buskirk *v.* Warren, 4 Abb. Ct. App. Dec. 458.

The assent and acceptance of the creditors is presumed, and the assignment cannot be avoided because of the fraud of the assignor, if neither the assignee nor creditors have knowledge or notice of such fraud at the time of their assent and acceptance. Robinson, etc., Co. *v.* Thomason, 113 Ala. 526, 20 So. Rep. 951.

If beneficial to them the creditors are presumed to accept assignment made for their benefit. Fearey *v.* O'Neill, 149 Mo. 467, 50 S. W. Rep. 918, 73 Am. St. Rep. 440.

The assent of the creditors is presumed even if they have no knowledge of the assignment. Smith *v.* Henell, 11 App. Cas. Dist. of Col. 425.

The actual assent of creditors to an assignment made for their benefit is not necessary to the validity of the assignment. Billings *v.* Parsons, 17 Utah, 22, 53 Pac. Rep. 730.

The acceptance of creditors of assignment for their benefit will be presumed only if the grant is unconditional. Gonzales *v.* Batts, 20 Tex. Civ. App. 421, 50 S. W. Rep. 403.

The assent of creditors will not be presumed if the assignment is made upon conditions which may be prejudicial to their rights. Weston *v.* Nevers, 72 N. H. 65, 54 Atl. Rep. 703.

A general assignment for the benefit of creditors neither stays nor suspends the remedies of creditors of the assignor; they have the right notwithstanding the assignment, to examine the assignor, as a judgment debtor, in supplementary proceedings and inquire into the circumstances of the assignment. In re Rutaced Co., 137 N. Y. App. Div. 716, 122 N. Y. Supp. 454.

[90] Burrill on Assignments, 392.

Where the assignment provides that the assent must be in writing, an oral assent accompanied by an agreement for a written assent, makes the assignment binding. Roberts *v.* Norcross, 69 N. H. 533, 45 Atl. Rep. 560.

In a common law assignment for the benefit of creditors the time specified in which creditors must give their written assent is of the essence of the contract. A creditor who has knowledge of the time in

assignee to convert or apply the assets to the purposes of the trust, he should also prove the filing of the bond and other steps which the statute makes a condition to the exercise of that power.[91] If the assignor omits to state in the assignment his residence and place of business, his identity may be determined by his signature to the assignment and the acknowledgment thereof before an officer specified in the statute.[92]

26. Testimony of Assignor.

The testimony of the assignor of the cause of action, when

which to assent and does not assent until after the expiration of the period, can properly be excluded from being a party to the contract. National Bank *v.* Bailey, 179 Mass. 415, 60 N. E. Rep. 925.

A creditor's acceptance given after the four months within which the statute requires it to be given, comes too late. Moody *v.* Templeman, 23 Tex. Civ. App. 374, 56 S. W. Rep. 588.

A non-assenting resident creditor can attach the property of the assignor, where the assignor is a non-resident and makes his assignment in an outside jurisdiction. Weston *v.* Nevers, 72 N. H. 65, 54 Atl. Rep. 703.

[91] Thrasher *v.* Bentley, 1 Abb. N. Cas. 39; Matter of Sheldon, 173 N. Y. 287, 65 N. E. Rep. 1096. See also Pearsall *v.* Nassau Nat. Bank, 74 N. Y. App. Div. 89, 77 N. Y. Supp. 11; Boese *v.* King, 78 N. Y. 471.

[92] Dutchess County Mut. Ins. Co. *v.* Van Wagonen, 132 N. Y. 398, 30 N. E. Rep, 971. If fraud in such an instrument is charged the onus is upon the party charging it to show affirmatively some illegal provision, or some act consciously or purposely done which is inconsistent with an honest purpose. Roberts *v.* Buckley, 145 N. Y. 215, 39 N. E. Rep. 966. When the instrument is assailed as fraudulent because it provides for the payment of a fictitious debt, it must appear that the assignor, with a fraudulent purpose in view, knowingly and consciously directed the payment of a claim which to his knowledge had no existence, either in whole or in some substantial part. (Id.) Laying in large supply of goods shortly before making an assignment for the benefit of creditors, for the purpose of enabling the assignee to carry on the business of the assignor, raises a presumption of intention to delay, hinder and defraud unpreferred creditors. Albany & Rensselaer Iron &c. Co. *v.* Southern Agricultural Works, 76 Ga. 135, 2 Am. St. Rep. 26.

offered by the assignee, is justly regarded by the law as liable to scrutiny, and is to be received with something of the same caution as that of a party testifying in his own behalf; [93] and where the adverse party is an executor, administrator, or other representative of one deceased or otherwise incompetent to testify, the assignor, equally with the assignee, is excluded from testifying to personal transactions or communications had by him with the person deceased or otherwise incapacitated.[94] But an assignor's testimony, unlike that of a party testifying in his own behalf, may be sufficient, without corroboration, to justify the court in taking the case from the jury.

The bias of the assignor may be shown by proof of a remaining or contingent interest,[95] but not by inquiring merely into the amount of the consideration. The comparatively trifling character of the consideration is not evidence of bias or interest, and cross-examination for this purpose is in the discretion of the court.[96]

27. Assignor's Declarations not Competent in Favor of Assignee.

Admissions and declarations of the assignor are not com-

[93] Watkins *v.* Cousall, 1 E. D. Smith, 65; Kenney *v.* Public Admr., 2 Bradf. 319; Smith *v.* Leland, 2 Duer, 497.

In an action on an open account in the name of an assignee, where the assignment is *bona fide*, and without recourse, and where no set-off or cross claim against the assignor is pleaded, the assignor is a competent witness to prove the account. Platt *v.* Hedge, 8 Iowa, 386, 392.

In an action on a certificate of deposit by the assignee thereof, the assignor is not a competent witness for the plaintiff. Loudon Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390.

[94] See chapter on *Actions by and against Executors and Administrators.*

An executor assignee is excluded from testifying as to transactions with a deceased. Murphy *v.* Schmidt, 80 N. J. Law, 403, 79 Atl. Rep. 293.

[95] Moore *v.* Viele, 4 Wend. 420.

[96] Arend *v.* Liverpool, N. Y. & Phila. Steamship Co., 6 Lans. 457; Chapin *v.* Hollister, 7 Id. 456.

The amount of consideration received by the assignor for the de-

petent evidence *in favor* of the assignee,[97] unless part of the *res gestæ* of an act properly in evidence,[98] or communicated to the debtor or otherwise brought home to him; and they are not made competent by being declarations against interest, offered after the assignor is dead.[99] Some qualifications of this rule will be noticed in considering the competency of evidence of good faith in a transfer impeached as fraudulent.

28. Their Competency Against Assignee.

To determine their competency when offered *against* the assignee, we must consider, 1. the time when they were made; 2. the character of the assignment; and, 3. the nature of the act or declaration offered in evidence.

29. —If Made Before Assignor was Owner.

Admissions and declarations made by the assignor before he became owner are wholly incompetent against the assignee,[1] except, perhaps, that when it is relevant to prove

mand assigned could not have affected his credibility. Livingston *v.* Spero, 18 N. Y. Misc. 243, 41 N. Y. Supp. 606.

[97] Rosc. N. P. 57.

Declarations of an assignor against his interest in support of his assignment are competent evidence against those claiming under him; but declarations by him tending to overthrow the assignment or to give it a different meaning from that which appears on its face are not competent as against the assignee. Oliver *v.* McDowell, 100 Ill. App. 45.

[98] According to Howard *v.* Upton, 9 Hun, 434, the act must not only be properly in evidence, but in issue, or relevant to the issue.

[99] Outram *v.* Morewood, 5 T. R. 123.

Declarations and admissions of a deceased donor that she had made a gift of her ring to plaintiff are admissible as corroborative proof of her intent to make the gift, but they are not in themselves sufficient to establish a valid gift. Garrison *v.* Union Trust Co., 164 Mich. 345, 129 N. W. Rep. 691, 32 L. R. A. N. S. 219.

[1] Bond *v.* Fitzpatrick, 4 Gray (Mass.), 89. So declarations made by one who afterwards became an assignee in bankruptcy, or a trustee, are not admissible against him in that capacity. Legge *v.* Edmonds, 25 L. J. Ch. 125; Metters *v.* Brown, 32 L. J. Ex. 140.

The declarations of a bankrupt made before the act of bankruptcy, are admissible against the assignee in bankruptcy, to charge the bank-

that as owner of the claim he had notice of any fact, declarations made previous to ownership, showing a then present knowledge of the fact may be, within reasonable limits, evidence to go to the jury tending to show notice at the time when he dealt with or possessed the thing assigned.

30. —If Made after he Ceased to be Owner.

The assignor's admissions and declarations, and even his formal written acknowledgment, made after he ceased to be owner,[2] are equally incompetent against the assignee, unless

rupt's estate. Von Sachs *v.* Kretz, 72 N. Y. 548.

[2] Eby *v.* Eby, 5 Pa. St. 435; Kinna *v.* Smith, 3 N. J. Eq. (2 Green) 14; Woodruff *v.* Cook, 25 Barb. 505; Pringle *v.* Pringle, 59 Pa. St. 289; Morton *v.* Morton, 13 Serg. & R. 108; S. P. 4 Pa. St. 439; Van Gelder *v.* Van Gelder, 81 N. Y. 625; Zobel *v.* Bauersachs, 55 Neb. 20, 75 N. W. Rep. 43; Welcome *v.* Mitchell, 81 Wis. 566, 29 Am. St. Rep. 913, 51 N. W. Rep. 1080; Muncey *v.* Sun Insurance Co., 109 Mich. 542, 67 N. W. Rep. 562; Brock *v.* Brock, 92 Va. 175, 23 S. E. Rep. 224. The question as to the validity of an assignment is to be determined by the facts existing at the time it was made, and, if when delivered it represented an honest purpose and was made in good faith, fraud cannot be fastened upon it thereafter by any act or statement, whether verbal or written, of the assignor. Roberts *v.* Buckley, 145 N. Y. 215, 39 N. E. Rep. 966. Payment by a garnishee of his debt to defendant cannot be proven against plaintiff by statements of defendant made after service of the garnishment. Willis *v.* Holmes, 28 Ore. 265, 42 Pac. Rep. 989. Greenleaf says, after he ceased to be *sole* owner. 1 Greenl. Ev., § 190. Taylor omits this qualification. 1 Tayl. Ev., § 713. And in Bond *v.* Fitzpatrick, 4 Gray (Mass.), 89, it was held that if the recovery is severable, the declarations of an assignor of a part interest may be competent against the assignee to the extent of that interest. The title of the assignee of a non-negotiable promissory note cannot be affected by the declarations of the assignor made after the assignment. Van Gelder *v.* Van Gelder, 81 N. Y. 625.

The former owner of a chose in action who has transferred his interest to another, cannot by subsequent admissions affect the right of the owner or holder. Such evidence is properly rejected. Wangner *v.* Grimm, 169 N. Y. 421, 62 N. E. Rep. 569. Declarations of the assignor made after the assignment are inadmissible against the assignee. Reinecke *v.* Gruner, 111 Iowa, 731, 82 N. W. Rep. 900.

the evidence connects the assignee with them; and it makes no difference that the assignment is only as collateral,[3] or

A declaration as to his age made by an assured who was the assignor of the policy, subsequent to the assignment, is incompetent as against the assignee. Barnett *v.* Prudential Ins. Co., 91 N. Y. App. Div. 435, 86 N. Y. Supp. 842.

Self-serving declarations such as letters written by assignor to the defendant stating that he had not assigned the claim to the plaintiff are incompetent. Williams *v.* Hamlin, 121 N. Y. Supp. 228.

Statements of the obligee of a title bond, made after assignment thereof, are not competent evidence against the assignee. Coldiron *v.* Asheville Shoe Co., 93 Va. 364, 25 S. E. Rep. 238.

Declarations made by the assignor out of court after the transfer of the property are not evidence against the assignee. Harlam *v.* Green, 31 N. Y. Misc. 261, 64 N. Y. Supp. 79, aff'd in 31 N. Y. Misc. 798, 62 N. Y. Supp. 1029.

The declarations of a grantor made after his conveyance cannot be received to disparage his deed. Bollinger *v.* Bollinger, 154 Cal. 695, 99 Pac. Rep. 196; Hughes Bros. *v.* Redus, 90 Ark. 149, 118 S. W. Rep. 414.

Declarations of a former owner of negotiable paper or chose in action are not admissible against the holder or assignee to affect his title or rights. Mitchell *v.* Baldwin, 88 N. Y. App. Div. 265, 84 N. Y. Supp. 1043, citing Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. Rep. 757; Dodge *v.* Freedmans S. & T. Co., 93 U. S. 379, 23 L. ed. 920; German-American Bank *v.* Slade, 15 N. Y. Misc. 287, 36 N. Y. Supp. 983.

The admissions of the original payee of a note, made long after its endorsement by him before maturity, that the note was originally without consideration, cannot affect the title acquired by a *bona fide* holder for value. Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. Rep. 229; Athens Nat. Bank *v.* Athens Exch. Bank, 110 Ga. 692, 36 S. E. Rep. 265.

Statements by an indorser and transferror of a check after payment on the same has been stopped, are inadmissible as to the *bona fides* of the ownership of a subsequent holder. Maslon *v.* Spruckerhoff, 50 N. Y. Misc. 644, 98 N. Y. Supp. 618.

[3] Wheeler *v.* Wheeler, 9 Cow. 34; Dazey *v.* Mills, 10 Ill. (5 Gilm.) 70. In Miller *v.* Bingham, 29 Vt. 82, the fact that the declarations were made while the chose in action was held by a temporary assignee as collateral security, was held not to render them incompetent against one to whom the declarant subsequently assigned it, after having redeemed it.

An admission in open court made by an executor respecting certain claims against the estate binds the estate, notwithstanding that there are two executors. Matter of Prince, 56 N. Y. Misc. 222, 107

good only in equity.[4] But if the assignee is merely a nominal party, suing for the assignor's benefit, they are competent; [5] while, on the other hand, if the assignee is the real party in interest, the fact that the action is in the assignor's name does not render competent his declarations, made subsequent to the transfer.[6]

31. If Made during his Ownership.

Three rules have contended for control in respect to admission of evidence of the assignor's acts and declarations against his own interest, made during his ownership. One rule [7] declares them universally competent against all as-

N. Y. Supp. 296; Barry *v.* Lambert, 98 N. Y. 300, 50 Am. Rep. 677.

[4] Mandeville *v.* Welch, 5 Wheat. 277.

[5] Eaton *v.* Corson, 59 Me. 510. Admissions, even by the nominal plaintiff, made after he parted with his interest in the cause of action, are not competent against the beneficial assignee suing in the name of the former. Wing *v.* Bishop, 3 Allen (Mass.), 456.

[6] Frear *v.* Evertson, 20 Johns. 142. So an assignor's acquiring possession again does not let in declarations made during the renewed possession, and relating to the former period. Cornett *v.* Fain, 33 Geo. 219; Tilson *v.* Terwilliger, 56 N. Y. 273. The rule of exclusion applies not only to matters in avoidance and discharge, but also to those which go to the maintenance of the action and the inception of the contract. Wing *v.* Bishop, 3 Allen (Mass.), 456; Benjamin *v.* Coventry, 19 Wendell, 353.

The declarations of a grantor, made after the transfer of both title and possession, cannot be received in evidence as against the grantee. Lent *v.* Shear, 160 N. Y. 462, 55 N. E. Rep. 2; see also Flannery *v.* Van Tassel, 127 N. Y. 631, 27 N. E. Rep. 393.

The declarations of a nominal plaintiff after he has parted with his interest in the cause of action, are not admissible in evidence to defeat the action. Dazey *v.* Mills, 10 Ill. 67; Butler *v.* Millett, 47 Me. 492; Palmer *v.* Cassin, 18 Fed. Cas. Co. 10, 687, 2 Cranch C. C. 66.

[7] Which is best represented in Cowen & Hill's Notes to Phillips on Evidence (1 Phil. Ev.), where cases are collected. An admission of an assignor of a chattel mortgage against his own interest, made before he assigned the instrument, is admissible against his assignee. Anderson *v.* South Chicago Brewing Co., 173 Ill. 213, 50 N. E. Rep. 655.

Admissions of claimant's pred-

signees, except transferees of negotiable paper before dishonor. This rule, which is a departure from the principle forbidding hearsay, and securing the sanction of an oath and the right of cross-examination as to all testimony,[8] is founded on the doctrine that, as every assignee stands in the shoes of his assignor, he must take title subject to whatever disparagement the latter may have put upon it. It

ecessors in title that such claim did not exist are competent against claim. Crane *v.* Brooks, 189 Mass. 228, 75 N. E. Rep. 710.

Admission by an assignor of a claim for services rendered, against interest, is binding upon the assignee. Kelley *v.* Schupp, 60 Wis. 76, 18 N. W. Rep. 725.

Declarations of assignor in disparagement of title, made before assignment, are admissible against him. McCormick *v.* Sadler, 14 Utah, 463, 47 Pac. Rep. 667.

Declarations of an assignor against his interest in support of his assignment are competent evidence against those claiming under him. Oliver *v.* McDowell, 100 Ill. App. 45.

Admissions of mortgagee during his ownership, that there was no consideration for the mortgage, are admissible against his assignee. Anderson *v.* Lee, 73 Minn. 397, 76 N. W. Rep. 24.

Declarations accompanying a transfer of promissory notes from hand to hand, and other declarations contemporaneous with the acts of those persons who were concerned in the making of the notes and in putting them into circulation, might be admissible under certain conditions to show that they were put into circulation fraudulently. Produce Exch. Trust Co. *v.* Bieberbach, 176 Mass. 577, 58 N. E. Rep. 162.

The declarations of a holder of a note while he held it and before he transferred it, are admissible to prove failure of consideration of the note as against any one but a *bona fide* holder. Frick *v.* Reynolds, 6 Okla. 638, 52 Pac. Rep. 391.

When a promissory note is endorsed by the payee after it is overdue, admissions by the payee while owner of the note are inadmissible in evidence against the indorsee in an action by him against the maker. Sears *v.* Moore, 171 Mass. 514, 50 N. E. Rep. 1027.

The declarations and statements of the wife as assignor, at the time of the assignment to her husband are admissible for the purpose of showing whether the transfer was a gift or a bargain and sale. Shackelford *v.* Orris, 135 Ga. 29, 68 S. E. Rep. 838.

[8] Bond *v.* Fitzpatrick, 4 Gray (Mass.), 89, 92; Bullis *v.* Montgomery, 50 N. Y. 358, rev'g 3 Lans. 258. But see Flannery *v.* Van Tassel, 127 N. Y. 631, 27 N. E. Rep. 393.

has been followed in many States, particularly where commercial transfers of things in action are less common than in New York.

A stricter rule, stated by Greenleaf and followed by Taylor, requires evidence of an identity of interest between assignor and assignee to admit these declarations, such identity being recognized in three cases: 1. Where the assignee is the mere agent and representative of the assignor. 2. Where he took title with actual notice of the true state of that of the assignor, as qualified by the admissions in question. 3. Where he purchased the demand already stale, or otherwise infected with circumstances of suspicion.[9]

The New York rule, now recognized also in the Supreme Court of the United States,[10] is still more strict in the protection of the right of assignees.[11] This rule is, that the oral admissions or declarations, as distinguished from the transactions, of the former holder of any chose in action or personal property,[12] even if made before his transfer, are not competent evidence against the transferee,[13] unless there is a

[9] 1 Greenl. Ev., § 190; 1 Tayl. Ev., § 713.

[10] Paige *v.* Cagwin, 7 Hill, 361; it is immaterial whether the assignee be one for value, or merely a trustee for creditors. Truax *v.* Slater, 86 N. Y. 630; Freeman's Sav., etc., Co. *v.* Dodge, 93 U. S. 379.

In New York the doctrine of *stare decisis* has been resorted to by the court to sustain the New York rule as to declarations concerning personal property, even though said rule may be inconsistent with the rule as to declarations concerning real property. Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. Rep. 757.

[11] Jones *v.* East Society, etc., 21 Barb. 174; Flannery *v.* Van Tassel, 127 N. Y. 631, 27 N. E. 393; Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. Rep. 757.

[12] Smith *v.* Webb, 1 Barb. 234; Beach *v.* Wise, 1 Hill, 612; Freedmen's Sav., etc., Co. *v.* Dodge, 93 U. S. 379; Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. Rep. 757. A former owner of a chattel who has transferred his interest to another by an absolute assignment, cannot, by his subsequent admissions, affect the right of the purchaser. Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. Rep. 180.

[13] The language of the court in Paige *v.* Cagwin, applies the rule only to purchasers in good faith and for value, but subsequent cases have extended it to one holding a sealed assignment, without other

present identity of interest between them.[14] And even the fact of the assignor having died before the trial does not allow the declarations to be admitted under the familiar rule that declarations against interest, by a person since deceased, are competent.[15]

proof of consideration; Prouty *v.* Eaton, 41 Barb. 416; s. p. Pringle *v.* Pringle, 59 Pa. St. 289; to a legatee, Smith *v.* Webb, 1 Barb. 230 (but see Smith *v.* Sergent, 2 Hun, 107); and to a voluntary assignee in trust for creditors; Bullis *v.* Montgomery, 50 N. Y. 358, and cases cited; 40 Id. 226. The rule of exclusion is available only for the protection of a subsequent purchaser or assignee. A stranger who does not claim under the declarant, but only proves the declarant's claim by way of defeating plaintiff's title, cannot object to the declarations, if admissible as declarations against interest by a person since deceased. Schenck *v.* Warner, 37 Barb. 258.

The declarations of an assignor of a contract for the conveyance of real estate while still owning the same cannot be proved against his assignee to defeat the latter's rights under the contract to enforce specific performance of it. Tittle *v.* Van Valkenburg, 75 N. Y. App. Div. 69, 77 N. Y. Supp. 786, aff'd in 186 N. Y. 597, 79 N. E. Rep. 1117.

Declarations of assignor of mortgage, made prior to the assignment are inadmissible against assignee to establish a defense to an action by him to foreclose. Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. Rep. 757.

Admissions by the assignor made after the assignment are not admissible to show that defendant came into possession of the goods as assignee. Finance Co. *v.* Josephson, 88 N. Y. Supp. 707, citing Von Sachs *v.* Kretz, 72 N. Y. 548.

[14] Cases cited in Paige *v.* Cagwin, 7 Hill, 361. The true criterion of identity of interest is whether the action is for the immediate benefit of the assignor. Jones *v.* East Society, 21 Barb. 175.

No declaration of a partner after he has assigned a cause of action can be received to defeat the claim. Gerding *v.* Funk, 48 N. Y. App. Div. 603, 64 N. Y. Supp. 423, aff'd in 169 N. Y. 572, 61 N. E. Rep. 1129.

[15] Nelson, Ch. J., Stark *v.* Boswell, 6 Hill, 405, s. p. 1 Barb. 234, and see 37 Id. 321.

The declarations of decedent and the records kept by him, prior to his assignment, are admissible to establish fraud and the amount of his indebtedness. Continental Nat. Bank *v.* Moore, 83 N. Y. App. Div. 419, 83 N. Y. Supp. 302.

A declaration as to her age made by the assignor of a life insurance policy on her life after the assignment of it, is not admissible as against the assignee. Barnett *v.* Prudential Ins. Co., 91 N. Y. App. Div. 435, 86 N. Y. Supp. 842.

31a. When Declarations are Part of the Res Gestæ.

But while, under the New York rule, the mere independent declarations of a prior holder of a chose in action cannot be given in evidence to affect the title or the rights of a subsequent holder, such declarations made at the time the chose in action was negotiated, to the person who is seeking to enforce it, may be proved as part of the *res gestæ* and may qualify the latter's title.[16] And the statements of a third person in possession of property, as to whom he holds it for, or as to who is the owner of it, are not hearsay, but competent evidence to prove the facts stated. They are a part of the *res gestæ* and characterize the possession.[17]

[16] Benjamin *v.* Rogers, 126 N. Y. 60, 26 N. E. Rep. 970.

Declarations which are not only part of the *res gestæ* but which are constituent elements of the transaction itself cannot be excluded as against an assignee for value. Squire *v.* Greene, 47 N. Y. App. Div. 636, 62 N. Y. Supp. 48, aff'd in 168 N. Y. 659, 61 N. E. Rep. 1135.

The declarations of a person while in possession of personal property in disparagement of his title or explanatory of the character of his possession are admissible as part of the *res gestæ*. Wiggins *v.* Foster, 8 Kan. App. 579, 55 Pac. Rep. 350, citing Cunningham *v.* Fuller, 35 Nebr. 58, 52 N. W. Rep. 836; Durham *v.* Shanon, 116 Ind. 403, 19 N. E. Rep. 190, 9 Am. St. Rep. 860.

The declarations of a deceased administratrix that a sale had been made of certain property are parts of the *res gestæ* and admissible. In so far as they are against the interest of her intestate they are also admissible since they concern only the act of the administratrix in making a sale and do not refer to any act of the intestate. In re Suess, 37 N. Y. Misc. 459, 75 N. Y. Supp. 938, citing Livingston *v.* Arnoux, 56 N. Y. 507.

The assignee of a mortgage takes it subject to all the equities existing in favor of the mortgagor, notwithstanding that at the time of the assignment the assignor makes an affidavit that the mortgage is valid for its full amount and the assignee pays the full value for it. Scheurer *v.* Brown, 67 N. Y. App. Div. 567, 73 N. Y. Supp. 877, citing Schafer *v.* Reilly, 50 N. Y. 61.

[17] Elwood *v.* Saterlie, 68 Minn. 173, 71 N. W. Rep. 13; Durham *v.* Shannon, 116 Ind. 403, 9 Am. St. Rep. 860. The declarations of a vendor of personal property, while he remains in possession thereof, though after the sale, as to the character of his possession, are admissible in evidence against his vendee. Murphy *v.* Mulgrew, 102

32. Preliminary Question.

An offer to give the acts and declarations of an assignor in evidence against his assignee, should be so framed as to show that they were made before the transfer,[18] and are admissible as having been made against interest at the time when they were made; and the judge must determine the question of their admissibility, and not leave it to the jury to determine when they were made.[19] If, on the evidence, it be left in doubt whether the declarations were made before or after the transfer, they must be excluded.[20]

Cal. 547, 41 Am. St. Rep. 200, 36 Pac. Rep. 857. But declarations of a person in possession explanatory of such possession, are admissible where neither of the ties to the suit claims under him. Oberholtzer *v.* Hazen, 101 Iowa, 340, 70 N. W. Rep. 207. And witnesses may not be allowed to state the common understanding in the neighborhood, or the general reputation as to ownership. Reiley *v.* Haynes, 38 Kan. 259, 5 Am. St. Rep. 737, 16 Pac. Rep. 440.

The declarations of a party in possession of personal property in disparagement of his title are admissible in evidence against a party claiming under him, upon the principle that they constitute verbal acts—parts of the *res gestæ*—and serve to illustrate the character of the possession. Vermillion *v.* Le Clare, 89 Mo. App. 55, citing Turner *v.* Belden, 9 Mo. 797; Cavin *v.* Smith, 21 Mo. 444; Darrett *v.* Donnelly, 38 Mo. 492; Thomas *v.* Wheeler, 47 Mo. 363; Burgert *v.* Borchert, 59 Mo. 80; Anderson *v.* McPike, 86 Mo. 293.

[18] Jermain *v.* Denniston, 6 N. Y. 276; Ball *v.* Loomis, 29 Ida. 416. This is the New York rule. To the contrary, Magee *v.* Raiguel, 64 Pa. St. 110, rev'g 7 Phila. 231; Von Sachs *v.* Kretz, 72 N. Y. 548.

[19] Vrooman *v.* King, 36 N. Y. 477, 484, S. P. Jones *v.* Hurlbut, 39 Barb. 403. If the plaintiff maintains that the assignor had an interest, defendant is not precluded from offering the assignor's admission by the fact that he denies the assignor had any interest. Eaton *v.* Corson, 59 Me. 512.

[20] Vrooman *v.* King, 36 N. Y. 477.

Whenever the admissions of one having or claiming title to real estate are competent against him, they will be competent against all persons subsequently deriving title through or from him. N. Y. Water Co. *v.* Crow, 110 N. Y. App. Div. 32, 96 N. Y. Supp. 899. See also Conkling *v.* Weatherwax, 181 N. Y. 258, 73 N. E. Rep. 1028, 2 Ann. Cas. 740; Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. Rep. 189.

33. Distinction between Declarations and Transactions.

The rule of exclusion is aimed at loose oral declarations and conduct not having the quality of contract or estoppel. It excludes, therefore, not only evidence of words, but evidence of acts offered as merely in the nature of admissions, such as the assignor's discontinuing an action brought for the same cause, and suffering judgment for costs; [21] but it does not exclude evidence of effective transactions, such as a message sent by the assignor while owner, to the debtor, on which the latter acted or gave assent, so as to constitute an agreement; [22] or such as the act of a bank, the assignor, in crediting a payment in its pass-book delivered to its debtor. The rule cannot apply against written evidence put into the debtor's hands by the assignor before the assignment.[23] To illustrate the distinction in another form, an unrecorded mortgage cannot be given priority over a recorded mortgage by mere evidence that the assignor of the latter declared or admitted, while he held it, that he took it with notice of the former; but this may be done by offering a written stipulation given by him to the owner of the former, defining their relative precedence. His admissions are not competent against his assignee; his agreement is.[24]

34. Declarations Admitted in Case of Conspiracy.

Where a combination is shown to have existed between the assignor and the assignee, by preliminary evidence in-

[21] Tousley *v.* Barry, 16 N. Y. 497. Written declarations by testator held incompetent. Lowery *v.* Erskine, 113 N. Y. 52, 20 N. E. Rep. 588. See also Merkle *v.* Beidleman, 165 N. Y. 21, 58 N. E. Rep. 757; Bush *v.* Roberts, 111 N. Y. 278, 18 N. E. Rep. 732, 7 Am. St. Rep. 741.

[22] Smith *v.* Schanck, 18 Barb. 344. Wife's testimony as to what was said between her deceased husband and the mortgagee held competent as against an assignee of the mortgage. Holcomb *v.* Campbell, 118 N. Y. 46, 22 N. E. Rep. 1107.

[23] Jermain *v.* Denniston, 6 N. Y. 276. Entry made by bookkeeper in a bank held insufficient proof of payment of a mortgage. Whitehouse *v.* Bank of Cooperstown, 48 N. Y. 239.

[24] Fort *v.* Burch, 6 Barb. 60, 77; Beers *v.* Hawley, 2 Conn. 467. See also Westbrook *v.* Gleason, 79 N. Y. 23.

dependent of the declarations of either, then the declarations of each, made while acting in furtherance of the wrongful scheme, and during the existence of the combination, are competent against the other, upon the familiar rule applicable to the declarations of co-conspirators,[25] and it need not be shown that such other had any knowledge of the declarations.[26]

[25] See Cuyler *v.* McCartney, 40 N. Y. 226, rev'g 33 Barb. 165, and cases cited; Lee *v.* Huntoon, Hoffm. 453; Adams *v.* Davidson, 10 N. Y. 309.

The declarations of the debtor made subsequent as well as prior to the transfer are admissible to establish fraud, where the circumstances indicate, and there is satisfactory proof of, conspiracy. Banning *v.* Marleau, 133 Cal. 485, 65 Pac. Rep. 964.

Where a conspiracy between a husband and wife to defraud creditors has been established, evidence of declarations made by him while the conspiracy was pending, and tending to show the intent to defraud, is admissible against the wife; especially so when the husband remains in possession of the property which his creditors are seeking to reach and which he had conveyed to her. Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. Rep. 898.

Where the transfer of personal property is merely colorable with no visible change of possession or control and there is satisfactory proof of conspiracy to defraud the creditors of the vendor his declarations made subsequent as well as prior to the transfer, are admissible to establish the fraud; but where, before the submission of the causes all declarations made by the vendor after sale were ordered stricken out, the vendor cannot be prejudiced by their admission. Banning *v.* Marleau, 133 Cal. 485, 65 Pac. Rep. 964.

Declarations of the fraudulent grantor that the property in controversy was his; that he had placed it in the name of his wife on account of his insolvency, and to prevent his creditors from subjecting it to the payment of their debts, were admissible to show continuous conspiracy, as alleged. Shelley *v.* Nolen, 39 Tex. Civ. App. 307, 88 S. W. Rep. 524.

Where the defense rests upon a conspiracy between the plaintiff and his father in making a transfer to defraud creditors, the declarations of the father, made while in possession of the property, should be admitted. Avard *v.* Carpenter, 72 N. Y. App. Div. 258, 76 N. Y. Supp. 105.

[26] Nudd *v.* Burrows, 91 U. S. 438.

Where the plaintiff is a party to a conspiracy to defraud creditors, the declarations of his co-conspirators, although made in his absence, are admissible in evidence. Pincus

35. Receipt, etc., of the Assignor.

A formal release or receipt, given by the assignor to the debtor, *before* the transfer, is competent [27] against the assignee; but the date of the paper is not even presumptive evidence against the assignee that it was then given.[28] There

v. Reynolds, 19 Mont. 564, 49 Pac. Rep. 145.

The burden of showing that a sale of property was fraudulent is upon the party asserting it, and, as bearing upon such question, conversations with the alleged fraudulent purchaser upon the subject, even in the absence of his vendor, prior to the time of sale, are competent. Elwood Mfg. Co. *v.* Faulkner, 87 Ill. App. 295.

Where there has been evidence tending to show a conspiracy to execute a fraudulent design between a debtor and his creditor that would hinder and delay other creditor, the acts of the conspirators, properly confined to the details and execution of such scheme, in the absence of each other are admissible against all. Where individual acts in the execution of the common design are material, the statements in connection therewith of any party thereto, characterizing such acts, are also admissible in evidence as to all. Carson *v.* Hawley, 82 Minn. 204, 94 N. W. Rep. 746.

Where the defense involves a charge of conspiracy, evidence of what the persons charged as conspirators did in and about the property and affairs of the debtor are competent evidence as to his intent. Pohalski *v.* Ertheiler, 18 N. Y. Misc. 33, 41 N. Y. Supp. 10. See Dewey *v.* Moyer, 72 N. Y. 70.

[27] Jermain *v.* Denniston, 6 N. Y. 276.

Where a release for a valuable consideration is given by the assignor to the debtor, *after* the assignment but before the debtor has notice of such assignment, the release is competent evidence, and binding on the assignee. Smith *v.* Kissel, 92 N. Y. App. Div. 235, 87 N. Y. Supp. 176, aff'd in 181 N. Y. 536, 73 N. E. Rep. 1133.

A release executed by the plaintiff's assignor for the benefit of the defendant is available against the plaintiff as subsequent assignee of the contract sued upon. Castor *v.* Bernstein, 2 Cal. App. 703, 84 Pac. Rep. 244.

[28] Foster *v.* Beals, 21 Id. 250; Smiths *v.* Shoemaker, 17 Wall. 637. The contrary has been ruled; Rosc. N. P. 38, 59 Pa. St. 289; and correctly so in the case of entries made in the usual course of business. Jermain *v.* Denniston, above; and see 56 N. Y. 507.

As to entries and memoranda made by persons since deceased, in the ordinary course of professional or official employment, see Leask *v.* Hoagland, 144 N. Y. App. Div. 138, 128 N. Y. Supp. 1017.

Compare paragraph 2 above.

must be extrinsic evidence that it was given before the assignor parted or assumed to part with the chose in action, in order to render it competent. If, on the evidence adduced, it be left in doubt whether the discharge was given before or after the transfer, it must be excluded.[29]

36. Notice to Produce.

To lay the foundation for secondary evidence of the contents of a paper in the hands of the assignor, notice to the plaintiff to produce it is not sufficient. The assignor should be subpœnaed to produce it.[30]

[29] Foster *v.* Beals, 21 N. Y. 250; s. p., 36 Id. 477. See Smith *v.* Kissel, 92 N. Y. App. Div. 235, 87 N. Y. Supp. 176, aff'd in 181 N. Y. 536, 73 N. E. Rep. 1133.

[30] Chaffee *v.* Cox, 1 Hilt. 78.

A letter written by a buyer to a seller cannot be proven by secondary evidence where it appears that it is not in the seller's possession, and where it does not appear that the buyer could not have compelled its production by means of a subpœna *duces tecum.* Auten *v.* Jacobus, 21 N. Y. Misc. 632, 47 N. Y. Supp. 1119.

CHAPTER II

ACTIONS BY AND AGAINST ASSOCIATIONS

1. Voluntary associations.
2. Joint-stock companies.

1. Voluntary Associations.

A voluntary association is a body who form their organization, conduct affairs, and settle accounts as if they were a corporation; but, not having the legal immunities of a corporation, are liable individually if at all to outsiders. Hence in actions between the members, the law, giving effect to their agreement, applies rules of evidence which are applied to corporations,[31] while in actions between them and stran-

[31] Tyrrell *v.* Washburn, 6 Allen, 466. See also Ashley *v.* Dowling, 203 Mass. 311, 89 N. E. 434, 133 Am. St. Rep. 296.

An unincorporated association is not a partnership and therefore the members of it may sue each other in regard to the exercise of rights over the association's property. Boston Base Ball Assoc. *v.* Brooklyn Base Ball Club, 37 N. Y. Misc. 521, 75 N. Y. Supp. 1076, citing Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. Rep. 919.

"Voluntary associations have no peculiar sovereignty relieving them from the application of the general law of contracts." Robinson *v.* Dahm, 159 N. Y. Supp. 1053, 94 Misc. 729.

The articles of association of an unincorporated association to which the members gave their assent are binding on them and should be recognized by the courts excepting in so far as they may be contrary to some policy of our law or so inequitable that courts would not enforce them. Reffon Realty Corp. *v.* Adams Land & Bldg. Co., 128 Md. 656, 98 Atl. 199.

The law does not require a voluntary association to possess a seal. White *v.* Hartman, 26 Colo. App. 475, 145 Pac. Rep. 716.

It is not necessary that an unincorporated association should have statutory authorization to have its real estate held by its president as a trustee for the members. Roberts *v.* Anderson, 226 Fed. Rep. 7, 141 C. C. A. 121.

An association of individuals for the purpose of purchasing a leasehold estate and constructing buildings thereon is not illegal. Such a purpose is not prohibited by law nor contrary to public policy. John-

son *v.* Northern Trust Co., 265 Ill. 263, 106 N. E. Rep. 814.

Where a voluntary association becomes incorporated, it is merged in the corporation, its members become the constituent members of the corporation, and its property becomes the property of the corporation. First Russian Nat'l Organization *v.* Zuraw, 89 Conn. 616, 94 Atl. 976.

When parties form voluntary associations for religious, literary, social or other purposes and adopt rules by which to regulate their conduct and measure their rights, and by the provision of which members may be admitted and expelled, such rules are articles of agreement to which all who have become members are parties and must be governed thereby in their relations to such association. Brown *v.* Harris County Medical Soc. (Tex. Civ. App.), 194 S. W. Rep. 1179.

A member cannot be expelled from a voluntary unincorporated association unless notice of the charges be served upon him. Grassi Bros. *v.* O'Rourke, 153 N. Y. Supp. 493, 89 Misc. 234.

The relations of a member of an unincorporated society to the society are fixed by the contract of the parties, as expressed in the constitution and by-laws. With their operation when applied as disciplinary measures a court of equity will not interfere, provided they are applied justly and fairly. Grassi Bros. *v.* O'Rourke, 153 N. Y. Supp. 493, 89 Misc. 234.

Where an association has power to try a member upon charges preferred against him the courts will not interfere unless such trial be characterized by bad faith, malice or manifest unfairness. Smith *v.* Merriott (Md.), 100 Atl. 731.

Where an association under its rules expels a member, such member must resort to, and must exhaust, the remedies provided by the association itself, before applying to a court of equity for relief unless such remedies are wholly unapplicable, inadequate and unreasonable and if resorted to would prove useless and furnish him with no relief. Brown *v.* Harris County Medical Soc. (Tex. Civ. App.), 194 S. W. Rep. 1179.

A member must be assumed to have assented to the provisions of the by-laws of an unincorporated association. Where, however, the remedies provided by the constitution and by-laws for his relief do not accord with natural justice, he need not avail himself of them but may apply to the courts for relief. Robinson *v.* Dahm, 159 N. Y. Supp. 1053, 94 Misc. 729.

In the absence of some statutory duty imposed upon unincorporated associations mandamus will not lie against such an association to compel the reinstatement of a member even though it appear that such association is closely affiliated with a foreign corporation. People *v.* Brotherhood of Painters, etc., 218 N. Y. 115, 112 N. E. Rep. 752.

The relations of the members of an unincorporated society with each other depend upon the agreement between them. O'Rourke *v.*

gers, the principles applicable in cases of agency or partnership prevail.[32]

Kelly The Printer Corp., 156 Mo. App. 91, 135 S. W. Rep. 1011.

An expelled member of a fraternal order, a mutual benefit association, an incorporated labor union, an unincorporated club, etc., must exhaust his remedy within such organization, including the right to appeal, before he can be heard in the courts. Rabb *v.* Trevelyan, 122 La. 174, 47 So. Rep. 455, citing Supreme Lodge O. S. F. *v.* Raymond, 57 Kan. 647, 47 Pac. Rep. 533, 49 L. R. A. 373, note "e." See also Crutcher *v.* Eastern Div. No. 321 Order Ry. Conductors, 151 Mo. App. 622, 132 S. W. Rep. 307.

Under §§ 3336, 3337, South Carolina Civ. Code, process served on an agent of an unincorporated association will bind the association. Appeal of Baylor, 93 S. C. 414, 77 S. E. Rep. 59.

Service of a citation upon a member of an unincorporated association who is the duly authorized agent of the officers and executive board to supervise and direct the affairs of the association, is service upon the association. Slaughter *v.* American Baptist Publication Soc. (Tex. Civ. App.), 150 S. W. Rep. 224; Carleton *v.* Roberts, 1 Posey, Unrep. Cas. (Tex.) 587.

[32] 2 Abb. Dig. Corp. 47, note; Park *v.* Spaulding, 10 Hun, 128; Bullard *v.* Kinney, 10 Cal. 60; Ebbinghousen *v.* Worth Club, 4 Abb. New Cas. 300.

The members of an association organized to carry on a business are copartners. Ranken *v.* Probey, 131 N. Y. App. Div. 328, 115 N. Y. Supp. 832.

An unincorporated association organized to buy and sell lands is essentially a partnership. Cronkrite *v.* Trexler, 187 Pa. St. 100, 41 Atl. Rep. 22.

A voluntary religious association which has never been incorporated has no legal entity and no right to sue or be sued. Presbyterian Church of Osceola *v.* Harken (Iowa), 158 N. W. Rep. 692.

A voluntary association whose only function is the promotion of common welfare, and from which the members derive no specific individual profit, may not be sued in its common name. Warman Steel Castings Co. *v.* Redondo Beach Chamber of Commerce (Cal. App.), 166 Pac. Rep. 856.

An unincorporated association may be sued in the name of its president or treasurer, but action cannot be maintained against both. Mazurajtis *v.* Maknawyce, 157 N. Y. Supp. 151, 93 Misc. 337.

In order to obtain judgment against a foreign unincorporated voluntary association itself, action should be brought against the president or treasurer. Where, however, the members of a local branch are liable for the full amount the action should be brought against the local president. Stewart *v.*

A stranger may prove the existence of the association and the membership of the defendants by parol, without accounting for the written articles,[33] unless the contents of the articles are necessary to establish the scope of the agency by which the contract was made. Even where the action is on a contract of the body, plaintiff is not bound to prove that he has joined all the associates, unless non-joinder is pleaded

Thoburn, 171 App. Div. 258, 157 N. Y. Supp. 242.

Any unincorporated association whether foreign or domestic, doing business in the State, may sue or be sued in its company name, without making its members parties. St. Louis S. W. Ry. Co. *v.* Thompson (Tex. Civ. App.), 192 S. W. Rep. 1095.

A voluntary association whose business and object are the prevention of cruelty to children, but whose policies are not in any manner subject to the visitorial control or power of the State, cannot avoid liability for malicious prosecution, if it acts wantonly, maliciously and without reasonable and probable cause. Fulton *v.* Ingalls, 170 App. Div. 904, 155 N. Y. Supp. 788.

An association which is not organized for pecuniary profit cannot be considered a partnership. Webster *v.* Taplin, 29 Ohi. Cir. Ct. R. 543, aff'd 76 Ohio St. 590, 81 N. E. Rep. 1196.

An unincorporated association is not a person, and has not the power to sue or be sued; but when such association has been organized, and is conducted, for profit it will be treated as a partnership, and its members will be held liable as partners. Slaughter *v.* American Baptist Publication Society (Tex. Civ. App.), 150 S. W. Rep. 224; Burton *v.* Grand Rapids School Furniture Co., 10 Tex. Civ. App. 270, 31 S. W. Rep. 91.

In Wisconsin, unless a non-stock corporation is organized under §§ 2002, 2007, Stat. of 1898, it cannot be sued in its own name. Crawley *v.* American Society of Equity of N. A., 153 Wis. 13, 139 N. W. Rep. 734.

The members of an unincorporated company are responsible in their individual capacities to the full amount of every debt justly due from the company. Jenne *v.* Matlack, 19 Ky. Law Rep. 503, 41 S. W. Rep. 11.

In the case of religious and eleemosynary associations, the members and managing committees who incur a liability, or assent to or subsequently ratify it, become personally liable. A church, being an unincorporated association, cannot be sued. Methodist Episcopal Church South *v.* Clifton, 34 Tex. Civ. App. 248, 78 S. W. Rep. 732.

[33] Cutler *v.* Thomas, 25 Vt. 73; though otherwise in an action between the members.

with names, etc.;[34] but if any of the defendants denies the alleged joint contract, plaintiff must prove the joint liability

[34] Fowler *v.* Kennedy, 2 Abb. Pr. (N. Y.) 347.

If the plaintiff is a voluntary association and all its members are not joined as parties plaintiff, the proceeding is irregular but not void. The question should be raised by demurrer, or by plea in the nature of plea in abatement. Franklin Union *v.* Peo., 121 Ill. App. 647, aff'd 220 Ill. 355, 77 N. E. Rep. 176, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001. Citing Iowa County *v.* Mineral Point R. Co., 24 Wis. 93; Keyes *v.* Ellensohn, 82 Hun, 13, 30 N. Y. Supp. 1035, aff'd 144 N. Y. 700, 39 N. E. Rep. 857.

Where a plaintiff elects under § 1923, N. Y. Code Civ. Pro., to bring his action against the individual members of an association, any defect of parties defendant must be raised by demurrer or answer on that ground, otherwise it is deemed waived. Peckham *v.* Wentworth, 116 N. Y. Supp. 781.

The defense by the defendant union that it is unincorporated and cannot be sued, must be specially pleaded before trial. Krug Furniture Co. *v.* Berlin Union of Amalgamated Woodworkers, 5 Ont. Law. Rep. 463. Citing, Taff Vale R. Co. *v.* Amalgamated Soc. of R. Servants (1901), A. C. 426, 27 E. R. C. 639, 1 B. R. C. 832.

Unless the association complies with the act requiring the filing of a certificate it cannot sue in its own name, irrespective of whether the question is raised by plea. Moore *v.* Hillsdale County Tel. Co., 171 Mich. 388, 137 N. W. Rep. 241

Under § 301 of Article 23, Md. Code, a joint-stock company or association may sue and be sued in its company name, but this does not take away the common-law right to bring the action against all the members. Littleton *v.* Wells, etc., Council, No. 14 J. O. U. A. M., 98 Md. 453, 56 Atl. Rep. 798.

Under § 1919, N. Y. Code Civ. Pro., which authorizes the bringing of an action against the president or treasurer of an unincorporated association upon any cause which may be maintained against all the members, no action can be brought unless the debt upon which the plaintiff seeks to recover is one for which all the members are liable. Strauss *v.* Thoman, 60 N. Y. Misc. 72, 111 N. Y. Supp. 745.

As to what is sufficient allegation of the existence of an association, to comply with § 1919, N. Y. Code Civ. Pro., see Schwarcz *v.* International Ladies' Garment Workers Union, 68 N. Y. Misc. 528, 124 N. Y. Supp. 968.

An action begun in the name of the president of an unincorporated association in compliance with § 1919 of N. Y. Code Civ. Pro. cannot subsequently be removed to the Circuit Court of the U. S., because the company cannot have citizenship attributed to it as an

of all the defendants named on the record. It is not enough to show a several contract by that part of the defendants

entity. Taylor *v.* Weir, 96 C. C. A. 438, 171 Fed. Rep. 636.

Service of a summons upon the secretary of an unincorporated association is not sufficient under § 1919, N. Y. Code Civ. Pro.; Hanke *v.* Cigar Makers' International Union, 27 N. Y. Misc. 529, 58 N. Y. Supp. 412.

Section 1919, N. Y. Code Civ. Pro., does not prohibit joining the members of an association as parties defendant with the president where the individual members as well as the association are charged with wrongdoing. April *v.* Baird, 32 N. Y. App. Div. 226, 52 N. Y. Supp. 973, 28 N. Y. Civ. Pro. R. 29, 6 N. Y. Ann. Cas. 129.

Political parties, their conventions and committees are included within the terms of § 1919, N. Y. Code Civ. Pro.; Brown *v.* Cole, 54 Misc. 278, 104 N. Y. Supp. 109.

An action in tort may be maintained against an association as such under § 1919, N. Y. Code Civ. Pro., where all the members are charged with committing the wrong through the association. Rourke *v.* Elk Drug Co., 75 N. Y. App. Div. 145, 77 N. Y. Supp. 373.

Where its members are numerous, a voluntary organization may sue or be sued in equity in the name of a few members for the benefit of the whole. Chicago Typographical Union *v.* Barnes, 134 Ill. App. 11, aff'd 232 Ill. 402, 83 N. E. Rep. 932, 122 Am. St. Rep. 129, 14 L. R. A. (N. S.) 1150; Bronson *v.* Industrial Workers of the World, 30 Nev. 270, 95 Pac. Rep. 354; Klein *v.* Rand, 35 Pa. Super. Ct. 263; Pearson *v.* Anderburg, 28 Utah, 495, 80 Pac. Rep. 307; Florence *v.* Helms, 136 Cal. 613, 69 Pac. Rep. 429.

There is no such legal entity as an unincorporated association. Every member of such association may be sued and if the members are numerous, some officers or members may be made parties defendant as representatives of a class. Bossert *v.* Dhuy, 166 App. Div. 251, 151 N. Y. Supp. 877.

An unincorporated association may be sued in equity in the name of a few members having the same interest as all. Maisch *v.* Order of Americus, 223 Pa. 199, 72 Atl. Rep. 528.

Voluntary associations are not suable entities. They must be sued in the name of all members or a few for all and the bill must describe them as members. American Steel & Wire Co. *v.* Wire Drawers', etc., Unions, 90 Fed. Rep. 598; Kimball *v.* Lower Columbia Fire Ass'n, 67 Ore. 249, 135 Pac. Rep. 877.

An unincorporated association cannot sue in its own name. Francis *v.* Perry, 82 N. Y. Misc. 271, 144 N. Y. Supp. 167; Cain *v.* Armenia Lodge, No. 1930, G. N. O. O. F., 12 Ga. App. 251, 77 S. E. Rep. 184.

An unincorporated sanitarium cannot be held responsible for the

who appear. Where, however, the liability of the association is proved, it is enough for the plaintiff to show that the litigating defendant was a member of the association, and so jointly liable with those whose membership is proved or admitted.[35]

malpractice of one of the physicians conducting it. Wharton *v.* Warner, 75 Wash. 470, 135 Pac. Rep. 235.

The proper method of suing an unincorporated association is to institute a suit in equity against some of the members as representing themselves and all others having the same interest, and after judgment, to compel the defendants to see that the treasury of the association pays the claim. Wolf *v.* Limestone Council, No. 373 O. I. A., 233 Pa. 357, 82 Atl. Rep. 499, citing Maisch *v.* Order of Americus, 223 Pa. 199, 72 Atl. Rep. 528.

Under § 2610, Wisconsin Stat. 1911, all the members should be made parties. Conway *v.* Zender, 154 Wis. 479, 143 N. W. Rep. 162.

[35] Downing *v.* Mann, 3 E. D. Smith, 36. Compare Mott *v.* Petrie, 15 Wend. 317.

Under pleas of non-joint liability by the defendants it is incumbent upon the plaintiff to show, by its evidence, a joint liability of all the defendants, including those who defaulted, before there could be a recovery without an amendment of the pleadings, and a dismissal as to any of the defendants who were not shown to be jointly liable with their co-defendants. M. W. Powell Co. *v.* Finn, 101 Ill. App. 512, aff'd in 198 Ill. 567, 64 N. E. Rep. 1036.

The members of the Socialist Labor Party, held not individually liable for the publication of a newspaper by its board of trustees, which newspaper was designated by the constitution of the party as its official organ. Lightbourn *v.* Walsh, 97 N. Y. App. Div. 187, 89 N. Y. Supp. 856.

An unincorporated association, formed for pecuniary profit, is a partnership. A contract made by it is a joint obligation, and where a judgment is taken against one of the joint debtors, the cause of action against all is merged in the judgment. United Press *v.* Abell Co., 87 N. Y. App. Div. 344, 84 N. Y. Supp. 425, citing Heckemann *v.* Young, 134 N. Y. 170, 31 N. E. Rep. 513, 30 Am. St. Rep. 655.

In Michigan while the statute, 3 Comp. Laws, § 10025, authorizes suit to be brought by or against an unincorporated association it does not preclude a litigant from proceeding against the members. Detroit Light Guard Band *v.* First Mich. Independent Infantry, 134 Mich. 598, 96 N. W. Rep. 934.

Where an action is brought against the individual members of an unincorporated association, upon a judgment previously obtained against the association, the plaintiff must allege and prove such

Membership may be proved by any evidence which sufficiently identifies the member with the association to show

facts as are sufficient to make out the original cause of action against the association. Barasch *v.* Riemer, 59 N. Y. Misc. 453, 110 N. Y. Supp. 1053.

A person assaulted by members of an unincorporated association cannot maintain an action for damages against the association unless he shows that the wrong complained of was committed by all of the members through the association. Mazurajtis *v.* Maknawyce, 157 N. Y. Supp. 151, 93 Misc. 337.

The members of an unincorporated association are responsible in their individual capacities to the full amount of every debt justly due from the association. Jenne *v.* Matlack, 19 Ky. Law Rep. 503, 41 S. W. Rep. 11.

In a proceeding or action against a voluntary unincorporated association to recover damages, facts must be alleged and proved which render all the members of such association liable for the sum claimed. People *v.* Brotherhood of Painters, etc., 218 N. Y. 115, 112 N. E. Rep. 752.

If a debt is of such a nature as to be binding on an association as a whole each member is individually liable for the entire debt. Webster *v.* San Joaquin Fruit, etc., Assn., 32 Cal. App. 264, 162 Pac. Rep. 654.

Where an indebtedness is incurred by an association in carrying on the business for which it was organized, the members are individually liable. Bennett *v.* Lathrop, 71 Conn. 613, 42 Atl. Rep. 634, 71 Am. St. Rep. 222.

The individual members of an association are responsible for its acts. Jenne *v.* Matlack, 19 Ky. Law Rep. 503, 41 S. W. Rep. 11; Thompson *v.* Garrison, 22 Kan. 765; McKenney *v.* Bowie, 94 Me. 397, 47 Atl. Rep. 918.

The members of an unincorporated association are responsible individually and jointly for the acts of the association. Inglis *v.* Millerburg Driving Ass'n, 169 Misc. 311, 136 N. W. Rep. 443, Ann. Cas. 1913 D. 1174.

That a person was influenced by the advice and belief that he would not be liable for any of the debts of an association and so became a member is immaterial. Fetner *v.* American Nat'l Bank, 15 Ga. App. 736, 84 S. E. Rep. 185.

The liability of the members of a voluntary association is joint and several and each member is individually liable for all of the debts of the association to third parties. Nolan *v.* McNamee, 82 Wash. 585, 144 Pac. Rep. 904.

Members of an association will not be bound by the acts of the treasurer who pays his individual debts out of funds of the association by check signed by him as treasurer. Washbon *v.* Hixon, 87 Kan. 310, 124 Pac. Rep. 366.

After an unincorporated association has elected officers and

that he allowed it to be his agent for the purpose of the transactions; [36] for instance, the fact that he subscribed unconditionally, though he never took any stock; [37] or that he paid up a subscription made in his name.[38]

And actual membership having been shown, it is not necessary that the plaintiff should have known of or relied on it in giving credit.[39]

Defendant is exonerated by proof of a termination of membership before the debt was contracted, unless the plaintiff dealt with the association knowning of and relying on defendant's membership, in which case defendant must prove notice of his withdrawal, as in case of a partnership.[40]

All the members are presumably cognizant of the rules

given them full charge of its affairs, a member cannot bind the association by his acts. Lambeth *v.* Vawter, 6 Robt. (La.) 127.

An association will not be bound by a false statement made by one of its members to a prospective surety for the association's treasurer, unless such member had general or special authority to act in the matter. Sewell *v.* Breathitt Lodge, 150 Ky. 542, 150 S. W. Rep. 677.

The officers of an unincorporated association who signed a contract for certain entertainments at an agreed price are individually liable for such price although they did not think or believe that they would incur such liability. Alkahest Lyceum System *v.* Featherstone, 113 Miss. 226, 74 So. Rep. 151.

The endorsement of a note by a member of the association to which it was made cannot be construed to be an assignment of the note by the association, even though such member was the treasurer of the association, and especially if he did not sign as treasurer. Nakagawa *v.* Okamoto, 164 Cal. 718, 130 Pac. Rep. 707.

The minute book is some evidence of any action taken by an association. Francis *v.* Perry, 82 N. Y. Misc. 271, 144 N. Y. Supp. 167.

[36] Taft *v.* Warde, 111 Mass. 518.

[37] Spear *v.* Crawford, 14 Wend. 20, 28 Am. Div. 513; Bodwell *v.* Eastman, 106 Mass. 525.

[38] Frost *v.* Walker, 60 Me. 468.

[39] Bodwell *v.* Eastman, 106 Mass. 525.

Members of a congregation who act for the congregation are individually responsible irrespective of whether they were a committee or elders. Thompson *v.* Garrison, 22 Kan. 765.

[40] Park *v.* Spaulding, 10 Hun, 128.

contained in their record openly kept within access of the members.[41]

2. Joint-Stock Companies, etc.

Joint-stock companies and some other associations are organized under laws giving to members of voluntary associations without ful incorporation some of the immunities of corporations, principally in three ways: 1. Allowing suits to be in the name of an officer, instead of joining the members; 2. allowing withdrawal, by transfer of shares, without dissolution of the organization; and, 3. requiring judgment to be had and enforced against a member. Under these statutes the association is deemed the party, although an officer be named on the record; and the question whether rules of evidence drawn from the law of partnership or from the law of corporations, should control, depends upon the same tests as in a case of a mere voluntary association. The better opinion is that a foreign joint-stock company formed under such laws is to be treated, as far as may be, as a corporation, not a mere partnership.[42]

[41] Rose N. P. 38; 1 Phill. Ev. 447.

In order to maintain an action against a voluntary association on a certificate of indebtedness plaintiff must show that all the members are liable and that the officers who executed the certificate had authority to pledge the personal credit of the members. Davis *v.* Young, 123 N. Y. Supp. 363.

The courts will not undertake to regulate the internal affairs of voluntary associations; and when property rights are involved they will pass upon questions affecting internal affairs only so far as it is necessary to protect those rights. Crutcher *v.* Eastern Division No. 321, O. R. C., 151 Mo. App. 622, 132 S. W. Rep. 307; Hanley *v.* Elm Grove Mut. Telephone Co., 150 Iowa, 198, 129 N. W. Rep. 807.

In Michigan under 2 Comp. Laws, § 6083, it is necessary to have two managers of a limited partnership association execute a contract in the name of the association in order to bind it in an amount exceeding $500. Geel *v.* Goulden, 168 Mich. 413, 134 N. W. Rep. 484.

[42] Westcott *v.* Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566. *Contra*, Gott *v.* Dinsmore, 111 Mass. 45; Taft *v.* Ward, 106 Mass. 518.

In suing a limited partnership all the members must be served in

order to hold them individually liable upon the judgment, except when one member has authority to represent the rest for the purpose of the suit. Romona Oölitic Stone Co. *v.* Bolger, 179 Fed. Rep. 979.

While a lodge by the terms of its charter has power to sue, such power is not necessarily exclusive, but the master and wardens in whom the legal title to property is vested as trustees for the lodge have power to sue to protect it. Rhodes *v.* Maret, 45 Tex. Civ. App. 593, 101 S. W. Rep. 278.

In New Jersey, suit may be brought against the treasurer, in his representative capacity, of the United States Express Company, which is a joint-stock company formed under the laws of New York, which authorize suit in the name of the president or treasurer. Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. Rep. 940.

The National League and American Association of Professional Baseball Clubs is not a joint-stock company nor a corporation nor a partnership and the laws applicable to a partnership cannot be applied to it. Boston Base Ball Assoc. *v.* Brooklyn Base Ball Club, 37 N. Y. Misc. 521, 75 N. Y. Supp. 1076, citing Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. Rep. 919.

At common law and without statutory authority persons may associate themselves together in a joint-stock company with transferable shares. Roberts *v.* Anderson, 226 Fed. Rep. 7, 141 C. C. A. 121.

At common law all members of a joint-stock company or association were necessary parties to an action by or against such company or association, whatever the number of its members might be. It is only when a statute gives the right that such company may sue or be sued in the name of an officer. Roberts *v.* Anderson, 226 Fed. Rep. 7, 141 C. C. A. 121.

A joint-stock company having powers and privileges not possessed by individuals and partnerships must be treated as a corporation and as such can sue and be sued and complain and defend in any court of law or equity as a legal entity. Williams *v.* U. S. Express Co., 195 Mo. App. 362, 191 S. W. Rep. 1087.

Where an association with many members is represented by a committee or regularly appointed officers, if such representatives be brought in, it will be deemed that the association, as such, is before the court. Spaulding *v.* Evenson, 149 Fed. Rep. 913, aff'd 150 Fed. Rep. 517, 82 C. C. A. 263, 9 L. R. A. N. S. 904.

An action in the name of a church, lodge, society or other unincorporated organization may be brought in the name of the organization by one or more of the members who are acting with the consent of the other members or a majority of them. Payne *v.* McClure Lodge, No. 539 (Ky.), 115 S. W. Rep. 764.

The fact that a joint-stock company is organized under the laws of the State of New York does not

make the company a citizen of New York. The company, being a partnership, its citizenship depends upon the citizenship of its members. Rountree *v.* Adams Express Co., 165 Fed. Rep. 152, 91 C. C. A. 186.

The American News Company, being a foreign joint-stock company and not a corporation, and disqualified by the law of Missouri from maintaining actions in the courts of that state, was not deprived of its right to maintain them in the national courts, for the jurisdiction of the latter was not granted, and it may not be revoked, annulled, or impaired by the law or act of any State. Johnson *v.* St. Louis, 172 Fed. Rep. 31, 96 C. C. A. 617, 18 Ann. Cas. 949.

The Adams Express Company, being a joint-stock association, cannot maintain an action at law in the name of the association nor in the name of its officers as trustees. Adams Express Co. *v.* Metropolitan St. Ry. Co., 126 Mo. App. 471, 103 S. W. Rep. 583.

The president of a joint-stock association does not own the property of the association, and where the action is brought against him as president of the association and a warrant of attachment issued against the property of the defendant, the property of the association cannot be seized thereunder; a motion to vacate the attachment will lie. Mertz *v.* Fenouillet, 13 N. Y. App. Div. 222, 43 N. Y. Supp. 217, 26 N. Y. Civ. Pro. 178, 3 N. Y. Ann. Cas. 353.

As to endorsement of a note by an unincorporated association, see Shaw, Kendall & Co. *v.* Brown, 128 Mich. 573, 87 N. W. Rep. 757.

For statement as to legal nature of a joint-stock association, see Hibbs *v.* Brown, 112 N. Y. App. Div. 214, 219, 220, 98 N. Y. Supp. 353, aff'd in 190 N. Y. 167, 82 N. E. Rep. 1108. See also Spotswood *v.* Morris, 12 Idaho, 360, 85 Pac. Rep. 1094, 6 L. R. A. N. S. 665.

A joint-stock company is generally classified as a partnership possessing some of the characteristics of a corporation. Rocky Mountain Stud Farm Co. *v.* Lunt, 46 Utah, 299, 151 Pac. Rep. 521.

Where the plaintiff alleged in her complaint that the defendant was a corporation and sued it as such, she cannot rely upon the averment in the answer that the defendant was an unincorporated stock company, but is put to her proof as regards the defendant's corporate existence. White *v.* Shipley, 48 Utah, 496, 160 Pac. Rep. 441.

Two or more persons who associate in business under a common name under Cal. Code Civ. Pro., § 338, may be sued in such name. Hewitt *v.* Storey, 39 Fed. Rep. 719.

Service of process against a joint-stock association may be made on the head officer. State *v.* Adams Express Co., 66 Minn. 271, 68 N. W. Rep. 1085, 38 L. R. A. 225.

The provisions of the statutes of another state that suits shall be prosecuted against the officers of a joint-stock association, are of local operation and not binding in Massachusetts. Boston, etc., R.

Co. *v.* Pearson, 128 Mass. 445; Gott *v.* Dinsmore, 111 Mass. 45.

The members of a joint-stock association may be sued for the torts of the association without being made a party to the action. Roller *v.* Madison, 172 Ky. 693, 189 S. W. Rep. 914.

The fact that a judgment against a joint-stock association does not formally read that the property of the association shall first be exhausted before issuing as to individuals does not vitiate the judgment and the plaintiff is not bound to prove that all the defendants are bound in order to recover against any one of them. Bastrop & Austin Bayou Rice Growers' Ass'n *v.* Cochran (Tex. Civ. App.), 171 S. W. Rep. 294.

Where land is conveyed to trustees and their successors duly appointed and qualified, the trustees, and not the members of a joint-stock company hold the title. Reffon Realty Corp. *v.* Adams Land & Bldg. Co., 128 Md. 656, 98 Atl. Rep. 199.

CHAPTER III

ACTIONS BY AND AGAINST CORPORATIONS

I. PROVING CORPORATE EXISTENCE

1. Pleading as to Corporate Existence.

It was the general rule that a corporation, whether domestic [43] or foreign,[44] suing in a name appropriate to a cor-

[43] Phœnix Bank of New York *v.* Donnell, 40 N. Y. 410, aff'g 41 Barb. 571, and cases cited.

The change in the name of a corporation amounts simply to an amendment of its charter in that respect. It remains and continues to be, the original corporation with all of the powers and liabilities possessed and assumed prior to the amendment. Board of Commissioners of Mattamuskeet Drainage Dist. *v.* A. V. Willis & Sons, 236 Fed. Rep. 362.

Where the name of a corporation has been legally changed, it is suable in the new corporate name, although the alleged cause of action may have arisen before the change. Porter *v.* State Grand Lodge No. 7, 146 Ga. 13, 90 S. E. Rep. 281.

[44] Camden & Amboy R. R. Co. *v.* Remer, 4 Barb. 127, and cases

porate body, may prove its incorporation when necessary, even though not alleged in its pleading.[45] But now, in New York, it is provided by statute that in an action brought by or against a corporation, the complaint must aver that the plaintiff, or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and if the latter, the State, country, or government, by or under whose laws it was created.[46]

cited; Paine *v.* Lake Erie, etc., Co., 31 Ind. 310, 354; s. c., 1 Withr. Corp. Cas. 386, 408.

Where there has been a change of the name of a corporation, the corporation should sue by its present name; and when the contract sued on was made with the corporation before the name was changed, it is sufficient to allege no more than that the plaintiff entered into the contract by its former corporate name. W. F. Rawleigh Co. *v.* Grigg (Mo. App.), 191 S. W. Rep. 1019.

[45] Marine, etc., Ins. Bank *v.* Jauncey, 1 Barb. 486. But where the provisions of a private or foreign charter are material to the cause of action, they should be pleaded. Hahnemannian Life Ins. Co. *v.* Beebe, 48 Ill. 87, s. c., 1 Withr. Corp. Cas. 420.

It is not necessary for a plaintiff corporation, in bringing a suit, to allege that it is a corporation. Leader Printing Co. *v.* Lowry, 9 Okla. 89, 59 Pac. Rep. 242.

A corporation may bring suit in its own name and if it fails to describe its legal entity, it may amend by alleging that it is a corporation. Collins *v.* Armour Fertilizer Works, 18 Ga. App. 533, 89 S. E. Rep. 1054.

The point that plaintiff is not a corporation should be raised by a special plea in the nature of a plea in abatement, before pleading to the merits, otherwise it is waived. Leader Printing Co. *v.* Lowry, 9 Okla. 89, 59 Pac. Rep. 242.

Where the corporation is created by a *public act* the mere designation of it by its corporate name is a sufficient allegation of corporate existence. Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. Rep. 673, 69 Am. St. Rep. 888.

The prefixing of the word "the" and the use of the word "club" in a corporate name distinguished it from a natural person, firm or copartnership. In re Nyack Country Club, 166 N. Y. Supp. 611.

[46] Code of Civil Procedure, § 1775.

All that Code of Civil Procedure, § 1775 requires is an allegation that plaintiff is a corporation organized under the laws of a certain State or country. Sun, etc., Bldg., etc., Ass'n *v.* Buck, 36 N. Y. App. Div. 637, 55 N. Y. Supp. 262.

A complaint alleging that plaintiff is "a Pennsylvania corporation" sufficiently states that it is a foreign corporation and names the

At common law, proof of corporate existence was essential under the general issue,[47] as well as under a special plea of "*nul tiel* corporation." But the New York statute provides that in an action brought by or against a corporation, the plaintiff need not prove upon the trial the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation.[48]

State where it was organized. Roberts *v.* Pioneer Iron Works, 125 N. Y. App. Div. 207, 109 N. Y. Supp. 230.

[47] Jackson *v.* Plumbe, 8 Johns. 295, and cases cited; Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 539, aff'g 5 Id. 478.

[48] Code of Civil Procedure, § 1776.

A plea of *nul tiel* corporation imposes upon the plaintiff the burden of proving its corporate existence; and as such plea goes to the merits and does not suggest a better writ, but tends to defeat and not to postpone the action, it is a plea in bar rather than a plea in abatement. Law Guarantee & Trust Soc. *v.* Hogue, 37 Ore. 544, 62 Pac. Rep. 380, 63 Pac. Rep. 690.

Where there is an allegation of incorporation, a general denial will not present the issue. The denial must be specific in the nature of a plea in abatement, in order to present the defense. Davis *v.* Nebrask Bank, 51 Neb. 401, 70 N. W. Rep. 963.

In order to put plaintiff to proof of incorporation the answer must affirmatively allege that plaintiff is not a corporation. Erie & J. R. Co. *v.* Brown, 57 N. Y. Misc. 164, 107 N. Y. Supp. 983.

The allegation of plaintiff's incorporation is as good as evidence, in the absence of a denial of such allegation. Fox *v.* Knickerbocker Engraving Co., 140 Fed. Rep. 714; Simon *v.* Calfee, 80 Ark. 65, 95 S. W. Rep. 1011; Charleston Live Stock Co. *v.* Collins, 79 S. C. 383, 60 S. E. Rep. 944.

Where the name of a party is stated in such words in a pleading as to imply a corporation, the party will be presumed to be a corporation until the fact is put in issue by a denial. Ohio Oil Co. *v.* Detamore, 165 Ind. 243, 73 N. E. Rep. 906.

An answer which "specifically denies each and every other allegation of the complaint" is not sufficient to put plaintiff to proof of allegation of incorporation. Pittsburg Plate Glass Co. *v.* Monroe, 79 S. C. 564, 61 S. E. Rep. 92.

The issue of incorporation will be raised by a specific denial of knowledge or information sufficient to form a belief. Milwaukee Gold Extraction Co. *v.* Gordon, 37 Mont. 209, 95 Pac. Rep. 995.

2. Strict Proof not Usually Required.

When evidence of incorporation becomes necessary, it is enough, in ordinary actions, to prove the existence of a corporation *de facto*, without proving formal compliance with the requirements of the law or charter in respect to the perfecting of the organization. In other words, it is enough to prove existence under color of law, without proving a regular origin of existence in conformity to law. If the company had, in form, a charter authorizing it to act as a body corporate, or acted under color of a general law sanctioning its purposes, and if it was, in fact, in the exercise of corporate powers at the time of the dealings in question, and at the time of litigation, then it was and is, as to all except the State, a corporation *de facto*.[49] This rule applies alike to

[49] Jones *v.* Dana, 24 Barb. 399, ALLEN, J.

Where there is a law authorizing incorporation and an attempt in good faith to organize, the corporation exists *de facto* and its legality cannot be questioned collaterally by one who deals with it as a corporation. The State alone can attack it in a direct proceeding.

The introduction in evidence of the charter and proof of user sufficiently proves a corporation *de facto*. Imperial Bldg. Co. *v.* Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. Rep. 167.

A bank which continues its business after its charter expires by limitation, continues as a *de facto* corporation and its transactions will not be declared invalid because of its supposed legal non-existence. Campbell *v.* Perth Amboy Mut. Loan Homestead, etc., Ass'n, 76 N. J. Eq. 347, 74 Atl. Rep. 144.

To prove the existence of a *de facto* corporation it must be shown (1) that there is a law of the State or territory where the corporation existed authorizing the organization of such a corporation; (2) that a *bona fide* attempt was made to effect such organization; (3) actual user of the corporate powers, or some of them. Milwaukee Gold Extraction Co. *v.* Gordon, 37 Mont. 209, 95 Pac. Rep. 995.

To prove the existence of a corporation it is only necessary to introduce a properly certified copy of its charter, and to show a compliance by the corporation with the statutory requirements. Calor Oil & Gas Co. *v.* Franzell, 33 Ky. Law Rep. 98, 109 S. W. Rep. 328.

Where a corporation has failed to pay its license tax and a forfeiture of its charter has been declared, it ceases to be a corporation. The title to property formerly owned by it rests in the former directors

actions brought by corporations as plaintiffs, whether upon contracts [50] or against wrongdoers, [51] and to actions brought against corporations, whether upon contracts made or wrongs committed by them.[52] Upon plea of *nul tiel* cor-

as trustees. Aalwyn's Law Institute *v.* Martin, 173 Cal. 21, 159 Pac. Rep. 158.

[50] In Methodist Episcopal Church *v.* Pickett, 19 N. Y. 482, and Slocum *v.* Warren, 10 R. I. 124, this rule is laid down in terms applicable only to actions on contracts made by the other party with the supposed corporation; but the reasons of the rule (which are explained in those cases, and in Narragansett Bank *v.* Atlantic Silk Co., cited below), are equally applicable, and in practice the rule is actually applied, to all actions in the nature of private remedies, with the exceptions indicated in paragraph 3.

Where plaintiff executed a bond to the defendant and in it conclusively recognized defendant's legal corporate existence and its capacity to sue, he is estopped from denying those things. Spreyne *v.* Garfield Lodge, No. 1, U. S. B. S., 117 Ill. App. 253.

Where it appears *prima facie* that plaintiff is a corporation and defendant fails to dispute that fact by plea or otherwise, no further proof of corporate existence is required, and the plaintiff, although a foreign corporation, will be permitted to conduct the action even if it never complied with the corporation act requiring a certificate to be filed in the state. Macmillan Co. *v.* Stewart, 69 N. J. L. 212, 56 Atl. Rep. 240, 69 N. J. Law, 676, 56 Atl. Rep. 1132.

The execution and delivery of an instrument, *e. g.*, a lease, to a corporation, as such, is *prima facie* evidence of the existence of the corporation, and no proof is necessary until such evidence is rebutted. West Side Auction House Co. *v.* Connecticut Mut. L. Ins. Co., 186 Ill. 156, 57 N. E. Rep. 839. See also Milwaukee Gold Extraction Co. *v.* Gordon, 37 Mont. 209, 95 Pac. Rep. 995.

Where plaintiff corporation sues on a promissory note and defendant in his answer admits making the note such admission is *prima facie* proof of plaintiff's corporate existence. Van Winckle Gin, etc., Works *v.* Mathews, 2 Ga. App. 249, 58 S. E. Rep. 396.

In a court not of record, where pleadings are oral, where plaintiff's witness swears to the fact of corporate existence, and the other side offers no evidence to the contrary, the proof of corporate existence is conclusive. Gillin Printing Co. *v.* Traphagen, 36 N. Y. Misc. 774, 74 N. Y. Supp. 900.

[51] Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315.

[52] Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. 288, Shaw, Ch. J. Whatever the alleged corporation would have to prove to an action brought by it, on an issue

poration the burden of proving corporate existence is on the plaintiff, but proof of its existence as a corporation *de facto* is sufficient.[53]

The three elements of *strict* proof of incorporation are: 1. Legislative sanction; 2. Existence under color of such sanction; 3. Regularity of origin conforming to the sanction. The first may now be generally supplied, in the case of domestic corporations, by the doctrine of judicial notice, and, in the case of foreign corporations, by the statute book; the second and third are often dispensed with by an estoppel; the third is not required save where the nature of the action demands strict proof.

3. Exceptional Cases.

The cases in which it is necessary to give strict proof of incorporation, that is, to prove not only the being, but the right to be, are: 1. Actions by the State to ascertain, or to put an end to corporate existence.[54] 2. Proceedings by a private corporation, in the exercise of a franchise in derogation of common right; for instance, to divest title to private property.[55] 3. Proceedings of a penal character by a private

of "no such corporation," may be controverted in an action against the supposed corporation, for relief based on the corresponding allegation that no such corporation ever existed; but beyond this the party contesting the claim of corporate existence cannot go. Allen, J., Jones *v.* Dana, 24 Barb. 398.

[53] Cozens *v.* Chicago Hydraulic Press Brick Co., 166 Ill. 213, 46 N. E. Rep. 788.

That a corporation is a *de facto* corporation and the plaintiff is a *de facto* stockholder is enough to sustain an action. McMillen *v.* Lamb, 166 N. Y. Supp. 656.

[54] Ang. & A., § 94; N. Y. General Corporation Law, §§ 130–136.

[55] See Searsburg Turnpike Co. *v.* Cutler, 6 Vt. 314. *Contra*, Matter of N. Y. Elevated Ry. Co., 3 Abb. New Cases, 401.

Courts have no power to dissolve corporations at the instance of private suitors except if and as authorized by statute. In re Litchfield County Agricultural Soc. (Conn.), 100 Atl. 356.

At the end of the term for which it is incorporated a corporation ceases to exist by virtue of the expiration of that term and no adjudication of a court is necessary to terminate the corporate life. In re Friedman (App. Div.), 164 N. Y. Supp. 892.

corporation.[56] 4. Actions on contracts like subscriptions for stock, if the very consideration is the legal organization of a corporation having a right to existence.[57] In such cases the inquiry may extend to the due compliance with all the requirements of the law; but often, even in these cases, it is narrowed or precluded by estoppel or admission. 5. Where the question is whether there is corporate power to take by will, sufficient regularity of origin to show an attempt in good faith to comply with the law may be required.

4. Incorporation Incidentally in Issue.

If the corporation is not a party, and its existence is only collaterally in question, as for instance, on indictment for counterfeiting bank notes, or in an action on a stockholder's contract for sale of stock in a reputed corporation, where fraud is not alleged, less proof suffices than in actions by or against the corporation; but, if its existence is directly in issue, even where it is not a party, as, for instance, where an individual defends on the ground that a private corporation was the real party in interest, and liable in his stead,[58] the rules stated in this chapter will apply. In proceedings to enforce ordinances of a municipal corporation, the illegality of the corporate organization cannot be shown to defeat a recovery; in such a collateral proceeding, evidence that the corporation is acting as such is all that is required.[59]

5. Legislative Sanction Necessary.

By the American law, evidence of mere user, however long continued, is not enough to prove the existence of a private

[56] Commonwealth *v.* U. S. Bank, 2 Ashm. 349.

A corporation may be indicted only when the legislature has specifically so provided. State *v.* Terre Haute Brewing Co. (Ind.), 115 N. E. Rep., § 772.

[57] See Ry. Co. *v.* Allerton, 18 Wall. 233.

[58] Williams *v.* Sherman, 7 Wend. 109.

When the corporate existence of a plaintiff corporation is put in issue, the allegation in that respect must be proved. Strang *v.* Oregon-Washington R. & Nav. Co., 83 Ore. 644, 163 Pac. Rep. 1181.

[59] 1 Dill. Mun. C. 440, § 351.

corporation.[60] There must be legislative sanction,[61] usually to be shown only by the existence of a charter,[62] or some

[60] Per SELDEN, J., Methodist Episcopal Church *v.* Pickett above. Especially if the acts are such as an unincorporated body might perform. Greene *v.* Dennis, 6 Conn. 292. For statutory exception in the case of Plank Road Companies, see L. of N. Y., 1855, c. 546, § 1; Belfast, etc., Plank Road Co. *v.* Chamberlain, 32 N. Y. 651. That a charter was once granted to a municipal corporation may be presumed from very long user. 1 Dill. M. C. 168; Robie *v.* Sedgwick, 35 Barb. 327.

In all criminal prosecutions involving proof of the legal existence of a corporation, user shall be *prima facie* evidence of such existence. Whiteman *v.* People, 83 Ill. App. 369.

Proof of user sufficiently supports the allegation of incorporation in an indictment, there being no countervailing proof. Waller *v.* People, 175 Ill. 221, 51 N. E. Rep. 900.

[61] Such, for instance, as that it claimed to be and acted as a town with the knowledge and assent of the legislature. Bow *v.* Allenstown, 34 N. H. 365, and cases cited; but see Welch *v.* Ste. Genevieve, 1 Dill. C. Ct. 136. But the recognition must be legislative. Recognition by the executive is not enough. People *v.* Phœnix Bank, 24 Wend. 431.

It is *prima facie* proof that a corporation has a legal existence where a United States patent introduced in evidence shows that the government recognized the corporation by conveying to it a patent; or where it appears that the legislature of the state by an act donated lands to the corporation. Altschul *v.* Casey, 45 Or. 182, 76 Pac. Rep. 1083.

The articles of incorporation, unsupplemented by other proof, *e. g.*, filing those articles, are inadequate to prove existence of corporation. Goodale Lumber Co. *v.* Shaw, 41 Or. 544, 69 Pac. Rep. 546.

[62] Proof of the destruction of public records in the same repository as the charter is admissible to explain the omission to produce a charter. Bow *v.* Allenstown, 34 N. H. 351; and, in such a case, evidence of reputation and forty years' user, may be sufficient. Dillingham *v.* Snow, 5 Mass. 547.

The articles of incorporation of the plaintiff with the filing marks thereon, are evidence of the due incorporation of the plaintiff. Sierra Land, etc., Co. *v.* Bricker, 3 Cal. App. 190, 85 Pac. Rep. 665.

Duly authenticated copy of articles of incorporation is sufficient proof of existence of corporation. Dowagiac Mfg. Co. *v.* Higinbotham, 15 S. D. 547, 91 N. W. Rep. 330.

Proof of the statute whereby a corporation was chartered together with proof of the acts of the railroad commissioners in assenting to a consolidation, is proof of the existence of a corporation. Com-

statute under which the supposed corporation might lawfully be created; and the better opinion is (although many of the cases fail to indicate the distinction), that the familiar rule forbidding one who has dealt with a body as incorporated, to question its corporate character, does not apply to the question of legislative sanction. The estoppel serves only in place of evidence of the existence and regularity of organization, it does not preclude denying the existence or validity of a law affording the necessary sanction.[63] Otherwise corporations could be formed by contract. But a legislative recognition of the existence of a corporation—as, for instance, by a statute even modifying its name—is, if coupled with some evidence of user, or admission, conclusive

monwealth *v.* Carroll, 145 Mass. 403, 14 N. E. Rep. 618.

The existence of an agricultural society cannot be proved by introducing a book entitled "Records of the Society" where such book contains no copy of any legal warrant giving it existence. McKenney *v.* Bowie, 94 Me. 397, 47 Atl. Rep. 918.

The purposes for which a corporation is organized must be ascertained by reference to the terms of its charter. The Taylor-Critchfield Co. *v.* Sluckart, 275 Ill. 129, 113 N. E. Rep. 895.

[63] Heaston *v.* Cincinnatti R. R. Co., 16 Ind. 275. There can be no estoppel in the way of ascertaining the existence of a law. Town of South Ottawa *v.* Perkins, 94 U. S. 267; Snyder *v.* Studebaker, 19 Ind. 462. Compare Phœnix Warehousing Co. *v.* Badger, 6 Hun, 293, where the estoppel was extended to the question whether the corporate object was within the scope of the statute.

A stockholder who has participated in the dividends of a corporation cannot later question the corporation's lawful existence. Lincoln Park Chapter No. 177, R. A. M. *v.* Swatek, 204 Ill. 228, 68 N. E. Rep. 429.

It is for the State alone to complain of any mis-use or non-user of the powers conferred in the creation of a corporation. Lincoln Park Chapter No. 177, R. A. M. *v.* Swatek, 204 Ill. 228, 68 N. E. Rep. 429.

The laws under which a corporation is created are as much a part of its charter as if actually written into it and made a part of the charter. In re Hanson's Estate (S. D.), 159 N. W. Rep. 399.

The general rule is that persons sued by a corporation in an action *ex contractu* as well as persons sued by a corporation in an action *ex delicto*, are equally debarred from setting up the defense that the corporation was not legally organized, which is a question for the State.

evidence of its existence, as against every one but the State.[64]

6. Domestic Corporation—General Law or Charter.

The courts [65] take judicial notice, not only of the general laws under which corporations are now usually formed,[66]

National Soc. U. S. D. *v.* American Surety Co., 56 N. Y. Misc. 627, 107 N. Y. Supp. 820.

[64] Green's Brice's Ultra V. 21, n. †, and cases cited.

Where the legislature by its acts recognizes the existence of the corporation's special charter, and in actions by the State against the corporation the validity of the latter's charter is not attacked, the State is precluded from subsequently disputing the legality of the corporation's existence in disregard of its special charter. Powers *v.* Detroit, etc., Railway Co., 201 U. S. 543, 26 Sup. Ct. Rep. 556, 50 L. ed. 860; People *v.* Detroit, etc., Ry. Co., 157 Mich. 144, 121 N. W. Rep. 814.

Proceedings for the dissolution of a corporation because it has ceased to act under its franchise are not properly instituted by a private individual, but must be brought by the State. Richards *v.* Cavalry Club of Rhode Island (R. I.), 101 Atl. Rep. 222.

[65] Including courts of United States held within the State. Covington Drawbridge *v.* Shepherd, 20 How. (U. S.) 227.

Where a corporation's charter was amended by an act of the legislature, and the validity of such act is not in question, the court will take judicial notice of the existence of the corporation. Parker *v.* Carolina Savings Bk., 53 S. C. 583, 31 S. E. Rep. 673, 69 Am. St. Rep. 888.

Where a certified list of corporations organized under a certain act is published pursuant to such act, the court will take judicial notice of the existence of any corporation included in such list. Coal Creek Consol. Coal Co. *v.* East Tenn. Iron & Coal Co., 105 Tenn. 563, 59 S. W. Rep. 634.

[66] But not of the organization of the company under it. Danville, etc., Co. *v.* State, 16 Ind. 456.

The charter of a city is a public law of which all courts take judicial notice. Naylor *v.* McColloch, 54 Ore. 305, 103 Pac. Rep. 68.

The courts of Tennessee cannot take judicial notice that a corporation was chartered in another State, and that it had not been domesticated under the laws of Tennessee. Nashville Trust Co. *v.* Weaver, 102 Tenn. 66, 50 S. W. Rep. 763.

While the personal knowledge of the court may inform it of the history of the railroad lines operated by defendant, it cannot take judicial notice of it; the facts must must appear in the record. Purdy *v.* Erie R. Co., 162 N. Y. 42, 56 N. E. Rep. 508, 48 L. R. A. 669.

but also of the existence and contents of special charters of municipal corporations.[67] They may do so respecting other *public* corporations, but the line of distinction between public and private corporations is ill-defined, and, in practice, a special charter, or so much of it as is material, should be put in evidence. It may be read from the volumes printed by authority of the government,[68] or (as is more convenient for inserting the charter in the record as an exhibit), by producing a certified copy.[69]

7. Evidence of Authenticity of Statute.

The presumption is that a statute published by authority of the government was correctly passed in respect to form. The objection that the requisite forms were not observed—*e. g.*, that three-fifths were not present, etc.,—must be pleaded, where the course of pleading requires the statute to be pleaded, and must be affirmatively proved.[70] The

[67] Lord *v.* City of Mobile, 113 Ala. 360, 21 So. Rep. 366; Prell *v.* McDonald, 7 Kans. 426; s. c., 12 Am. Rep. 423, and cases cited; and see 25 Ind. 512; see Abb. Dig. Corp. tit. Pub. C. Priv. C.; 1 Whart. Ev., § 294.

The court must take judicial notice of the acts affecting the incorporation of the Chicago City Ry. Co. McArdle *v.* Chicago, etc., Ry. Co., 141 Ill. App. 59.

[68] Wood *v.* Jefferson County Bank, 9 Cow. 194; People *v.* Supervisors of Chenango, 8 N. Y. 317; Howell *v.* Ruggles, 5 Id. 444, N. Y. L. of 1843, p. 80, c. 98, § 2; N. Y. Code of Civ. Pro., § 932, or within six months after the close of the session at which it was passed, it may be read from a newspaper officially designated to publish the laws.

[69] Duncan *v.* Duboys, 3 Johns. Cas. 125.

The certificate of incorporation of the plaintiff being of record in the office of the secretary of the territory of Montana, the existence of the plaintiff was properly proved by a copy of said certificate certified by the Secretary of State under Montana Code Civ. Pro., § 3207. Western Iron Works *v.* Montana Pulp & Paper Co., 30 Mont. 550, 77 Pac. Rep. 413.

The introduction in evidence of a properly certified copy of the charter of the plaintiff corporation, which was regular on its face, and showed a compliance with statutory requirements, established the existence of the corporation. Calor Oil & Gas Co. *v.* Franzell, 33 Ky. Law Rep. 98, 109 S. E. Rep. 328. See Cent. Dig., Vol. 13, Corporations, §§ 106–118.

[70] People *v.* Supervisors of Chenango, 8 N. Y. 317.

court may, and should,[71] if necessary, look beyond the printed statute book and examine the original engrossed bill on file in the office of the Secretary of State, to ascertain if a bill had a constitutional vote.[72] Whenever the existence of a statute, or the time when a statute took effect, or the precise terms of a statute, are in question, the judges have a right, unless a different rule has been enacted, to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such questions; always seeking first for that which, in its nature, is most appropriate.[73] Hence they may look to other connected records to ascertain the date of enactment, if no date appears in the official certificate.[74] So they may look beyond the authentication of the act, to the journal of either branch, to see if the bill passed by the constitutional vote.[75] But the better opinion is that this inquiry for more cogent evidence than the promulgated form of the law can go no further than to ascertain the facts of enactment and taking effect. If the act is found to have been passed by a constitutional vote, the legislative journals, or other sources of information, are not competent to impeach it on the ground of irregularity or departure from parliamentary usage in the proceedings of the legislature,[76] nor to show that the contents of the act had been changed by a mistake of the engrossing clerk.[77] For qualifications of these rules the local statutes should be consulted.[78]

[71] But see 4 Centr. Law J. 132.

[72] Purdy *v.* People, 4 Hill, 384, rev'g 2 Id. 31.

[73] Gardner *v.* The Collector, 6 Wall. 511.

[74] Id. 509.

[75] Osburn *v.* Staley, 5 W. Va. 85, s. c., 13 Am. Rep. 640, and cases cited; Skinner *v.* Deming, 2 Ind. 558; Purdy *v.* People (above). *Contra*, Grob *v.* Cushman, 45 Ill. 119; Louisiana State Lottery Co. *v.* Richoux, 23 La. An. 743, s. c., 8 Am. Rep. 602; Sherman *v.* Story, 30 Cal. 253; State ex rel. Pangborn *v.* Young, 3 Vroom (N. J.) 29.

[76] People *v.* Devlin, 33 N. Y. 269; Elevated R. R. cas. 3 Abb. New Cas. 301, 372, n.

[77] Mayor, etc., of Annapolis *v.* Harwood, 32 Md. 471; s. c., 3 Am. Rep. 161.

[78] By the N. Y. law, the Secretary of State's certificate upon the original bill of the date of passage is conclusive. 1 R. S. 157, § 11;

8. National Bank.

The existence and organization of a national bank may be proved by producing the certificate of the comptroller of the currency, under his hand and seal, reciting that it had been made to appear that the bank had been duly organized, and certifying that it was duly authorized to commence business (without producing the record of organization), together with testimony to user by a witness cognizant of the fact of their carrying on business.[79]

9. Corporation of Sister State.

To prove the general law of incorporation, or the charter of a corporation of another State or territory of the Union, the practitioner may either pursue the mode provided by the law of the forum, which usually permits the law [80] of a sister

People *v.* Devlin (above). No bill can be deemed passed by two-thirds vote (1 R. S. 157, § 3), nor when three-fifths were present (L. 1847, c. 253), unless so certified by the presiding officers of both houses; but the Secretary of State's statement, in the title of the published law, that it was passed in either way, is presumptive evidence that the bill was certified by the presiding officers as so passed, and his omission to insert such statement is presumptive evidence that it was not so passed. L. 1847 (above); L. 1842, c. 306, § 3; and by L. 1837, c. 140, certified copies of petitions and papers presented to the legislature, are *prima facie* evidence.

[79] Merchants' Bank *v.* Glendon Co., 120 Mass. 97; National Bank of Commerce of Tacoma *v.* Galland, 14 Wash. 502, 45 Pac. Rep. 35. A certificate signed by the Deputy Comptroller of the Currency as "acting Comptroller of the Currency," is a sufficient certificate by the Comptroller of the Currency within the requirements of Rev. Stat., § 5154, U. S. Keyser *v.* Hitz, 133 U. S. 138. An assignment of national bank stock absolute in form may be shown *aliunde* to have been taken and held as collateral security. Williams *v.* American Nat. Bank of Ark. City, 56 U. S. App. 316, 85 Fed. Rep. 376; Riley *v.* Hampshire Co. Nat. Bank, 164 Mass. 482, 41 N. E. Rep. 679.

[80] Persse & Brooks Paper Works *v.* Willett, 1 Robt. 131; s. c., 19 Abb. Pr. 416; Barrett *v.* Mead, 10 Allen, 339; Paine *v.* Lake Erie, etc., Co., 31 Ind. 310, 354; s. c., 1 Withr. Corp. Cas. 386, 408.

"There is no common-law rule in respect to the granting of charters to private business corporations; in this country they are generally

State or territory to be proved by producing a book or publication, purporting or proved to have been published by its authority, or proved to be commonly admitted as evidence of the existing law, in the tribunals thereof (and such evidence may be admitted on general principles without an enabling statute);[81] or he may pursue the mode prescribed

granted either by special acts of the lawmaking power or obtained under general statutes regulating the subject. In these circumstances, no presumption can be indulged as to what the law of Illinois is, in regard to the issuance of certificates of incorporation, or what officer of that State is authorized to issue such certificates, or who is the proper custodian of them. Plaintiff alleged that it was incorporated under the laws of Illinois and defendant denied its incorporation under oath. The fact that the plaintiff was incorporated was thus squarely put in issue and it devolved upon plaintiff to show some affirmative evidence that it was incorporated, as alleged. The existence of the laws of Illinois, like any other question of fact, was a proper subject of proof." Florsheim & Co. *v.* Fry, 109 Mo. App. 487, 84 S. W. Rep. 1023.

Books printed and published under authority of a sister State purporting to contain statutes of such State are admissible in Oregon as evidence of statutes relating to powers of private corporations. Hills Ann. Laws Ore., § 725; State *v.* Savage, 36 Ore. 191, 60 Pac. Rep. 610, 61 Pac. Rep. 1128.

Existence of a bank is proved by putting in evidence a certified copy of its charter signed by the auditor of Illinois, and certified by the Recorder of Deeds of Chicago, supplemented by the deposition of the cashier of the bank as to its doing business under said charter. State Bank *v.* Carr, 130 N. C. 479, 41 S. E. Rep. 876.

[81] See People *v.* Calder, 30 Mich. 85, and cases cited. But a statute book of another State, not purporting nor proved to be published by authority, nor proved to be commonly admitted and read as evidence in the courts of that State, is not admissible. Matter of Belt, 1 Park. Cr. 169.

If a corporation was created under a foreign statute, the statute must be proved as a fact, in order to prove existence of the corporation. Law Guarantee, etc., Society *v.* Hogue, 37 Ore. 544, 62 Pac. Rep. 380, 63 Pac. Rep. 690.

A book entitled "Law of Minnesota" setting forth on the page opposite the title page an act of the legislature of Minnesota authorizing its publication, will be received in evidence in Wisconsin as purporting to be published with authority as required by § 4136, Wisc. Stats. 1898. Hollister *v.* McCord, 111 Wisc. 538, 87 N. W. Rep. 475.

by the act of Congress,[82] and produce a copy certified to by the Secretary of such State, under the seal of the State;[83] and in strictness a copy under the seal of the State whose law it is, is competent in the courts of another State [84] and in the courts of the United States,[85] without any certificate that it is a copy, and without proof of the seal, or of the official character of the secretary.[86] Or in the case of a special charter, he may produce a copy, with proof by a witness who has examined and compared the copy with the original in its proper place of custody; [87] and if proof by an authenticated copy fails, from a defect in the authentication, he may fall back upon this mode.[88] Proof of the statute under which the corporation is organized, together with proof of its certificate of incorporation issued in pursuance thereof

[82] U. S. R. S. 170, § 905.

[83] Grant *v.* Henry Clay Co., 80 Pa. St. 208; Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. Rep. 124.

Existence of corporation proved in Oregon by copy of articles of incorporation certified by Secretary of State of State of Nebraska. State *v.* Savage, 36 Ore. 191, 60 Pac. Rep. 610, 61 Pac. Rep. 1128.

[84] Coit *v.* Millikin, 1 Den. 376; State *v.* Carr, 5 N. H. 369.

[85] Id.; U. S. *v.* Johns, 1 Wash. C. 369.

[86] See Dorsey Harvester Rake Co. *v.* Marsh, 6 Fish. Pat. Cas. 387. In the absence of evidence to the contrary the letters patent issued by the executive of another State, reciting the passage of the charter, and certifying the performance of its conditions, have been held sufficient evidence of the existence of a charter. Wellersburgh, &c. Co. *v.* Young, 12 Md. 476. The seal is judicially noticed; but if it is not a common-law seal, be prepared to prove the foreign law as to seal. Courts requiring a common-law seal have refused to take notice of foreign statutes allowing public seals to be a mere impression on paper. Coit *v.* Millikin, 1 Den. 376.

[87] For objections which may perhaps be raised, unless there are two witnesses, one of whom has read one, while the other read the other, etc., see 1 Whart. Ev., § 94.

[88] Soc. for Prop. of the Gospel *v.* Young, 2 N. H. 312. The testimony of an attorney at law of a sister State is not legal evidence of the statute law of that State where it affects the merits of the case; but the statute being proved, an attorney may testify as to its interpretation by the law of the State. 1 Greenl. Ev., 13th ed. 535, § 486, etc., and cases cited.

is sufficient to establish its existence as a corporation *de facto*.[89]

10. Corporation of Foreign State.

In the case of a corporation of a foreign nation or country an exemplified copy may be produced, certified in the manner prescribed by the law of the forum;[90] or the statute or charter may be read from the officially promulgated publication of the laws or edicts of the foreign State containing the charter;[91] or a copy may be proved by a witness as stated in the last paragraph.[92]

11. Modes of Proving De Facto Existence.

Legislative sanction having been shown, there are four principal ways in which the practical existence of the corporation on that foundation is shown: 1. By evidence of the formal acceptance of the charter, or the organization of the

[89] Cozzens *v.* Chicago Hydraulic Press Brick Co., 166 Ill. 213, 46 N. E. Rep. 788.

[90] N. Y. Code of Civ. Pro., §§ 956, etc.

A foreign bank, created under the laws of Great Britain can prove its existence by introducing in evidence a certified copy of its "certificate of designation of agent" filed in the office of the Secretary of State. See Cal. Stats. 1871–1872, p. 826; Cal. Stats. 1899, p. 111; Anglo-Californian Bank *v.* Field, 146 Cal. 644, 80 Pac. Rep. 1080.

A law of England permitting an unincorporated association to receive a charitable bequest, cannot be proved in New York by a letter, nor by a declaration made under the laws of Great Britain and Ireland providing for the taking of proof to be used in the colonies of that nation, as neither complies in any way with the laws of New York so as to permit it to be read in evidence. Pratt *v.* Roman Catholic Orphan Asylum, 20 N. Y. App. Div. 352, 46 N. Y. Supp. 1035; affirmed in 166 N. Y. 593, 59 N. E. Rep. 1120.

[91] N. Y. Code of Civ. Pro., § 942. A sufficient foundation for the introduction of a volume in proof of the laws of a foreign country is laid by the testimony of a barrister and solicitor of such country that it is a volume of the statutes commonly admitted and used as evidence in the courts of his country. Dawson *v.* Peterson, 110 Mich. 431, 68 N. W. Rep. 246.

[92] National Bank *v.* De Bernales, 1 Car. & P. 569.

incorporators under the statute. 2. By evidence that the executive officers of the State have authorized the company to proceed with corporate business, upon the assumption that they were duly organized and entitled to act. 3. By evidence that they have actually proceeded to exercise corporate franchises. 4. By evidence that the very dealings between them and the adverse party, which gave rise to the action, were had on the basis of a supposed incorporation, and amount to an admission which ought to conclude the question.

It is best to be prepared with some evidence both of organization and of user, but the requisite cogency of proof, and the question how far proof of either of these facts is enough without the others, depends on some considerations which have given rise to much apparent diversity in reported cases,[93] and attention to which is necessary to guide

[93] Soon after the introduction of the method of incorporation by general law, moreover, the courts relaxed the stricter rules of proving regular incorporation, which were often formerly applied.

"To constitute a *de facto* corporation, there must be either a charter or a law authorizing the creation of such a corporation, with an attempt in good faith to comply with its terms, and also a user, or attempt to exercise corporate powers under it." Fisher *v.* Pioneer Const. Co. (Colo.), 163 Pac. Rep. 851.

It is essential to the existence of a *de facto* corporation that there be: (1) A valid law under which a corporation with the powers assumed might be incorporated. (2) A *bona fide* attempt to organize a corporation under such law. (3) An actual exercise of corporate power. Farmers' Mutual *v.* Reser, 43 Ind. App. 634, 88 N. E. Rep. 349.

A *de facto* corporation exists when there is a charter or a statute under which the corporation might have done business, an attempt to organize under it, and actual user of some of the corporate powers. State *v.* Savage, 36 Ore. 191, 60 Pac. Rep. 610, 61 Pac. Rep. 1128. See also Thompson on Corporations, § 8207.

It is not necessary to prove existence of a corporation by a certified copy of its articles of incorporation. Proof of the *de facto* existence of a corporation can be given by any one who has knowledge of such existence, or even by general reputation. State *v.* Pittam, 32 Wash. 137, 72 Pac. Rep. 1042.

A bank cannot prove its cor-

in the application of established principles. 1. If the record of the organization is put in evidence, in proportion as it is full and regular, the necessity of proving user is reduced. 2. He who has participated in acts of user must yield to much slighter evidence of organization than he who is a stranger to the corporation. 3. He who has participated in the steps of organization cannot usually avoid responsibility by objecting to the regularity of those steps, and must yield to slighter evidence of user than a stranger. 4. He who has received and enjoyed a consideration from the company cannot require further proof of its corporate power to contract, or to require him to respond. 5. One who has in any way dealt with the company as a corporation is taken to have admitted its existence, and this admission, though alone slight evidence, comes in aid of other proof. 6. A mere trespasser, claiming no title, cannot require evidence of regular organization.[94]

porate existence by parol testimony of its teller, although such testimony may be competent to prove that the bank was a *de facto* corporation. People *v.* Dole, 122 Cal. 486, 55 Pac. Rep. 581, 68 Am. St. Rep. 50.

Evidence that a corporation has attempted to do the business which it was authorized by its charter to do, establishes at least that it is a corporation *de facto*. Leavengood *v.* McGee, 50 Ore. 233, 91 Pac. Rep. 453, 12 Cent. Dig. Corps., § 70.

[94] But this consideration does not apply in ejectment by a corporation, so as to make an exception to the rule that the plaintiff must recover on the strength of his own title. Goulding *v.* Clark, 34 N. H. 148. It is the varying effect of such considerations as these which explains the want of any well-defined line as to the requisite cogency of proof of user referred to in De Witt *v.* Hastings, 40 Super. Ct. (J. & S.) 463.

A corporation *de facto* may legally do and perform every act and thing which it could do or perform were it a *de jure* corporation. As to all the world except the State from which it receives its power it occupies the same position, as though in all respects valid, and even against the State, except in direct proceedings, its acts are to be treated as efficacious. Fisher *v.* Pioneer Const. Co. (Colo.), 163 Pac. Rep. 851.

12. Acceptance of Charter.

Acceptance of a special charter may be proved by producing the corporate minutes,[95] duly authenticated,[96] containing a vote of acceptance; and the notice of the first meeting need not be proved in the first instance, but may be presumed after a lapse of time,[97] or after user.[98] Or the acceptance may be shown by indirect evidence, such as official notice of acceptance given to the State officers,[99] or a notice calling a meeting to organize, signed by the defendant as a corporator.[1] In general, evidence that the body in its organic capacity (as distinguished from the individual conduct of the corporators), acted under the charter, is sufficient evidence of acceptance, unless the charter prescribes a different method.[2] Any unequivocal or decisive corporate act [3] is competent evidence of acceptance.[4] And

[95] Middlesex Husbandmen *v.* Davis, 3 Metc. 133.

A legal organization may be inferred from the grant of a charter and the performance of corporate acts, without production of a record of the corporation's first meeting. Sampson *v.* Bowdoinham Steam Mill. Corp., 36 Me. 78. But the mere production of the "Records of the Society" will not prove the corporation's existence. McKenney *v.* Bowie, 94 Me. 397, 47 Atl. Rep. 918.

[96] See paragraphs 56–59, below.

[97] Grays *v.* Turnpike Co., 4 Rand. 578.

"The State in which a corporation is organized determines the citizenship, whether it has offices and transacts business in the State in which the suit is sought to be brought or not." Martin *v.* Matson Nav. Co., 239 Fed. Rep. 188.

[98] Middlesex Husbandmen *v.* Davis, 3 Metc. 133.

Under § 486, c. 38, Ill. Crim. Code, user is *prima facie* evidence of the legal existence of a corporation. Waller *v.* People, 175 Ill. 221, 51 N. E. Rep. 900. See also Whiteman *v.* People, 83 Ill. App. 369; Kincaid *v.* People, 139 Ill. 213, 28 N. E. Rep. 1060.

One who deals with a corporation as existing *de facto* is estopped to deny, as against it, that it has been legally organized. Lincoln Park Chapter No. 177 R. A. M. *v.* Swatek, 204 Ill. 228, 68 N. E. Rep. 429.

[99] Philadelphia Bank *v.* Lambeth, 4 Rob. (La.) 463.

[1] Gleaves *v.* Brick Church Turnpike Co., 1 Sneed, 491.

[2] Bangor, etc., R. R. Co. *v.* Smith, 47 Me. 34; Taylor *v.* Commrs. of Newberne, 2 Jones Eq. 141.

[3] Thus acceptance of an act

[4] Abb. Dig. Corp. 147.

acceptance may be presumed from the fact that the corporators applied for the charter,[5] unless it appears that no proceedings were ever taken under it.[6] The rule requiring some evidence of the acceptance of a charter does not apply to municipal corporations,[7] nor to any charters which are so expresse as to take effect in creating the body corporate independently of any acts on the part of the corporators; [8] but if a charter of even a municipal corporation be made expressly to depend on acceptance, there must, when incorporation is properly in issue, be some evidence of acceptance. [9] Acceptance may be disproved by evidence of proceedings of the body declining the charter, and resisting a *quo warranto* on the ground that they had never accepted it.[10]

13. Organization under General Law.

If the legislative sanction relied on is a general law, the existence of the corporation under it may be proved, unless the law otherwise provides, by producing the certificate of organization which the law required to be filed,[11] with proof

allowing a resurvey and alteration of route, is not proved by evidence of resurvey, without alteration. Pingry *v.* Washburn, 1 Aik. 264.

[5] Middlesex, etc., Soc. *v.* Davis, 3 Metc. 133; State *v.* Dawson, 22 Ind. 272.

[6] Newton *v.* Carberry, 5 Cranch C. Ct. 632.

Where an institution attempts to incorporate, and thereafter performs no corporate acts of any character, holds no meetings, elects no officers, adopts no by-laws or seal, issues no certificates, and is managed after as it had been before the attempt to incorporate, there is no corporation *de facto*. Wall *v.* Mines, 130 Cal. 27, 62 Pac. Rep. 386.

[7] Gorham *v.* Springfield, 21 Me. 58; Berlin *v.* Gorham, 34 N. H. 266; Mining, etc., Co. *v.* Windham Co. Bk., 44 Vt. 497.

[8] Some authorities treat the question as if it depended on whether the act was to take effect immediately or not; but the true test is, Is its language alone enough to constitute the body a corporation (either immediately or at a subsequent day), or is it such as to require the performance of a condition to effect the creation?

[9] See City of Paterson *v.* Society, 4 Zabr. 385.

[10] Thompson *v.* Harlem R. R. Co., 3 Sandf. Ch. 625.

[11] Chamberlin *v.* Huguenot Manuf. Co., 118 Mass. 532; Fortin

of its filing.[12] Where strict proof is not required, parol evidence of filing has been received in lieu of official certificate.[13] The statutes now in force usually make the record of the certificate, or a certified copy, evidence equally with the original; but in the absence of such a provision the original is the best evidence,[14] but a certified copy is admissible against the company, if, on notice, they fail to produce the original.[15]

v. U. S. Wind Engine, etc., Co., 48 Ill. 451, s. c., 1 Withr. Corp. Cas. 437.

The articles of incorporation with the filing marks thereon are evidence of due incorporation. Sierra Land & Cattle Co. *v.* Bricker, 3 Cal. App. 190, 85 Pac. Rep. 665.

[12] Meriden Tool Co. *v.* Morgan, 1 Abb. New Cas. 125. The duplicate filed in the Secretary of State's office need not be proved where strict proof is not required. Id.; S. P., 25 N. Y. 574, 14 Cal. 424. Proof of filing after suit brought has been held enough in an action on a contract with the corporation. Augur, etc., Co. *v.* Whittier, 117 Mass. 451; and see 20 N. Y. 157. Otherwise in an action to enforce an assessment on lands. New Eel River Draining Assoc. *v.* Durbin, 30 Ind. 173, S. C., 1 Withr. Corp. Cas. 353. As to the cases in which failure to prove filing may be fatal, see Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385, and cases cited. In what case the certificate is conclusive, see Priest *v.* Essex Hat Co., 115 Id. 380. For an opinion insisting on the proof of performance of the statute conditions, in case of organization under a general law, see Mokelumne, etc., Co. *v.* Woodbury, 14 Cal. 424.

The articles of incorporation filed with the county clerk or Secretary of State are evidence of the existence of the corporation. Goodale Lumber Co. *v.* Shaw, 41 Ore. 544, 69 Pac. Rep. 546.

[13] Miller *v.* Wild Cat, etc., Co., 52 Ind. 51.

[14] Jackson *v.* Leggett, 7 Wend. 377; Evans *v.* Southern, etc., Co., 18 Ind. 101.

Certified copies of articles are proof of the existence of the corporation. Goodale Lumber Co. *v.* Shaw, 41 Ore. 544, 69 Pac. Rep. 546.

Duly authenticated copy of articles of incorporation with the certificates from the Secretary of State are evidence of the existence of the corporation. Dowagiac Mfg. Co. *v.* Higinbotham, 15 S. D. 547, 91 N. W. Rep. 330.

While the law provides that certified copies of articles of incorporation shall be proof of existence there is no provision of law excluding other proof of the existence of the corporation. Oral proof of existence by one having knowledge is sufficient if not objected to. State *v.* Pittam, 32 Wash. 137, 72 Pac. Rep. 1042.

[15] Chamberlin *v.* Huguenot Mfg. Co., 118 Mass. 532.

If the statute requires filing a duplicate in another office, it is the better practice to prove both; [16] but in all the classes of cases where strict proof of incorporation is not requisite, evidence of the filing of either is enough to go to the jury, whether in favor of or against the company, if there is evidence either of user or that the defendant has admitted the fact of organization.[17] If the certificate states all that the statute requires it to state, other facts, though made by the statute conditions precedent to its validity, may be presumed.[18] In the case of a corporation of a sister State, formed under its general statute, the evidence of incorporation which such statute declares shall be deemed sufficient to prove the fact of such incorporation, should be deemed sufficient in the courts of the State where the case arises, provided that due proof of the existence and contents of such statute is also given.[19]

[16] A sworn copy of the original, with proof of filing in the county clerk's office, and loss of the original and production of a certified copy of the duplicate filed in the Secretary of State's office, is sufficient. N. Y. Car Oil Co. *v.* Richmond, 6 Bosw. 213, s. c., 10 Abb. Pr. 185.

Where law requires the filing of articles with the Secretary of State and the county clerk proof of such filing in both places is best evidence of existence of the corporation. Goodale Lumber Co. *v.* Shaw, 41 Ore. 544, 69 Pac. Rep. 546.

Proof of filing in one office held sufficient evidence of incorporation. Spokane, etc., Lumber Co. *v.* Loy, 21 Wash. 501, 58 Pac. Rep. 672, 60 Pac. Rep. 1119.

[17] Leonardsville Bank *v.* Willard, 25 N. Y. 574; Bank of Toledo *v.* International Bank, 21 Id. 542; De Witt *v.* Hastings, 40 Super. Ct. (J. & S.) 475.

[18] All Saints' Church *v.* Lovett, 1 Hall, 191.

[19] Eagle Works *v.* Churchill, 2 Bosw. 166, Ang. & A. on Corp., § 635. Produce an exemplified copy of the papers on file, with authentication of the certifying officer's act and power, either according to R. S. U. S., § 906, or according to the law of the forum. And by a recent statute of New York, if the certificate of organization of incorporation in any other State or territory, or in Canada, is by the local laws *prima facie* evidence of its existence, the certificate duly exemplified, or an exemplified copy, is equally evidence in the New York courts. L. 1877, p. 333, c. 311; see N. Y. Code of Civ. Pro., §§ 957, 958.

14. Official Permission to do Corporate Business.

If the statute requires an official certificate by supervising State officers to authorize a corporation to commence business, a certificate that it is so authorized, founded on a professed compliance with the law and accompanied with proof of user, is sufficient, but not exclusive [20] evidence of its corporate existence,[21] at [22] and after the time when it was given,[23] without further proof of organization.[24] Where the adverse party has dealt with the company as a corporation—for instance as its collecting agent,—its existence is sufficiently proved by the general law and the certificate of organization, without the certificate that it was authorized to commence business.[25] But in an action for tolls, the official certificate is the only and conclusive evidence of the condition of the way.[26]

[20] Duke *v.* Cahaba Nav. Co., 10 Ala. N. S. 87, 91.

The original warrant issued to the corporation must be produced in order to prove existence of the corporation. McKenney *v.* Bowie, 94 Me. 397, 47 Atl. Rep. 918.

[21] Jones *v.* Dana, 24 Barb. 402, ALLEN, J. At least to go to the jury.

The certificate of the Secretary of State and a copy of the original record in his office is sufficient proof. Concord Apartment House Co. *v.* Alaska Refrigerator Co., 78 Ill. App. 682.

[22] Hyatt *v.* Esmond, 37 Id. 601.

If business is carried on before a certificate of complete organization is filed as required by law, the directors are liable for the debts so contracted. Vestal Co. *v.* Robertson, 277 Ill. 425, 115 N. E. Rep. 629.

[23] Williams *v.* Babcock, 25 Barb. 109.

[24] Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 302. In Bill *v.* Great W. Turnpike Co., 14 Johns. 416, it was held that, as against a subscriber for stock, the executive certificate of authority to commence business was not sufficient evidence of organization. The records should be produced.

Certificate of Secretary of State proves the existence of the corporation. Boatmen's Bank *v.* Gillespie, 209 Mo. 217, 108 S. W. Rep. 74.

[25] So held in case of a foreign corporation. Bank of Toledo *v.* International Bank, 31 N. Y. 542.

Where it is shown that a foreign corporation has not complied with the law authorizing it to do business in a State, its directors, officers, and agents are personally

[26] Duke *v.* Cahawba Nav. Co., 10 Ala. N. S. 87, 91.

15. Disregard of Statute Conditions.

Where the question is not raised by or against the State, nor upon a subscription contract such as requires for its consideration a legal organization, the fact that the steps of organizing, and proceeding to business, did not comply with express conditions of the charter or general law, does not necessarily affect the case, if there is color of organization and proof of user.[27] Compliance is presumed in the absence of evidence to the contrary; [28] and so long as the State does not interfere, the question, plainly intended as such cannot be raised by an individual.[29]

16. Effect of Proof of User.

As a general rule, alike in actions by and against corporations, the other party sufficiently supports his allegation of incorporation by showing the charter, or the general law and certificate filed, together with actual use of the powers and privileges of an incorporated company under the name designated in the charter or certificate.[30] User duly thus proved is enough, without proving a formal acceptance of the charter; [31] and where there is proof of user, the certifi-

liable for debts contracted by them in its name. Ryerson *v.* Shaw, 277 Ill. 524, 115 N. E. Rep. 650.

[27] Gaines *v.* Bank of Miss., 12 Ark. (Eng.) 769; Bank of Manchester *v.* Allen, 11 Vt. 302; Leonardsville Bank *v.* Willard, 25 N. Y. 574.

[28] Williams *v.* Cheney, 3 Gray, 220; and see 17 Metc. 592, and cases cited; Colonial Bank of Australasia *v.* Willan, L. R. 5 P. C. 417, s. c., 9 Moak's Eng. 225.

[29] Union Horse Shoe Works *v.* Lewis, 1 Abb. U. S. 518, s. c., 1 Withr. Corp. Cas. 73.

After the Secretary of State has issued the certificate of incorporation no one except the State can question its corporate existence in a direct proceeding. Boatmen's Bank *v.* Gillespie, 209 Mo. 217, 108 S. W. Rep. 74.

If a corporation fails to file its certificate in the county, the State alone, in its sovereign capacity, can complain. Woods Gold Min. Co. *v.* Royston, 46 Colo. 191, 103 Pac. Rep. 291. See also Cent. Dig., § 77; Dec. Dig., § 29.

[30] Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. 282, 288.

[31] Trott *v.* Warner, 11 Me. 227; Came *v.* Brigham, 39 Id. 35.

In criminal prosecutions involving proof of the existence of a cor-

cate is admissible, though defective; [32] and if the steps taken for organization are so defective as to be merely colorable, the corporate existence may still be shown by proof of user.[33] If performance of conditions be necessary, proof of user raises a presumption of performance.[34] One who participated in the acts of user cannot object that there was no due incorporation.[35]

17. Mode of Proving User.

A single act may not be sufficient to establish user,[36] but any evidence is competent showing the repeated performance of characteristically corporate acts; that is to say, acts which involve franchises which partnerships and associations have no right to assume,—for instance, presuming to sue by a name of incorporation; or to have and use a common seal; or, without any joint-stock company law, to claim a perpetual succession by which to hold lands, or permit shares to be transferable; or the acquisition and enjoyment of the necessary property for a corporate use; [37] expending

poration, proof of user is *prima facie* evidence of corporate existence. Waller *v.* People, 175 Ill. 221, 51 N. E. Rep. 900. To the same effect Whiteman *v.* People, 83 Ill. App. 369.

[32] Danneborge Mining Co. *v.* Barrett, 26 Cal. 286.

[33] Even in an action on a subscription for stock. Buffalo, etc., R. R. Co. *v.* Cary, 26 N. Y. 75.

[34] Williams *v.* Union Bank, 2 Humph. 339.

Presumption of due organization of cemetery corporation. Packard *v.* Old Colony R. Co., 168 Mass. 92, 46 N. E. Rep. 433.

[35] Aspinwall *v.* Sacchi, 57 N. Y. 338, and cases cited.

Participation in corporation's dividends bars the right to question its lawful existence. Lincoln Park Chapter No. 177, R. A. M. *v.* Swatek, 204 Ill. 228, 68 N. E. Rep. 429.

[36] Per ALLEN, J., Buffalo, etc., R. R. Co. *v.* Cary, 26 N. Y. 79.

Where the evidence shows that there were no meetings of the members or trustees, no election of officers, no by-laws adopted, no certificates of shares or membership issued, no seal adopted or used, no records or minutes kept, *i. e.*, no corporate acts performed, it will support a finding that there was no *de facto* corporation. Wall *v.* Mines, 130 Cal. 27, 62 Pac. Rep. 386.

[37] Buffalo, etc., R. R. Co. *v.* Cary,

money and incurring liabilities in preparation for corporate transactions; [38] maintaining a place of business where the company continually carried on the corporate business specified; [39] and the fact that their business was managed by directors chosen from time to time; [40] the fact that they issued or received, and acted on documents such as insurance policies, bonds for fidelity of officers; [41] and the like.

18. Admission of Incorporation.

A mere parol admission that the body was incorporated is competent evidence, against the party who made it, of the fact of acceptance of the charter or of organization under a general law; [42] but is never conclusive unless connected with circumstances raising an equitable estoppel against

26 N. Y. 76; All Saints' Church *v.* Lovett, 1 Hall, 191.

When the name of a party to a suit is such as to import that the party is a corporation there is a presumption to this effect until the contrary is shown. The name "The Cable Company" imports a corporation. Holcomb *v.* Cable Co., 119 Ga. 466, 46 S. E. Rep. 671.

[38] Buffalo, etc., R. R. Co. *v.* Cary, above; but compare De Witt *v.* Hastings, 40 Super. Ct. (J. & S.) 463, 475.

[39] U. S. Bank *v.* Stearns, 15 Wend. 314; Commonro *v.* Bakeman, 105 Mass. 56, 60.

[40] Utica Ins. Co. *v.* Tillman, 1 Wend. 556; Wilmington, etc., R. R. Co. *v.* Saunders, 3 Jones L. R. 126.

Evidence held sufficient to meet a plea of *nul tiel* corporation, where the corporation transacted its business under the management of persons acting as a board of directors. Holt *v.* Tennent-Stribling Shoe Co., 69 Ill. App. 332.

[41] Cahill *v.* Kalamazoo Ins. Co., 2 Dougl. 124.

Where the United States government conveys by patent to a company as a corporation, and where the State has recognized the company as a corporation by donating lands to it, and where the company assumed to convey the same lands as a body corporate, such evidence is enough to establish *prima facie* the existence of the corporation. Altschul *v.* Casey, 45 Ore. 182, 76 Pac. Rep. 1083.

[42] Thus defendant's letters, admitting that he held the money of the bank, plaintiff, were admitted in evidence by ABBOTT, C. J., in connection with a charter raising a question of misnomer, and it was left to the jury to say that the bank was the same. Nat. Bk. *v.* De Bernales, 1 Car. & P. 569.

him.[43] To give cogency to such an admission or estoppel it should clearly import corporate as distinguished from associate character.[44] The estoppel does not conclude the party as to the existence of legislative sanction, but only as to matters of fact, such as organization and user.[45] And when the estoppel exists, it need not be pleaded, but is to be given in evidence in aid, or instead, of direct proof.[46]

[43] Welland Canal Co. *v.* Hathaway, 8 Wend. 480. This case is sound in its conclusion; although some of the reasons assigned—as that a corporation could not be estopped, and that an ambiguous admission would not be competent, —are not now the guides. The fact that the note in suit was made payable at a specified national bank, who are plaintiffs, does not raise a presumption of law that they are a corporation, but is only evidence for the jury. Hungerford Nat. Bk *v.* Van Nostrand, 106 Mass. 559. So defendant's correspondence with a bank as its collecting agent is competent, together with user of corporate franchises, under color of an act authorizing the incorporation. Bank of Toledo *v.* International Bank, 21 N. Y. 542. *Contra*, 1 Greenl. Ev., 13th ed. 240, § 203. Many cases in the books lay down the rule in unrestrained language to the effect that he who deals with a corporation cannot deny its character when sued on the contract, but the rule depends on the existence of facts constituting an equitable estoppel. In the leading case, Henriquez *v.* Dutch West India Co., 2 Ld. Raym. 1535, the cause of action was a bail bond given by defendants to the company, plaintiff, in a name explicitly importing incorporation, and in an action in which the incorporation was proved.

[44] Id. *Contra*, McBroon *v.* Lebanon, 31 Ind. 268, s. c., 1 Withr. Corp. Cas. 373.

[45] See paragraph 5, above.

If there is no law authorizing the organization of the corporation there can be no corporation *de facto*, and one who deals with such corporation is not estopped from denying its legal existence. Imperial Bldg. Co. *v.* Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. Rep. 167.

If partners use the name of a supposed corporation which they have attempted but failed to organize according to law, they cannot escape their liability as partners. Harrill *v.* Davis, 168 Fed. Rep. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153.

[46] Nelson, J., Welland Canal Co. *v.* Hathaway, 8 Wend. 482.

A receipt which shows a contract to have been made with a corporation in its corporate name as well as the receipt of money from such corporation, is competent evidence as to the corporate existence of the company. Sierra Land,

19. Estoppel against the Company.

It is a general principle that at least where there is an act or charter in existence under which a company by taking the proper steps can become a corporation, if a company does *de facto* organize and hold itself out as a corporation, contracting obligations as such, it cannot, when sued upon such obligations by persons who have dealt with it as such, in good faith, be permitted to avoid a corporate liability thereon, by setting up that it has not taken all the steps prescribed as conditions predecent to its legal existence.[47]

etc., Co. *v.* Bricker, 3 Cal. App. 190, 85 Pac. Rep. 665.

[47] Slocum *v.* Warren, 10 R. I. 124, and cases cited.

A corporation is estopped to deny it was a corporation when it issued a certificate in which its name imported that it was a corporation, and which was signed by its president and secretary and attested with its seal, and in the body of which certificates its constitution and by-laws are referred to as fixing the conditions and amount of recovery. Chicago City Ry., ete., Ass'n *v.* Hogan, 124 Ill. App. 447.

On the trial of an indictment against a corporation any evidence at all which tends to show its *de facto* existence is sufficient. Standard Oil Co. *v.* Commonwealth, 29 Ky. Law Rep. 5, 91 S. W. Rep. 1128.

Where there has been a good faithful effort to organize a corporation under a statute, and corporate functions have been assumed and exercised, the organization becomes a *de facto* corporation. Huntington Mfg. Co. *v.* Schofield, 28 Ind. App. 95, 62 N. E. Rep. 106.

A certificate of incorporation executed and filed in accordance with the law is evidence of corporate existence and justifies strangers in doing business with the corporation without further examining into the subscriptions to the stock. Gunderson *v.* Illinois Trust & Savings Bk., 199 Ill. 422, 65 N. E. Rep. 326, affirming 100 Ill. App. 461.

An insurance company, which is admitted by itself to have been at one time a legal corporation, after having contracted with the plaintiff as such corporation and in the apparent exercise of corporate franchises and powers and having from time to time reaffirmed the existence and powers of said corporation by the acceptance of premiums due and owning on the policy, may not be permitted to deny its own existence, and thus escape liability for its contracts. Brady *v.* Delaware Mut. L. Ins. Co., 18 Del. 237, 45 Atl. Rep. 345.

An irrigation corporation which has received the full consideration for which its bonds were issued, and has built its works with the proceeds, and uses such works for

When such a defense is set up, it is for those who rely on it to show that they acted under an honest mistake, and that the other party was not misled to his prejudice thereby.[48] And upon the same ground a corporation which has dealt in excess of its powers, and retains the fruit of its dealing, cannot, nor can any one in its place, refuse to pay the consideration to one who acted in good faith.[49]

the purposes intended, and acts as a corporation at all times, cannot escape liability for the principal and interest on the bonds on the ground that it was never legally or-organized and had no legal right to issue bonds. Citing Douglas County *v.* Bolles, 94 U. S. 104, 110, 24 L. ed. 46, where the court said: "Common honesty demands that a debt thus incurred be paid." Tulare Irr. Dist. *v.* Shepard, 185 U. S. 1, 22 S. Ct. 531, 46 L. ed. 773, affirming 94 Fed. Rep. 1.

Where the company represents in a letter to plaintiff's assignors that it was a corporation, it is sufficient evidence to support the finding of the corporate character of the company. Marx *v.* Raley, 6 Cal. App. 479, 92 Pac. Rep. 519.

[48] Callender *v.* Painesville, etc., R. R. Co., 11 Ohio St. 516, 526.

Parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization. Kalamazoo *v.* Kalamazoo Heat, etc., Co., 124 Mich. 74, 82 N. W. Rep. 811.

A foreign corporation is estopped from making the defense that it had no lawful authority to do business or make the contract out of which the cause of action arose, but the other party to the contract is not estopped to deny its validity and to assert his rights. Ryerson *v.* Shaw, 277 Ill. 524, 115 N. E. Rep. 650.

[49] Parish *v.* Wheeler, 22 N. Y. 494.

Where a note is signed by the president but not countersigned by the treasurer of a corporation and the paper is not diverted from its original purpose, and the company received the benefits of the proceeds and the paper is in the hands of a *bona fide* holder, a valid legal obligation is created, and the fact that the treasurer did not countersign constitutes no defense. Bigelow Co. *v.* Automatic Gas Producer Co., 56 N. Y. Misc. 389, 107 N. Y. Supp. 894.

An *ultra vires* contract which is no longer executory and is not tainted by fraud or clearly prohibited by statute or condemned by sound public policy, cannot be impeached by the corporation or anyone representing it. Eastman *v.* Parkinson, 133 Wis. 375, 113 N. W. Rep. 649, 13 L. R. A. N. S. 921.

A corporation may not avail itself of *ultra vires* as a defense where a contract has been entered into and executed in good faith by the

20. Estoppel against those Dealing with the Company.

Upon the same principle one who has contracted with a *de facto* corporation, [50] either directly or through an agent

other party and the corporation has received the benefit of the performance. Pannebaker *v.* Tuscarora Valley R. Co., 219 Pa. 60, 67 Atl. Rep. 923.

"A corporation which accepts the benefit of a contract made by an officer without authority is estopped from denying the authority of such agent or officer if the contract is one within the charter powers of the corporation." Alabama Fidelity & Casualty Co. *v.* Jefferson Co. Savings Bank (Ala.), 73 So. Rep. 918.

A corporation cannot retain the profits of a transaction, or anything of value received from the other party thereto, and set up *ultra vires* as a defense to the enforcement of the contract. Wrightsville Hardware Co. *v.* McElroy, 254 Pa. 422, 98 Atl. Rep. 1052.

In order to estop a corporation, because of its course of dealing, from denying the authority of its president or board of directors to act, one must show that he relied upon such course of dealings. Stanley *v.* Franco-American Ferment Co., 161 N. Y. Supp. 365, 97 Misc. 401.

[50] O'Hara *v.* Mobile & Ohio R. Co., 40 U. S. App. 471, 76 Fed. Rep. 718; Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. Rep. 294.

One who deals with a corporation as existing in fact is estopped to deny as against the corporation that it has been legally organized. Close *v.* Glenwood Cemetery, 107 U. S. 466, 2 Stat. 267, 27 L. ed. 408; Seven Star Grange No. 73, P. H. *v.* Fergusson, 98 Me. 176, 56 Atl. Rep. 648; Owensboro Wagon Co. *v.* Bliss, 132 Ala. 253, 31 So. Rep. 81, 90 Am. St. Rep. 907; Palatine Ins. Co. *v.* Santa Fé Mercantile Co., 13 N. M. 241, 82 Pac. Rep. 363; Kalamazoo *v.* Kalamazoo Heat, etc., Co., 124 Mich. 74, 82 N. W. Rep. 811; First National Bank of Decatur *v.* Henry, 159 Ala. 367, 49 So. Rep. 97; Harrill *v.* Davis, 168 Fed. Rep. 187, 94 C. C. A. 47, 22 L. R. A. N. S. 1153; Hasbrouck *v.* Rich, 113 Mo. App. 389, 88 S. W. Rep. 131.

The fact that a creditor has contracted with a company holding itself out as a corporation does not necessarily work an estoppel to deny its legal corporate existence. Provident Bank, etc., Co. *v.* Saxon, 116 La. 408, 40 So. Rep. 778.

One who deals with a *de facto* corporation is estopped from denying its existence and thereby holding the supposed corporators liable as partners. Tennessee Automatic Lighting Co. *v.* Massey (Tenn.), 56 S. W. Rep. 35.

One who contracts with and receives money from a corporation cannot escape liability by denying

designated as such in an obligation naming the corporation,[51] and who retains or has applied the fruits of his deal-

its capacity to sue. Thompson *v.* Commercial Union Assur. Co., 20 Colo. App. 331, 78 Pac. Rep. 1073.

When an individual receives the property of a corporation through a contract made with such corporation by its corporate name, and there is extrinsic proof of the user by it of corporate powers, such individual is estopped from disputing the incorporation in an action brought to compel an accounting for such property. Commercial Bank of Keokuk *v.* Pfeiffer, 108 N. Y. 242, 15 N. E. Rep. 311.

The owner of a bond and mortgage who is induced by fraudulent representations to assign such bond and mortgage to a corporation, which in turn assigns it to a *bona fide* holder for value, cannot as against such *bona fide* holder question the validity of the corporation's existence, on the theory that if two innocent persons must suffer by a deceit he who puts trust and confidence in the deceiver should be a loser, rather than a stranger. Green *v.* Grigg, 98 N. Y. App. Div. 445, 90 N. Y. Supp. 565.

A shareholder who has affirmatively acquiesced in the acts of the directors is estopped from attacking their validity. Jackson *v.* Crown Point Min. Co., 21 Utah, 1, 59 Pac. Rep. 238, 81 Am. St. Rep. 651.

Where one railroad company contracts with another to deprive itself of a franchise, the latter is not estopped from denying the corporate existence of the former, as there can be no estoppel as to matters which did not arise out of the contract. Wilmington City Ry. Co. *v.* Wilmington, etc., Ry. Co., 8 Del. Ch. 468, 46 Atl. Rep. 12.

The legality of the organization of a *de facto* corporation cannot be questioned in a collateral proceeding. Otoe County Fair, etc., Assoc. *v.* Doman, 1 Neb. (Unof.) 179, 95 N. W. Rep. 327.

If a person deals with an association known as Dan Head & Co. as a corporation, such dealing, by estoppel, as to such transaction, fixed the status of the company to be what it was represented and recognized to be therein. Clausen *v.* Head, 110 Wis. 405, 85 N. W. Rep. 1028, 84 Am. St. Rep. 933.

One who deals with an association as a corporation is estopped from denying its corporate existence under Georgia Civil Code, § 1862. Collins *v.* Citizens' Bank, etc., Co., 121 Ga. 513, 49 S. E. Rep. 594.

[51] Vater *v.* Lewis, 36 Ind. 288; s. c., 10 Am. Rep. 29.

It does not lie in the mouth of a man who borrows money from a *de facto* bank to set up in defense to an action to recover that money that the bank had no right to exist. Campbell *v.* Perth Amboy Shipbuilding, etc., Co., 70 N. J. Eq. 40, 62 Atl. Rep. 319.

One who has dealt with a *de facto* corporation as such cannot question the validity of its existence at least so far as transactions within

ings with it,[52] or who has accepted from the company a corporate office and so received its property,[53] cannot contest its supposed corporate powers are concerned. Gilman *v.* Druse, 111 Wis. 400, 87 N. W. Rep. 557.

No person sued on a contract made with a corporation will be permitted to set up the want of legal organization in defense to such action. Lincoln Butter Co. *v.* Edwards-Bradford Lumber Co., 76 Neb. 477, 107 N. W. Rep. 797.

One who deals with a corporation in such a manner as to recognize its existence, and thereby causes it to change its condition to its detriment, is estopped from denying as against it that it has been legally organized. Spreyne *v.* Garfield Lodge, No. 1, U. S. B. S., 117 Ill. App. 253; Carroll *v.* Pacific National Bk., 19 Wash. 639, 54 Pac. Rep. 32.

One who signs a note to the order of "The Plattner Implement Company, a corporation duly organized under the laws of Colorado" is estopped from denying the company's legal corporate existence. Young *v.* Plattner Implement Co., 41 Colo. 65, 91 Pac. Rep. 1109.

Those who dealt with a railroad company as a corporation cannot make the objection that it is not a corporation. Rannels *v.* Rowe, 145 Fed. Rep. 296, 74 C. C. A. 376.

The members of a corporation are not individually liable where it is a corporation *de facto*, though not *de jure*, and the plaintiff has dealt with it as a corporation. Love *v.* Ramsey, 139 Mich. 47, 102 N. W. Rep. 279.

The existence of a *de facto* corporation cannot be collaterally attacked. Clark *v.* American Cannel Coal Co., 35 Ind. App. 65, 73 N. E. Rep. 727.

Where the plea of *nul tiel* corporation is set up all that is required to meet it is proof of a corporation *de facto*. Holt *v.* Tennent Stribling Shoe Co., 69 Ill. App. 332.

[52] Palmer *v.* Lawrence, 3 Sandf. 161, and cases cited.

Where a mortgage is made to a banking corporation as such, the mortgagor is estopped to deny the corporate existence of the bank. Citizens' Bank *v.* Jones, 117 Wis. 446, 94 N. W. Rep. 329.

A person who has contracted with an incorporated building and loan association as such is estopped from asserting that it is not a corporation. Eagle Savings & Loan Co. *v.* Samuels, 43 N. Y. App. Div. 386, 60 N. Y. Supp. 91.

One who borrows from a building and loan association solemnly recognizes the association as a valid building incorporation and is estopped from questioning its existence. Deitch *v.* Staub, 53 Cir. Ct. App. 137, 115 Fed. Rep. 309.

[53] All Saints' Church *v.* Lovett, Hall, 197.

One who contracts with an association about to be incorporated and who takes part in the organization, but who severs his connection with it before actual incorporation and does not accept corporate

his liability in respect to such dealings on the ground of any defect in its organization,[54] nor on the ground that the dealings in question were *ultra vires*,[55] or even forbidden by the charter.[56] This estoppel, it is true, is conclusive only as to the existence and power at the time the transactions were had, but the existence is presumed to continue so that corporate power to sue and be sued is conclusively implied, unless dissolution by the State is shown.

21. Estoppel against Members and Subscribers.

It is often said that one who subscribes for stock in a company cannot, when sued on his subscription, or on the corporator's individual liability for the debts of a corporation, question the corporate character and power to contract which he has thus admitted; [57] but the true rule in re-

office to which he is elected is not estopped from asserting that it is not a corporation. Byronville Creamery Ass'n *v.* Ivers, 93 Minn. 8, 100 N. W. Rep. 387.

[54] Palmer *v.* Lawrence, above.

[55] Parish *v.* Wheeler, 22 N. Y. 494.

The plea of *ultra vires* is not to be interposed by a stranger to the contract. Hazelwood Brewing Co. *v.* Siebert (Pa.), 100 Atl. Rep. 493.

[56] Steam Nav. Co. *v.* Weed, 17 Barb. 378, A. J. PARKER, J.

[57] So held on demurrer in a frequently cited case. Dutchess Cotton Manuf. *v.* Davis, 14 Johns. 238; and see Chubb *v.* Upton, Sup. Ct. U. S., Oct., 1877, 17 Alb. L. J. 77.

The stockholder of a corporation at common law was not responsible personally for any of the liabilities of the corporation. He is only responsible because of some constitutional or statutory provision. Golden *v.* Cervenka, 278 Ill. 409, 116 N. E. Rep. 273.

The liability of a stockholder, according to the laws of the jurisdiction in which business is transacted, rests upon his consent to be bound by such laws. His consent is inferred from the fact that he has by his act of becoming a stockholder, authorized the governing officers of the corporation to transact business in such State. Provident Gold Mining Co. *v.* Haynes, 173 Cal. 44 159 Pac. Rep. 155.

One who takes part in the organization of a corporation, but withdraws before completion of the organization is not estopped from questioning the validity of the incorporation. Middle Branch Mut. Tel. Co. *v.* Jones, 137 Iowa, 396, 115 N. W. Rep. 3.

One who takes part in the organization of a corporation and contracts with it before organiza-

gard to members and subscribers is the same that has already been stated in respect to other persons, that the admission is not conclusive unless there is ground for an equitable estoppel—as, for instance, where one becomes a member of a mutual insurance company, and, on giving a premium note, receives a policy,[58] or where one not only receives certificates for shares,[59] but holds or appropriates the stock;[60]

tion is estopped from denying its existence. Western Investment Co. *v.* Davis, 7 Ind. Ter. 152, 104 S. W. Rep. 573, 15 Ann. Cas. 1134.

[58] White *v.* Ross, 4 Abb. Ct. App. Dec. 590; Trumbull Co. Mut. F. Ins. Co. *v.* Horner, 17 Ohio, 407.

Stockholders cannot after authorizing or acquiescing in a contract have the same avoided on the ground that it was *ultra vires*. Olson *v.* Warroad Mercantile Co. (Minn.), 161 N. W. Rep. 713.

Whatever will estop all the stockholders will estop the corporation itself. Id.

Although a subscriber becomes a shareholder in consequence of frauds practiced upon him by the corporation, he is nevertheless estopped as against creditors to deny that he is a shareholder, if, at the time the rights of creditors accrued, he voluntarily occupied and was accorded the rights appertaining to that relation. Bartlett *v.* Stephens (Minn.), 163 N. W. Rep. 288.

A contract to take and pay for stock in a corporation, made in consequence of fraudulent representations, is voidable and not void and can only be avoided subject to the rights of creditors. Prompt action should be taken by the subscriber who seeks to avoid his liability on the ground of fraud. Kramer *v.* Hamsher, 63 Pa. Super. 211.

[59] De Witt *v.* Hastings, 40 Super. Ct. (J. & S.) 475. The bare receipt of a certificate does not prove membership, much less corporate existence, 2 Whart. Ev., § 1152, citing Challis' Case, L. R. 6 Ch. 266; but an acknowledgment of receiving or holding them may. Id.; Chubb *v.* Upton, above cited.

One who is a subscriber to stock in a corporation cannot defend himself by alleging irregularity of its organization. American Alkali Co. *v.* Campbell, 113 Fed. Rep. 398.

One who accepts stock and gives notes for the amounts due thereon waives the right to question the corporate existence of the company. Pope *v.* Merchants' Trust Co., 118 Tenn. 506, 103 S. W. Rep. 792.

A transferee with full notice that stock though purporting to be fully paid for, is not really paid for, is liable to corporate creditors for unpaid subscriptions. Durand *v.* Brown, 236 Fed. Rep. 609, 149 C. C. A. 605.

[60] See Palmer *v.* Lawrence, 3 Sandf. 161; Parish *v.* Wheeler, 22 N. Y. 494.

Where a stockholder and officer

or where he participates in acts of user, thus aiding to hold out the company to the world as a corporation.

22. The Estoppel Liberally Applied.

This rule of equitable estoppel is freely applied in furtherance of justice, both against companies and in their favor, and in favor of their receivers or others claiming under them.[61] The same general principles of estoppel which preclude contesting corporate existence, preclude contesting the fact of acceptance of a new power, though conferred by law upon condition.[62] The equitable estoppel, if raised by

of a corporation consented to a corporate transaction he is estopped from thereafter attacking it. Fish *v.* Harrison (N. J. Ch.), 100 Atl. Rep. 185.

Where a stockholder fails to have a transfer of stock by him registered on the books of the corporation he remains liable as a stockholder to the creditors of the corporation. Kirschler *v.* Wainwright, 255 Pa. 525, 100 Atl. Rep. 484.

While one who transfers his stock is not released from liability for the then existing debts of a corporation, his liability becomes secondary to that of the transferee, and the liability of both secondary to that of the corporation. Way *v.* Moers, 135 Minn. 339, 160 N. W. Rep. 1014.

[61] In an action by the company's indorsee of premium notes made by defendant, expressed to be payable to the insurance company, the production of the notes is *prima facie* evidence against him that the corporation was duly organized and competent to transact the business in question. Nor need the indorsee show, in the first instance, that the corporation had complied with the law of its own State, or that of the State where contract was made. Williams *v.* Cheney, 3 Gray, 220; Topping *v.* Bickford, 4 Allen, 120.

"If the stockholders would repudiate the acts of their officers, they must act with promptness or at least within reasonable time. The circumstances of delay may be such as to give rise to an equitable estoppel, but it is not necessary that there should be facts sufficient to create a technical estoppel." Olson *v.* Warroad Mercantile Co. (Minn.), 161 N. W. Rep. 713.

Ordinarily stockholders are bound by a judgment against their corporation but they may go behind the judgment and impeach it for fraud. Robinson *v.* Phegley, 84 Or. 124, 163 Pac. Rep. 1166.

[62] Zabriskie *v.* Cleveland &c. R. R. Co., 23 How. (U. S.) 397, and cases cited.

A holding corporation has a

an undisputed state of facts, is for the court to pass on, and submission to the jury is not necessary.[63] Where there are several parties contesting the question, and some are estopped, a want of proof that the others participated personally in the dealings with the corporation as such, must be objected to at the trial.[64]

23. The General Principle as to Proof of Incorporation.

In conclusion, the rule of requisite proof of incorporation which I deduce from the best considered cases, is, that where the issue of corporation or no corporation arises only on the question of power to make the particular contract, or appear as a party in the particular action in controversy, it is necessary, and unless interference by the State is shown, it is sufficient to show a charter, and, under that charter, user of corporate powers, on other occasions reasonably contemporaneous with the one in suit; or to show a general law, and user, by a professed organization under the law,[65]

separate corporate existence, and is to be treated as a separate entity, unless facts are averred which show that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth, or where the organization and control are shown to be such as that it is but an instrumentality or adjunct of another corporation. Martin *v.* Development Co. of America, 240 Fed. Rep. 42, 153 C. C. A. 78.

[63] Graff *v.* Pittsburgh, etc., R. R. Co., 31 Pa. St. 496.

If there is no evidence that one has dealt with a company as a corporation, the court will not estop him from questioning the existence of the corporation. Kanawha Dispatch *v.* Fish, 219 Ill. 236, 76 N. E. Rep. 352.

[64] Leonardsville Bank *v.* Willard, 25 N. Y. 574, affi'g 16 Abb. Pr. 111.

Creditors cannot assail a merely *ultra vires* act of a corporate officer unless it also resulted in depleting the assets of the corporation in fraud of creditors. Brent *v.* Simpson, 238 Fed. Rep. 285, 151 C. C. A. 301.

[65] The same principle applies in case of consolidation of corporations, as in original creation. Mitchell *v.* Deeds, 49 Ill. 416, 464, s. c., 1 Withr. Corp. Cas. 460.

Articles of incorporation properly authenticated are admissible in evidence to show corporate entity. Collins *v.* Armour Fertilizer Works, 18 Ga. App. 533, 89 S. E. Rep. 1054.

The plea of *nul tiel* corporation does not impose the burden of

of corporate powers, on other occasions reasonably contemporaneous with those in suit; and, in either class of cases, proof of user is aided by an admission of the fact of incorporation, and is dispensed with by circumstances which equitably estop the party from denying what he has admitted.

24. Materiality of Date.

The evidence should be viewed not merely with reference to the time of commencement of suit, in which regard it only affects the power to appear as a party on the record, but also with reference to time when the corporate power is alleged to have been exercised, in which regard it may affect the substance of the cause of action. For either purpose the mode of proof is the same. If the existence of incorporation before the exercise of corporate power is shown, there is a presumption of law that the incorporation continued, unless evidence tending to show the contrary is given; but if existence at a later period only is shown, there is no presumption, without other evidence, that incorporation was had before the exercise of the power.[66] In ordinary cases it is well to present testimony to user covering, in a general way, the whole period involved.

25. Misnomer.

An error in the corporate name used on the record goes

proving that it was in all respects a perfectly legal corporation. The corporation is entitled to recover on the issue presented by that plea, on making proof that it had a *de facto* existence. Concord Apartment House Co. *v.* Alaska Refrigerator Co., 78 Ill. App. 682.

[66] In the case of a municipality, if the date of first incorporation is material, the mere fact that a charter is put in evidence does not raise a presumption of law that there was no prior incorporation. It is at most a question for the jury. Bow *v.* Allenstown, 34 N. H. 351.

The presumption of regularity extends to the proceeding in the organizations of corporations. Packard *v.* Old Colony R. Co., 168 Mass. 92, 46 N. E. Rep. 433.

only in abatement,[67] and in modern practice is freely amendable in furtherance of justice, on proof of the true name;[68] and where there is an error in the name used in a deed or will, the corporation should appear in its true name and aver that the instrument intended them by using the wrong name.[69] And the instrument produced by the corporation, with *prima facie* evidence of delivery to them, is competent evidence against the grantor and those claiming under him, that the corporation were known and intended by the name used.[70]

26. Fraud, Forfeiture, or Non-user.

Upon the mere question of corporate existence it is not competent (except in some cases where strict proof is required) to give evidence that the charter was obtained by a fraud, not infecting the very cause of action itself, nor that by misuser or non-user the corporations have become amenable to a forfeiture of their franchises,[71] nor even that

[67] 2 N. Y. R. S. 549, § 14; Christian Soc. in Plymouth *v.* Macomber, 3 Metc. (Mass.) 235.

If "Globe Investment Company" is sued in the name of "The Globe Investment Company" the variance is immaterial. Clifford *v.* Thun, 74 Neb. 831, 104 N. Y. Rep. 1052.

To the same effect Western Bank, etc., Co., *v.* Ogden, 42 Tex. Civ. A. 465, 93 S. W. Rep. 1102.

[68] Bank of Havana *v.* Magee, 20 N. Y. 355, affi'g Bank of Havana *v.* Wickham, 7 Abb. Pr. 134. Compare Hallett *v.* Harrower, 33 Barb. 537. For a strict rule against misnomer, where a corporation proceeds under statute adversely to common right, see Glass *v.* Tipton, etc., Co., 1 Withr. Corp. Cas. 377, s. c., 32 Ind. 376. Compare Bank of Commerce *v.* Mudd, 32 Mo. 218.

[69] See will cases in chapter on *Actions By and Against Heirs, etc.*

In an action brought by the assignee of a corporation a letter addressed by the defendant to the corporation in its corporate name is evidence on which it can be found in the absence of any evidence to the contrary that the plaintiff's assignee was a corporation. Stauffer *v.* Koch, 225 Mass. 525, 114 N. E. Rep. 750.

[70] Mayor, etc., *v.* Blamire, 8 East, 493.

[71] Nor even that the corporations were not organized within the time limited by the charter. County of Macon *v.* Shores, 97 U. S. (7 Otto) 272.

Until a forfeiture of a charter

there has been such a cessation of business as had been previously declared by statute should have the effect to terminate the corporate powers, nor that there has been a voluntary dissolution without judicial proceedings.[72]

II. CORPORATE POWERS IN GENERAL

27. New Powers.

The acceptance of an apparently beneficial grant of additional power, subsequent to the charter, may be inferred as against the body as a whole, and equally in its favor where strict proof is not required, from slight evidence of acceptance or acquiescence by a majority of the corporators or of the directors, as the case may require; in some form such evidence is requisite; and even then it does not necessarily prove the act to be binding on a particular associate.[73]

28. Distinction between Original Powers of Corporation and Delegated Powers of Officers.

The rules of pleading and evidence both recognize the distinction between the original powers of a corporation, which are such as are expressly conferred or reasonably implied in the statute, viewed in relation to the requirements and usages of the business for which incorporation was granted, and the authority to act in the exercise of such

is judicially decreed, neither the forfeiture nor the cause of it can be inquired into in another suit, nor can the existence of the corporation be questioned incidentally or collaterally. Bloch *v.* O'Conner Mining & Mfg. Co., 129 Ala. 528, 29 So. Rep. 925.

[72] 2 Abb. N. Y. Dig. 339–341; Ang. & A. on Corp., § 636, and cases cited. Receivership does not necessarily bar suit. Willitts *v.* Waite, 25 N. Y. 577; and see 20 Wall. 1.

[73] Ang. & A. 63–69, §§ 81–86; Railway Company *v.* Allerton, 18 Wall. 233.

Where it clearly appears that one corporation is merely a creature of another the latter holding all the stock of the former, thereby controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation, when necessary for the purpose of doing justice. United States *v.* United Shoe Machinery Co., 234 Fed. Rep. 127.

power which is conferred by the corporation or managing board on its officers and agents. Under an allegation merely of want of corporate power to do the act, evidence that an act the corporation had power to do was done by officers whom the board had not authorized, is inadmissible,[74] except by amendment; and under an allegation merely that the

[74] Ogden *v.* Raymond, 5 Bosw. 16, 3 Abb. Ct. App. Dec. 396.

Acts taken by corporations are presumed, in the absence of evidence to the contrary, to be within either the express or implied powers of the corporation. Heinz *v.* National Bank of Commerce, 237 Fed. Rep. 942, 150 C. C. A. 592.

A corporation has no natural rights, such as an individual or partnership has, and if a power is claimed for it, the words giving the power or from which it is necessarily implied, must be found in the charter, or it does not exist. Citizens' Electric Illuminating Co. *v.* Lackawanna, etc., R. Co., 255 Pa. 176, 99 Atl. Rep. 465.

An ordinary business corporation has no power to become surety for another corporation or individual, but where such acts are incidental to the business of the company and the proper management thereof, and done in good faith, they are not *ultra vires*. Edwards *v.* International Pavement Co., 227 Mass. 206, 116 N. E. Rep. 266.

The general rule is that without express authority conferred by the corporation articles, no corporation has the power by any form of contract or indorsement to become a surety or guarantor for another. Miller *v.* Northern Brewery Co., 242 Fed. Rep. 164.

An implied power can only be such power as is necessary to enable a corporation to carry out the power expressly granted it so as to effect the purpose for which it was created. Citizens' Electric Illuminating Co. v. Lackawanna, etc., R. Co., 255 Pa. 176, 99 Atl. Rep. 465.

A State cannot authorize a corporation to exercise its franchise in other States. A corporation has no existence beyond the boundaries of the State of its creation, or power to perform strictly corporate acts outside of it. Ryerson *v.* Shaw, 277 Ill. 524, 115 N. E. Rep. 650.

A corporation can exercise in another jurisdiction only such powers as are set forth in its articles of incorporation, but the articles are not void because they do not authorize the corporation to do business in the State of its creation. Troy & North Carolina Gold Mining Co. *v.* Snow Lumber Co. (N. C.), 92 S. E. Rep. 494.

In the absence of constitutional or statutory prohibition, corporations have inherent power to buy, to sell, and to retire their own stock. Sanford *v.* First Nat'l Bank, 238 Fed. Rep. 298, 151 C. C. A. 314.

officer was not authorized by the corporation, evidence merely that the act was not within the corporate power would be equally objectionable. But the variance must be substantial and misleading to have the effect to exclude the evidence. The proper authority to the officer or agent by whose hand the act is shown to have been done, may be proved under a general allegation that the corporation did the act,[75] and under an allegation of authority in the agent, evidence of subsequent ratification equivalent in effect is admissible.[76] Where the allegation is merely general, that the corporation did the act, a denial of the act admits evidence of the want of authority.[77]

29. Evidence of Delegation of Power.

To charge a corporation upon the act of an officer or agent, it must be shown directly or presumptively, either that the act was performed while in the discharge of his ordinary duty in the usual course of business, and was within the general scope and apparent sphere of such duty, or that it was expressly authorized, or that it was performed with the knowledge and implied assent of the directors or of the corporation or its authorized officers, or was subsequently ratified by them.[78]

[75] Partridge *v.* Badger, 25 Barb. 146; Nelson *v.* Eaton, 26 N. Y. 410. An allegation that a contract was made by the president and directors of the company, is equivalent to saying that it was made by the corporation. Insurance Co. of N. A. *v.* McDowell, 50 Ill. 120, s. c., 1 Withr. Corp. Cas. 438; Soulby *v.* Smith, 3 Barn. & Ad. 929. Compare 65 N. Y. 278.

[76] Hoyt *v.* Thompson, 19 N. Y. 207.

Where there is no evidence showing that the cashier of a corporation was authorized to bind it by accommodation endorsements, the burden rests on the other party to show that the corporation had power to make such endorsements. A. D. Farmer & Son Type-Fdy. Co. *v.* Humboldt Pub. Co., 27 N. Y. Misc. 314, 57 N. Y. Supp. 821.

[77] Baleman *v.* Midwales Co., L. R. 1 C. P. 499.

[78] First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 290, and cases cited.

It is competent evidence in proving the authority of an agent of a corporation to show that the

Where there was a consideration, and not an absolute want of authority in the officers to do any act of the nature of that in question, but only a want of authority in the particular instance, he who would impeach the power must show, either by direct evidence or presumptively, that the want of authority was known to the other party as well as to the officers.[79]

agent was personally directing the work which was concededly being done by the corporation. Alabama Securities Co. *v.* Dewey, 156 Ala. 530, 47 So. Rep. 55.

"A stockholder is not an agent of the corporation in which he owns a share. He has no legal title to any of its property." Rensselaer, etc., R. Co. *v.* Irwin, 239 Fed. Rep. 739.

The delivery to the defendant of a corporate check for a personal obligation puts the defendant upon inquiry to ascertain whether the making of the check was authorized. Martindale *v.* DeKay, 166 N. Y. Supp. 405; J. B. Kepner Co., *v.* Hutton, 166 N. Y. Supp. 408.

Where there is no proof that a corporation did not know of the declarations and acts of its agent, it is a fair and warranted presumption that it had such knowledge. Swift *v.* Matthews Engineering Co., 178 App. Div. 201, 165 N. Y. Supp. 136.

A corporation cannot exist before its charter has been granted, and consequently cannot be a principal in any transaction or have agents. Powers *v.* Brunswick-Balke-Collender Co., 19 Ga. App. 706, 91 S. E. Rep. 1062.

[79] See 1 Redf on Rys. 603 (4).

Letters written by the officer of a corporation apparently within the scope of his duties and pertinent to the issue under investigation, are admissible in evidence against the corporation. Dawson Paper Shell Pecan Co. *v.* Montezuma Fertilizer Co., 19 Ga. App. 42, 90 S. E. Rep. 984.

There is a presumption of law, where the contrary does not appear, that one occupying the position of secretary and treasurer of a corporation is a proper officer to sign for the corporation; and the burden is upon the corporation to show the contrary. Dawson Paper Shell Pecan Co. *v.* Montezuma Fertilizer Co., 19 Ga. App. 42, 90 S. E. Rep. 984.

A corporation is chargeable with the presumptive knowledge of one who acts for it in the incorporation of another company and is estopped from denying the right of the latter to sue because of any irregularity in its organization. Lindenberger Cold Storage & Canning Co. *v.* J. Lindenberger, Inc., 235 Fed. Rep. 542.

Where the evidence showed that a person was in sole charge of a corporation place of business during its business hours, that he dealt

30. General Presumption as to Corporate Acts.

The same presumptions, whether of law drawn by the court, or of fact, allowed to be drawn by a jury, arise in respect to the conduct of corporations, and their officers and agents, as in respect to that of individuals and their agents, except where statutes impose a different rule.[80] It will be presumed that they conduct their operations, as to details, substantially upon the same principles and in the same manner as individuals engaged in like business.[81] The principle is

with a customer, received money from him, and gave receipt for same, it is presumed that he is an agent of the corporation with authority to act for it. Sherman *v.* Auto Bankers, Inc., 164 N. Y. Supp. 698.

Where a person enters into an agreement with a corporation and submits to a personal examination pursuant to such agreement, there is an implied contract that the patient will be treated not only skillfully but decently, respectfully and courteously and the corporation is answerable for the failure of an employee while acting in the course of his employment to conduct himself as the corporation impliedly contracted that he would conduct himself. Stone *v.* Eisen Co., 219 N. Y. 205, 114 N. E. Rep. 44.

[80] Bank of the U. S. *v.* Dandridge, 12 Wheat. 70; s. p., Union Bank *v.* Ridgely, 1 Har. & G. 324.

A general superintendent of a mining corporation is clothed with large specific as well as discretionary powers, and it is a reasonable inference to conclude that he is acting within the scope of his powers when he orders the nursing and caring for an injured miner at the expense of the corporation. Mt. Wilson Gold, etc., Mining Co. *v.* Burbridge, 11 Colo. App. 487, 53 Pac. Rep. 826.

[81] Mead *v.* Keeler, 24 Barb. 20.

The general rule is that the owner of all the capital stock of a corporation does not own the property of the corporation. Venner *v.* N. Y. Cent. & H. R. R. Co. (App. Div.), 164 N. Y. Supp. 626.

One who owns the majority of the stock of a corporation sustains a fiduciary relation to it. His power to control and direct the action of the corporation constitutes him the actual, if not the technical trustee for the holders of the minority of the stock. Alaska Juneau Gold Mining Co. *v.* Ebner Gold Mining Co., 239 Fed. Rep. 638, 152 C. C. A. 472.

In the absence of proof to the contrary it will be presumed that the agent of a corporation who executed a chattel mortgage in its behalf had authority to do so and that he lawfully and properly executed the chattel mortgage. American Exchange National Bk.

well settled that dealings which are not apparently beyond the scope of the incorporation, and are not expressly or by necessary implication forbidden by law, are presumed to be valid until the contrary is shown; [82] and the later decisions of the highest authority go far to support the rule, that any formal contract of a corporation, not expressly or by necessary implication forbidden or illegal, is valid against the corporation, when there is ground either for an equitable estoppel, or for holding that the parties are not *in pari delicto* in exceeding the limits of the law.[83] Illegality is not

v. Ward, 111 Fed. Rep. 782, 49 C. C. A. 611, 55 L. R. A. 356.

[82] Green's Brice's Ultra V. 40, n.; and see 6 Moak's Eng. 17, n.

Where officers of a corporation executed a deed, and there was no repudiation of the authority, and the stockholders and officers knew all about the transaction, the authority will be conclusively presumed. West Seattle Land & Impr. Co. *v.* Novelty Mill Co., 31 Wash. 435, 72 Pac. Rep. 69.

[83] Bissell *v.* Mich. S. & N. I. R. R. Co., 22 N. Y. 258; Riche *v.* Ashbury Rw. Carr. Co., L. R. 9 Exch. 224; 7 H. of L. 653; Green's Ultra V. 379, n. A part of the apparent conflict in the hostile authorities on this subject is removed by distinguishing between cases, 1, where the objection was raised by the company to avoid its liability upon the act in question, upon the ground that the act was foreign to the scope of incorporation; and, 2, where the objection from the same source was to an act in excess of the officer's authority; and, 3, where the objection was raised by a dissenting shareholder, or by a creditor, that the company could not part with its funds for a purpose foreign to the scope of incorporation.

A note, signed by the proper officers of a corporation, and with the seal attached, is *prima facie* evidence of the authority of the officers and due execution by them. Mills *v.* Boyle Mining Co., 132 Cal. 95, 64 Pac. Rep. 122.

A corporation will not be permitted, after allowing one to act as its secretary, and causing its records to be authenticated by him as its secretary, to object to the regularity of his appointment, or to repudiate its obligations signed by him under the direction of its board of directors. Barrell *v.* Lake View Land Co., 122 Cal. 129, 54 Pac. Rep. 594.

Where the agent who made the contract for a corporation acted beyond the scope of his authority, and the corporation had not received the fruits of his act, it is not estopped from denying his authority to bind it thereby. Red Cross Protective Soc. *v.* Wayte,

presumed of the action of a corporation.[84] Acts done by them which presuppose the existence of other facts to make them

171 Fed. Rep. 643, 96 C. C. A. 126.

Where a director purchases anything of value from the corporation he serves, the sale must be fairly and openly made and for a fair consideration. Wing *v.* Dillingham, 239 Fed. Rep. 54, 152 C. C. A. 104.

A complaining stockholder must first seek relief through the directorate or controlling authorities of the corporation before he can apply to the courts. Winstead *v.* Hearne Bros. & Co. (N. C.), 92 S. E. Rep. 613.

A shareholder's right to prosecute a case in the interest of a corporation against the directors does not exist until after a reasonable demand has been made upon the directors to act and they have refused to do so. Bartlett *v.* N. Y., N. H. & H. R. R. Co., 226 Mass. 467, 115 N. E. Rep. 976.

Where one corporation deals through another, which it privately owns and directs, and in effect makes a sale to itself, the burden of proving the fairness of the transaction and the adequacy of price devolves upon it. Pennsylvania Canal Co. *v.* Brown, 235 Fed. Rep. 669, 149 C. C. A. 89.

Where a corporation is owned and controlled by a single person (either a natural or an artificial person) the rule that the corporation and the shareholders have a separate entity and existence can never be made use of for purposes of evading responsibility, or as a means of destorting or hiding the truth, or of covering up transactions. In such cases, the presumption that knowledge of facts and circumstances affecting the interests of the stockholders of a corporation cannot be imputed to the corporation itself has no application, unless the interests of the stockholders and the corporation are adverse, but, on the contrary, the presumption is otherwise where such interests are not adverse. Searchlight Horn Co. *v.* American Graphophone Co., 240 Fed. Rep. 745.

[84] Thus power to acquire a patent may be inferred from the descriptive title of the corporation. Dorsey Harvester Rake Co. *v.* Marsh, 6 Fish. Pat. Cas. 393, citing Blanchard's Gunstock Turning Factory *v.* Warner, 1 Blatchf. 271.

It is not necessary to allege the authorization of any act charged to a corporation in a pleading. It is sufficient to allege that the act in question was done by the corporation, and then prove that it was done by constituted authority. Grand Rapids & I. Ry. Co. *v.* Jaqua (Ind. App.), 115 N. E. Rep. 73.

One dealing with an officer or agent of a foreign corporation cannot be presumed to know that the corporation has not complied with the laws of the State. Ryerson *v.* Shaw, 277 Ill. 524, 115 N. E. Rep. 650.

legal, are presumptive proof of such other facts; [85] and the burden, both of allegation [86] and of proof,[87] is on the party impeaching the transaction, to show that the circumstances giving validity to the exercise of the power did not exist.[88]

[85] Nelson *v.* Eaton, 26 N. Y. 410, s. c., 16 Abb. Pr. 113, rev'g 7 Abb. Pr. 305. This is a presumption of law, and may be drawn by the court without submission to the jury. Thus if a loan by a corporation would be valid if made from one fund, but invalid if made from another, the presumption is that it was made from the former. Farmers' Loan & Trust Co. *v.* Clowes, 3 N. Y. 470. Or if the acquiring, holding and conveying of real property would be valid under some circumstances or for some purposes, but not otherwise, the presumption is that it was valid. Farmers' Loan & Trust Co. *v.* Curtis, 7 N. Y. 466; Chautauqua Co. Bank *v.* Risley, 19 N. Y. 369; De Groff *v.* Am. Linen Thread Co., 21 N. Y. 124, rev'g 24 Barb. 375.

In determining whether a given act is within the express powers of a corporation, the judgment and actions of the directors and stockholders have no legal weight or bearing, as to implied powers their judgment, while not conclusive, is entitled to consideration. Heinz *v.* National Bank of Commerce, 237 Fed. Rep. 942, 150 C. C. A. 592.

Where a director acquires land from the corporation he serves, he is charged with knowledge as to how his corporation acquired it. Wing *v.* Dillingham, 239 Fed. Rep. 54, 152 C. C. A. 104.

The rights of stockholders, in a corporation formed under the laws of another State must be determined by the laws of that State. McMillen *v.* Lamb, 166 N. Y. Supp. 656.

[86] Howard *v.* Boorman, 17 Wisc. 459.

[87] Cases cited in last note but one. And these presumptions are applied to foreign corporations. N. Y. Floating Derrick Co. *v.* N. J. Oil Co., 3 Duer, 648; Star Brick Co. *v.* Ridsdale, 36 N. J. L. 229.

The burden rests upon the party seeking to charge a corporation upon a contract made by one of its officers to prove all the facts necessary to establish its validity. Gilbert *v.* Seatco Mfg. Co., 98 Fed. Rep. 208.

Where there is testimony tending to show that the act of the secretary of a corporation in endorsing a note was done with authority, the burden rests upon the corporation to show that the act was not authorized or ratified, either by affirmative action or by receiving the benefits of the transaction. Karsch *v.* Pottier, etc., Mfg., etc., Co., 82 N. Y. App. Div. 230, 81 N. Y. Supp. 782.

[88] And the better opinion is, that if the contract is only collaterally in question, and the party impeach-

This rule, however, relates to the legality of the power, and does not supply the want of evidence that the officer or agent who assumed to exercise the power was authorized by the corporation to do so.[89]

III. CONTRACTS BY A CORPORATION

31. Implied Promises.

When a corporation acts within the scope of the legitimate objects of its institution, all parol contracts made by its authorized agents are express promises by the corporation; and upon all duties imposed upon them by law, and upon all benefits conferred at their request, the law implies the same promises of the principal as in the case of an individual.[90] To sustain an action for services, or goods sold, or the like, it is not necessary to show that the directors, at a formal meeting, authorized or ratified the employment or order. It is enough to show either, 1, that the officer or agent who made the engagement did so within the scope of his duty or authority; or, 2, that the engagement was performed with the knowledge of the directors, and they received its benefit

ing it is not the one sought to be charged on it, he cannot do even that. Farmers', etc., Bank *v.* Detroit, etc. R. R. Co., 17 Wisc. 372, DIXON, J. Every corporation is presumed to have power to purchase and hold real estate, and if there is anything in its charter, or the business in which it is engaged, or the law under which it is organized, abridging this power, it must be shown affirmatively by the person assailing its title, else a conveyance to it will be deemed valid. Granite Gold Mining Co. *v.* Maginness, 118 Cal. 131, 50 Pac. Rep. 269.

Where plaintiff makes the contention that a corporation did not hold certain stocks lawfully, the burden is on him to show that the stocks were illegally held, and in the absence of such proof the court will assume the action of the corporation is legal. Burden *v.* Burden, 159 N. Y. 287, 54 N. E. Rep. 17.

[89] See Partridge *v.* Badger, 25 Barb. 146.

Ordinarily the burden rests upon one seeking to hold a corporation liable on a contract to show that the execution of the contract was properly authorized. Western Development, etc., Co. *v.* Caplinger, 86 Ark. 287, 110 S. W. Rep. 1039.

[90] Dunn *v.* Rector of St. Andrews, 14 Johns. 118.

without objection.[91] The law raises the same presumption as to assent, etc., against corporation as against natural persons; and in such a case, where the corporation have enjoyed performance, they will be presumed to have ratified the contract, and will not be permitted to deny the authority of the agent.[92]

32. Simple Contracts in Writing.

The unsealed contracts of corporations are often made by the adoption of a resolution, communicated to and accepted by the other party. A contract in this form is a sufficient memorandum to satisfy the statute of frauds as against the corporation, if the minutes of the corporation, signed by the clerk, contain, either expressly or in part by reference to other documents, the terms agreed on.[93] Where the contract is made in such a mode, the writing should be deemed within the rule requiring it to be produced as the best evidence of its contents, or accounted for;[94] and the rule forbidding parol

[91] Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Div. 351, and cases cited.

Where the president and secretary of a corporation execute a contract in behalf of the company, which is regular on its face and not shown to be outside of the regular business of the corporation, it is *prima facie* evidence that it was executed with authority, and those who deny the authority take upon themselves the burden of establishing their claim. Neosho Valley Inv. Co. *v.* Hannum, 10 Kan. App. 499, 63 Pac. Rep. 92.

[92] Fister *v.* La Rue, 15 Barb. 323.

Where the president of a corporation dedicates lands of the corporation to a city for a public street, his authority to do so will be inferred from the corporation's subsequent silence and acquiescence in the public use. West End *v.* Eaves, 152 Ala. 334, 44 So. Rep. 588.

[93] Argus *v.* Mayor, etc., of Albany, 55 N. Y. 495, affi'g, in effect, 7 Lans. 264; and see 22 Ohio St. 451.

The signature of the mayor of a municipal corporation to an ordinance containing a contract is a sufficient memorandum, and its acceptance by the party contracted with closes the contract. Aurora Water Co. *v.* Aurora, 129 Mo. 540, 31 S. W. Rep. 946.

[94] Whitford *v.* Tutin, 10 Bing. 295. *Contra*, where the proposal does not contain all the terms, and is modified on a parol acceptance. Pacific Works *v.* Newhall, 34 Conn. 67.

Where a resolution of a corpora-

evidence to vary a writing, as between the parties to it, applies. Where a formal instrument is executed without seal, such as an assignment, or a note or bill, there must be some evidence of the authority of the person executing it. To prove a sale which is not a transaction in the ordinary course of business of the corporation—*e. g.*, an executory contract to sell bonds of the company,[95] or to cancel a mortgage without consideration,[96] the authority of the officers will not be presumed. A power of attorney from the president is not enough. The president's authority must be shown. If there is a board of directors, authority from them is presumptively enough.[97] If, however, the statute provides that specified officers shall sign the contracts of the corporation, their signatures are presumptive evidence that such contract is the act of the corporation.[98]

33. Sealed Instruments.

An instrument executed under the seal of a corporation may be put in evidence without further proof, if it has been

tion is acted upon it is in itself sufficient evidence of a contract of employment. Sotter *v.* Coatesville Boiler Works (Pa.), 101 Atl. 744.

[95] Ang. & A. on C., §§ 297–299; Titus *v.* Cairo, etc., R. R. Co., 37 N. J. L. 102.

[96] Smith *v.* Smith, 117 Mass. 72.

[97] See Hoyt *v.* Thompson, 5 N. Y. 320, 3 Bosw. 267, 285. But the power is now often presumed in favor of third persons dealing in good faith.

The signing of a petition by the board of directors for paving a street and thereby charging the corporation's real estate with the expense of the improvement is an act generally deemed to be within the scope of the managing powers of such board. Trephagen *v.* South Omaha, 69 Neb. 577, 96 N. W. Rep. 248, 111 Am. St. Rep. 570.

The depositing of funds of a corporation by its treasurer, with another corporation, is not in violation of any statute, and it is therefore presumed not to be in violation of any by-law of the corporation. Matter of Smith, etc., Co., 170 Fed. Rep. 900, 96 Circ. Ct. App. 76.

A deed executed by an officer of a corporation with the corporate seal affixed raises the presumption that the officer was authorized to execute it. Sibly *v.* England, 91 Ark. 420, 119 S. W. Rep. 820.

[98] Bronson, J., Gillett *v.* Campbell, 1 Den. 520.

proved or acknowledged as required for a deed of lands to be recorded; and if it has been also recorded, under the statute, the record or a certified copy, according to the statute, is equally admissible as the original.[99] This, as in the case of a deed of an individual, raises a legal presumption that the seal was the seal of the corporation, and that it was affixed by its authority,[1] even where the law requires express authority from the corporation or board to sanction the grant in question. But this presumption is rebutted by an admission or proof that the act was not authorized nor ratified by the board, and in such case it is void,[2] unless the use of a seal was unnecessary and superfluous. If the instrument is not thus authenticated, the seal (unless it be that of a domestic municipal corporation which the court may judicially notice) [3] must be proved to be genuine, by calling either one who saw it affixed, or equally well any one who knows the seal.[4] But the testimony of a witness that he had been told

[99] Lovett *v.* Steam Mill, etc., Co., 6 Paige, 60; Kelly *v.* Calhoun, 95 U. S. 710. A certified copy of deed, to be admissible, need not show by scroll or otherwise that the original was under the seal of the corporation making it, if its recitals are to the effect that it was under the corporate seal. Colvin *v.* Republican Valley Land Ass'n, 23 Neb. 75, 8 Am. St. Rep. 114, 36 N. W. Rep. 361.

To the same effect, Sargent *v.* Chapman, 12 Colo. App. 529, 56 Pac. Rep. 194.

[1] Id.; Chamberlain *v.* Bradley, 101 Mass. 188, s. c., 3 Am. R. 331; Sheehan *v.* Davis, 17 Ohio St. 571, 581.

The corporate seal need not be attached to a corporate contract unless a similar contract, when made by an individual would require a seal. Alabama Fidelity & Casualty Co. *v.* Jefferson Co. Savings Bank (Ala.), 73 So. Rep. 918.

[2] Hoyt *v.* Thompson, 5 N. Y. 335, 19 Id. 207; Eureka Co. *v.* Bailey, 11 Wall. 491.

The mere affixing of the seal of the corporation to a note or other instrument not requiring a seal will not make the instrument a specialty; it must be shown that the seal is the seal of the corporation and that it was affixed with authority. Grubbs *v.* National Life Maturity Ins. Co., 94 Va. 589, 27 S. E. Rep. 464.

[3] The court does not judicially notice the seal of a foreign corporation. Ang. & A. on Corp. 201, § 216.

[4] Jackson *v.* Pratt, 10 Johns. 381, Ang. & A. on Corp. 200, § 216;

by corporate officers that it was the seal of the corporation, is not enough.[5]

The seal being thus proved, upon a corporate deed regular on its face, and apparently executed in due form, the law presumes that the deed was executed and the seal affixed by competent authority from the corporation.[6] Hence, alike where the deed bears a due certificate of acknowledgment,[7] etc., and where the seal is proved or judicially noticed,[8] the law presumes that the deed was duly executed and the seal affixed by a competent authority in pursuance of whatever power the corporation has, or may be presumed to have,[9] to convey; and it is not necessary for the party claiming under the instrument to produce the resolution or by-law giving authority, but the burden is on the party resisting it to show

Moises *v.* Thornton, 8 T. R. 307; Brounker *v.* Atkyns, Skinn. 2, cited in Rosc. N. P. 146; Finch *v.* Gridley, 25 Wend. 469.

[5] Moises *v.* Thornton, above.

[6] Whitney *v.* Union Trust Co., 60 N. Y. 576; Hoyt *v.* Thompson, 5 N. Y. 320, Rosc. N. P. 147, and cases cited. Where the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, the courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. Osborne *v.* Tunis, 1 Dutch. (N. J.) 633; Lovett *v.* Steam Saw-Mill Ass'n, 6 Paige's Ch. 54; Flint *v.* Clinton Co. Trustees, 12 N. H. 430; Chouquette *v.* Barada, 28 Mo. 491; Bank of the United States *v.* Dandridge, 12 Wheat. 70; Trustees Canandarque Academy *v.* McKechnie, 90 N. Y. 618. A contract under seal executed by the agents of a corporation is subject to the same rules of evidence, and of law, as a similar contract executed by the agents of an individual. In order to prove the execution of such a contract, it must be shown that the agents by whom the contract purports to have been executed were in fact agents of the corporation, having authority to execute the contract in question or contracts of that general description. Morrison *v.* Wilder Gas Co., 91 Me. 492, 40 Atl. Rep. 542.

The corporate seal affixed to the assignment of an underwriting agreement is *prima facie* evidence that the assignment was executed by corporate authority. Kirkpatrick *v.* Eastern Milling, etc., Co., 135 Fed. Rep. 144.

[7] Johnson *v.* Bush, 3 Barb. Ch. 239.

[8] 2 Dill. M. C. 550, § 450.

[9] Paragraph 30, above.

that the officers signing were not authorized to convey, or that those having custody of the seal were not authorized to affix it.[10] If the seal is an ordinary one, not the distinctive seal of the particular corporation, some evidence must be adduced (if the seal is necessary to the instrument), that it was used as a corporate seal, and that the instrument was executed by the proper officers by authority from the board or corporation; [11] and this will admit the deed.[12] A corporate seal, undisputed, is *prima facie* evidence that the deed is that of the corporation.[13] The facts necessary to show authority on the part of the agent of execution, whoever he may be, may always be proved by extrinsic evidence, and always by parol, unless it appears that the best evidence is in writing, or the statute requires the corporation to give written authority. Where a conveyance is made by a corporation, the grantee's attorney usually requires a certified copy of the resolution authorizing its execution, and this, if preserved, affords convenient primary evidence as against the corporation, and secondary evidence as against others, of authority, where direct proof of authority is necessary. Proof of the seal on an instrument produced by one claiming under it, is sufficient

[10] Same authorities. A recital in a deed of a corporation, properly executed, that it was executed in pursuance of an order of the board of directors, dispenses with the necessity of proving such action of the board otherwise than by the deed itself. Caldwell *v.* Morganton Mfg. Co., 121 N. C. 339, 28 S. E. Rep. 475. Proof that the seal was affixed by the printer of corporate bonds, by direction of the proper officers, who afterward signed and delivered the bonds, is sufficient. Royal Bank *v.* Grand Junction R. R. Co., 1 Withr. Corp. Cas. 644, s. c., 100 Mass. 414.

Oral evidence as to a resolution under seal is not admissible in the absence of the production of a copy of such resolution. Tobin *v.* Roaring Creek, etc., Co., 86 Fed. Rep. 1020.

[11] Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, s. c., 1 Withr. Corp. Cas. 250, 284, and cases cited.

[12] Phillips *v.* Coffee, 17 Ill. 154, and cases cited; Christie *v.* Gage, 2 Supm. Ct. (T. & C.) 344.

[13] St. John's Church *v.* Steinmetz, 18 Pa. St. 273.

An assignment by a corporation with seal affixed is presumed to be made with authority. McKee *v.* Cunningham, 2 Cal. App. 684, 84 Pac. Rep. 260.

proof of delivery, unless it appears that affixing the seal was not intended as a complete execution.[14] The officer or agent who signs on the part of the corporation, though expressly to "attest" the instrument, is not deemed a subscribing witness who must be called, unless the intent is clear that he signed not on the part of the corporation, but as an indifferent witness.[15]

34. Corporate Acceptance of Deeds, etc.

The acceptance of a bond or deed to a corporation may be presumed from the fact that, after it was submitted to the board for approval, it was retained by the corporation, and acted on—as, for instance, in the case of a cashier's bond, where the cashier was permitted to enter upon or continue in the discharge of his duties—and the fact that it was presented to and approved by the board may be established by parol.[16]

35. Contract Ambiguous as to Party.

The act or contract of an agent of a corporation does not derive its efficacy to bind or to benefit the corporation from professing on its face to have been done in the exercise of the agency.[17] If upon the face of the instrument there are indications suggestive of agency—such as the addition of words of office or agency to the signature, or the imprint of the corporate title on the paper—parol evidence is competent to show who the parties intended should be bound or

[14] Ang. & A. on Corp. 202, § 227.

[15] Compare Deffell *v.* White, L. R. 2 C. P. 144; Kelly *v.* Calhoun, U. S. Supm. Ct. 17 Alb. L. J. 55.

[16] Bank of U. S. *v.* Dandridge, 12 Wheat. 64; Graves *v.* Lebanon Nat. Bank, 10 Bush (Ky.), 23, s. c., 19 Am. Rep. 50, and cases cited.

[17] Mech. Bk. *v.* Bank of Columbia, 5 Wheat. 326.

Corporate powers, business and property of a corporation must be exercised, controlled and conducted by the board of directors; and *prima facie* the corporate power of making contracts or of refusing to perform rests with the board of directors. Bradford Belting Co. *v.* Gibson, 68 Ohio St., 442, 67 N. E. Rep. 888.

benefited.[18] And even where the contract bears no such suggestion on its face, the rule as now generally received is that parol evidence is competent either in favor of or against the corporation (except, perhaps, when the instrument is a specialty); but that it is not competent for the purpose of exonerating the signer from personal liability if the other party to the instrument chooses to hold him personally liable,[19] unless there is evidence that the signer was duly authorized to contract for the corporation, and that credit was actually given to the corporation alone.[20] If a seal is not essential to the validity of the act, the authority of the agent may be proved by oral evidence,[21] or by proof of ratification, *e. g.*, the payment of an instalment pursuant to it.[22]

IV. TORTS BY A CORPORATION

36. False Representations by Meeting.

Fraudulent representations by the corporate body may be proved by evidence that an official report, containing material misrepresentations of fact as to the affairs of the corporation, was presented to a public and general meeting of the corporators, by a board or committee acting in the course of its duty, and either that it was tacitly sanctioned by the meeting and subsequently circulated by the directors for the benefit of the company,[23] or that it was expressly

[18] Id.; Vater *v.* Lewis, 36 Ind. 288, and cases cited.

An offer signed by "W. H. M., manager," will sustain a finding that it was intended to be an offer by the corporation. Metropolitan Coal Co. *v.* Boutell Transp., etc., Co., 196 Mass. 72, 81 N. E. Rep. 645.

[19] 2 Tayl. Ev., § 1054; Briggs *v.* Partridge, 64 N. Y. 357.

[20] See Ang. & A. on Corp. 299, § 294.

Whether a contract was made with a company as a corporation or as a partnership—*Held* a question of fact for the jury, in Rush-Owen Lumber Co. *v.* Wellman, 10 S. Dak. 122, 72 N. W. Rep. 89.

[21] See paragraph 29, above, and 48, below.

[22] Eureka Company *v.* Bailey Company, 11 Wall. 491.

[23] Nat. Exch. Bk. *v.* Drew, 2 Macq. H. L. 103, s. c., 32 Eng. L. & Eq. 1; New Brunswick, etc., Co., 9 Ho. of L. Cas. 711.

A court of equity may intervene

adopted by the meeting and put forth to the public, even although no vote to publish it were passed.[24] But the mere acceptance of a false communication from an officer or servant,[25] or a vote "accepting" a report of a committee, does not alone make the statements in it representations, or even admissions, competent against the corporation.[26]

37. Frauds by Directors, etc.

It has been held that fraud by the board of directors, or by the managing agent, may be proved under an allegation of fraud committed by the corporation, if the act be such as to bind the company.[27] False representations in corre-

and appoint a receiver of a corporation not insolvent, where there has been such mismanagement of its business as to require such appointment for the protection of the rights of stockholders. Morse *v.* Metropolitan S. S. Co. (N. J. Ch.), 100 Atl. Rep. 219.

At the instance of complaining stockholders, where willful and intentional mismanagement in the affairs of a corporation are shown, a court of equity may, without statutory authority, and in the absence of corporate insolvency, intervene by way of receivership, and adjudge a dissolution of the corporation. Green *v.* National Advertising & Amusement Co. (Minn.), 162 N. W. Rep. 1056.

A complaining stockholder who does not show that he has ever called the subject-matter of his complaint to the attention of the directors, has no standing in equity for relief. Chapin *v.* Citizens' Telephone Co. (Mich.), 162 N. W. Rep. 958.

[24] Green's Brice Ultra V. 245, citing Re Nat. Patent Steam Fuel Co., 4 Drew, 529.

The issuance of stock in consideration of property will be presumed free from fraud unless the contrary clearly appears. Brown *v.* Weeks (Mich.), 161 N. W. Rep. 945.

[25] Burns *v.* Pennell, 2 H. L. Cas. 497.

An action may be maintained against a corporation for damages caused by a conspiracy in which it participated. It is not necessary for its officers or agents to have had authority to perform all of the acts done in the execution of the conspiracy, but any essential act which the conspiracy contemplated done by an agent of the corporation must be in fact done by him as such agent acting within the line and scope of his employment. National Park Bank *v.* Louisville & N. R. Co. (Ala.), 74 So. Rep. 69.

[26] 1 Dill. M. C. 357, § 242.

[27] Glamorganshire Co. *v.* Irvine, 4 F. & F. 947; Barwick *v.* English

spondence or other wise by officers or agents of a corporation, if brought home to the corporation as its act, will sustain the allegation, and the large latitude given to the admission of evidence bearing on a question of fraud is allowable against a corporation as well as against individuals.[28]

Joint Stock Bank, L. R. 2 Ex. (Ch.) 259; Mackay *v.* Com. Bk., L. R. 5 C. P. 394, s. p., King *v.* Fitch, 2 Abb. Ct. App. Dec. 508; and see 21 N. Y. 238.

Funds of a corporation can be lawfully used for corporate purposes only and if misapropriated by the directors, they and whoever with notice participated with them are jointly and severally liable to the corporation. If the corporation remains inactive, equity will afford relief on a bill brought by one or more of the stockholders for its benefit and to which it must be made a party. Corey *v.* Independent Ice Co., 226 Mass. 391, 115 N. E. Rep. 488.

If a director acts for himself in matters where his interest conflicts with his duty, the law holds the transaction constructively fraudulent and voidable at the election of the corporation. Du Pont *v.* DuPont, 242 Fed. Rep. 98.

Where directors own a majority of the stock of a corporation and completely control it, a stockholder may maintain an action to set aside acts of the directors for fraud without alleging that he has first applied to the corporation or its directors and requested corporate action. Alabama Fidelity Mortgage & Bond Co. *v.* Dubberly (Ala.), 73 So. Rep. 911.

"While the directors are not liable for losses resulting from mistakes of judgment such as are excused in law, they are liable for gross mismanagement and neglect of the affairs of the corporation. Good faith alone will not excuse them when there is the lack of the proper care, attention and circumspection in the affairs of the corporation which is exacted of them as trustees." Anthony *v.* Jeffress, 172 N. C. 378, 90 S. E. Rep. 414.

[28] See Butler *v.* Watkins, 13 Wall. 464; Marigny *v.* Union Bank, 5 Rob. (La.) 354; Upton *v.* Englehardt, 3 Biss. 343.

A corporation is liable for the fraud of its agents acting within their authority and in due course of its business, and cannot shield itself from responsibility by showing that the agent also failed in his duty to the corporation. Vulcan Detinning Co. *v.* American Can Co., 70 N. J. Eq. 588, 62 Atl. Rep. 881.

A minority stockholder may proceed in equity in behalf of himself and other stockholders against the corporation, its officers and third persons in collusion with its officers, for fraud or acts *ultra vires* which operate to injure or damage the property of the corporation, but it must be shown that he has acted promptly, and that he has

38. Liability for Wrongs by Officers or Agents.

To render a corporation liable for a tort committed by its officers or agents, it is not necessary to show that the corporation was authorized to do the act,[29] but it must be shown that he by whom it was done was at the time engaged in the business of his office or agency, and acting within its scope. In these respects, the evidence to charge a corporation with a fraud of its agent or officer depends on the general principles of agency.[30] If the act is such that had

made earnest effort to obtain redress at the hands of the directors and stockholders. In such a case the corporation is a necessary party defendant. Smith *v.* Coolidge Banking Co. (Ga.), 92 S. E. Rep. 519.

Where the negligence of a director is an injury to his corporation, the corporation is vested with a legal right to recover for such negligence. Kelly *v.* Dolan, 233 Fed. Rep. 635, 147 C. C. A. 443.

[29] N. Y. & New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30, affi'g 38 Barb. 534.

Where an officer or agent of a corporation performs, in favor of a certain person, an act which he has no right to do, although it comes within the apparent scope of his authority, his action cannot be held to bind the corporation in favor of said person, who has knowledge of his lack of authority. Lucile Dreyfus Mining Co. *v.* Willard, 46 Wash. 345, 89 Pac. Rep. 935.

[30] Hunter *v.* Hudson River Iron Co., 20 Barb. 507; and see 46 N. Y. 23.

Where an officer of a corporation used a corporate check without authority, and the corporation thereupon secured itself against loss upon such check by taking the bond of a third person, the corporation effected a novation and could thereafter look to the substituted debtor only for reimbursement. Security Warehousing Co. *v.* American Exchange National Bk., 118 N. Y. App. Div. 350, 103 N. Y. Supp. 399.

Where one is induced by the oral fraudulent representations of an agent of a corporation, not amounting to warranties, to enter into a contract of subscription to the stock of the corporation, he may have such contract set aside, notwithstanding the fact that the contract contains a provision that no statement, representation of agreement of warranty made by the agent taking the contract shall in any way operate to cancel or annul it. Jones *v.* Bankers' Trust Co., 239 Fed. Rep. 770.

"Corporations act through agents or servants, and if they are liable for negligence, they are so liable because of the negligent act or omission of some particular

it been done without malice, the corporation would have been bound by it (as in case of a prosecution instituted), or would have been liable for injury resulting (as in case of a carrier's breach of duty), it is no defense for the corporation to show that it was the willful and malicious act of the agent or servant.[31]

V. MEETINGS AND BY-LAWS

39. Evidence of Regularity of Meetings.

When the books are competent, an entry in the usual form, that after due notice [32] the members met, imports

agent or servant." Miller *v.* Ann Arbor R. Co. (Mich.), 162 N. W. Rep. 1025.

[31] Weed *v.* Panama R. R. Co., 17 N. Y. 362, affi'g 5 Duer, 190, and cases cited; Green's Brice's Ultra V. 266, nn. *. †. Compare Ang. & A. Corp., § 388; 1 Redf. Rw. 533, and Rounds *v.* Delaware, etc., Co., 64 N. Y. 133.

If the agent under guise and cover of executing the corporation's orders, and executing the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury, then the corporation is not liable. Cohen *v.* Dry Dock, etc., R. Co., 69 N. Y. 170.

Where the president of a corporation fraudulently obtained a check from another and indorsed it to the corporation, no other officer or director having any reason to suspect fraud, his knowledge of the fraud is not imputed to the corporation. In re U. S. Hair Co., 239 Fed. Rep. 703, 152 C. C. A. 537.

[32] The principle that in certain cases the proceedings of a meeting are not valid without due notice of meeting, is confined to meetings of the corporate body, and does not extend to meetings of directors and committees. Samuel *v.* Holladay, Woolw. C. C. 400, s. c., 1 Withr. Corp. Cas. 145. And due notice of a meeting of the corporators, if not in issue, may be presumed, against the corporation and those claiming under them. Cobleigh *v.* Young, 15 N. H. 493. For requisites of proof of notice, where the action of the meeting is directly and not collaterally in question, see Green's Ultra V. 350–355; People *v.* Batcheler, 22 N. Y. 128, affi'g 28 Barb. 310; Atlantic Fire Ins. Co. *v.* Sanders, 36 N. H. 269; Clark *v.* Wardwell, 55 Me. 61.

Where certificates of stock had been assigned in blank and the stock had never been transferred upon the books of the company but a memorandum to this effect had been entered upon the stubs in the certificate of the stock book, the holder of the stock was not such a

that the statutory quorum was present; [33] and from a record stating a proceeding, but silent as to the mode of it, the law presumes that the legal mode was pursued.[34] It has generally been held that to prove the action of a board or committee, there should be evidence that there was a meeting of the committee, and that those who signed the report were together when they signed it, or that the absent members had notice of the meeting, or an opportunity to be present; [35] but in the case of private corporations this rule is more or less relaxed, according to the common usages of corporate business within the jurisdiction.[36]

40. Acts by Parol.

The acts of a private corporation, or of its board or committee, may generally be proved by parol testimony of a witness,[37] even where the statute requires a fair and regular record of proceedings to be kept,[38] or declares the books to be evidence, if it does not declare them to be exclusive evi-

stockholder of the company as entitled him to notice of a stockholders' meeting. Osborn *v.* Detroit Kraut Co. (Mich.), 160 N. W. Rep. 442.

[33] Commonwealth *v.* Woelper, 3 Serg. & R. 32; Grays *v.* Turnpike Co., 4 Rand. 578, and see 8 Allen, 217, 15 N. H. 502.

At a meeting called for a special purpose no action taken will be binding unless every stockholder has had notice. Asbury *v.* Mauney (N. C.), 92 S. E. Rep. 267.

[34] Hathaway *v.* Addison, 48 Me. 440, and see 2 B. Monr. 177.

In general, directors of a corporation may hold their meetings and transact business outside of the State of incorporation, unless it is otherwise prescribed by its charter or by-law. Lippman *v.* Kehoe Stenograph Co. (Del. Ch.), 98 Atl. Rep. 943.

[35] See City of Troy *v.* Winters, 2 Hun, 63.

[36] See Re Bonelli's Telegraph Co., L. R. 12 Eq. 246; Bradstreet *v.* Bank of Royalton, 42 Vt. 128, cited in Field on Corp. 256, § 237, n.; Edgerly *v.* Emerson, 23 N. H. 566.

[37] Bk. of Lyons *v.* Demmon, Hill & D. Supp. 398; Am. Ins. Co. *v.* Oakley, 9 Paige, 496; Partridge *v.* Badger, 25 Barb. 146, and cases cited. See also on this subject, 31 How. St. Tr. 673, cited in 1 Phill. Ev. 591; R. *v.* Hunt, 3 B. & Ald. 566.

[38] Bank of U. S. *v.* Dandridge, 12 Wheat. 64, Story, J.

dence, of the proceedings,[39] for acts even so formal as a by-law or regulation may be adopted without written evidence of a vote [40] and when so adopted they may be proved by direct evidence, or inferred from circumstances, even if there be written records of other acts; [41] and the fact that no record was made of the act in question may be proved by calling the keeper of the record, without producing or accounting for the book.[42]

41. Pleading By-laws, etc.

The courts refuse to notice judicially the by-laws of a private corporation,[43] and under the new practice they should be pleaded, whenever directly in question, as the foundation of an action or defense.[44] Nor do the courts, unless it be those of the municipality, judicially notice the ordinances of a municipal corporation, if not directed by law to do so. Therefore, such ordinances, when sought to be enforced by action, or when set up by the defendant as a protection, should be set out in the pleading. It is not sufficient that they be referred to generally by the title or sections.[45]

[39] Inglis *v.* Great N. Ry. Co., 16 Eng. L. & Eq. 55, s. c., 1 McQ. H. L. 112, 119, Ld. St. Leonards; Magill *v.* Kauffman, 4 Serg. & R. 317, Ang. & A. Corp. 159, § 186; Waters *v.* Gilbert, 2 Cush. 31. *Contra*, in case of a municipal corporation, Gilbert *v.* City of New Haven, 40 Conn. 102.

[40] See paragraphs 56–58.

[41] Lockwood *v.* Mechanics', etc., Bk., 9 R. I. 308, s. c., 11 Am. R. 253, and cases cited; U. S. Bank *v.* Dandridge, 12 Wheat. 64. Where there are no books to resort to, clear and satisfactory evidence of another sort should be required. Shaw, Ch. J., Central Turnpike Corp. *v.* Valentine, 10 Pick. 142.

[42] Smith *v.* Richards, 29 Conn. 232, 243. Otherwise, perhaps, where the evidence is offered by the corporation. "We must take notice of a usage so general as that of a church to keep a record." Shaw, Ch. J., Sawyer *v.* Baldwin, 1 Pick. 492; and see Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. 287.

[43] Youngs *v.* Ransom, 31 Barb. 49.

[44] Compare Atlantic Fire Ins. Co. *v.* Sanders, 36 N. H. 252.

[45] 1 Dill. M. C. 167, and cases cited; 436, § 346.

42. Proof of By-Laws.

By-laws or ordinances of a municipal corporation will be usually proved pursuant to statute, by producing the volume in which they are officially published, or by a certified copy.[46] Where they are proved by production of the minutes of the common council, the mayor's approval must be also shown.[47] By-laws adopted by other than municipal corporations are valid, although no written record of the vote of adoption was made; and hence they may be proved by production of the original book or paper, with indirect evidence of adoption, such as that they have been handed down

[46] N. Y. Code of Civ. Pro., § 941; Howell *v.* Ruggles, 5 N. Y. 444, 1 E. D. Smith, 398; Porter *v.* Waring, 2 Abb. New Cas. 230.

Courts do not take judicial notice of municipal ordinances. Norfolk, etc., Traction Co. *v.* Forrest, 109 Va. 658, 64 S. E. Rep. 1034; Tucker *v.* O'Brien, 117 N. Y. Supp. 1010.

An ordinance may be proved *prima facie* by introducing in evidence a book entitled "Charter and Ordinances of the City" printed by authority of the city. Texarkana, etc., Ry. Co. *v.* Frugia, 43 Tex. Civ. App. 48 (Tex.), 95 S. W. Rep. 563; Vol. 36, Cent. Dig. Mun. Corps., § 287.

A book containing city ordinances, published by authority of the common council is presumptive evidence of such ordinances; and after three years from date of compilation it is conclusive evidence of the regularity of the adoption of the ordinances. See § 4137, Wisc. Stats. 1898. It must appear clearly that the book was published with authority. Quint *v.* City of Merrill, 105 Wis. 406, 81 N. W. Rep. 664.

A book of ordinances published by the authority of the city of South Ottawa is by statute made competent evidence of any ordinance contained in it. See Rev. Stat. Ill., chap. 28, § 66. Chicago, etc., R. Co. *v.* Thorson, 68 Ill. App. 288.

A volume of Revised Ordinances of the City of St. Louis, purporting to be published by the city, is admissible in evidence under § 3100, Missouri Revised Statutes, 1899, to prove any ordinance contained in the volume. Campbell *v.* St. Louis, etc., Ry. Co., 175 Mo. 161, 75 S. W. Rep. 86.

Proof by the secretary of the town council that a certain book contained the ordinance of the town, as regularly adopted, and an offer of said book in evidence, is evidence of any ordinance contained therein. McCaffrey *v.* Thomas, 20 Del. 437, 56 Atl. Rep. 382.

[47] Kennedy *v.* Newman, 1 Sandf. 187.

from officers to successors, and always acted on as the rule of the corporation.[48] When collaterally relevant, parol proof is usually allowed, without production of the written form, especially if no question is made as to the terms of the writing; and juries have been allowed to infer the existence of a supposed by-law, or the repeal of an actual one, from long usage.[49]

VI. AUTHORITY OF OFFICERS, AGENTS AND MEMBERS

43. Evidence of Appointment of Officers and Agents.

Where the title to office or agency is involved only as incidental to the right or liability of the corporation growing out of the acts of the officer or agent, it may be proved not only by the corporate record of election, if any, but equally well by parol testimony, either going directly to the fact of election, or showing that the person in question acted as such and was generally reputed so to be. Proof of such facts by the adverse party throws upon the corporation the burden of disproving the alleged authority.[50] General reputation is not enough alone, except perhaps in case of a public officer.[51] But with evidence that the corporation had

[48] Union Bank *v.* Ridgeley, 1 Har. & G. 324.

[49] Ang. & A. Corp. 353, §§ 328, 329, p. 394, § 368.

[50] Pusey *v.* N. J. R. R. Co., 14 Abb. Pr. (N. S.) 441. In the absence of any statute making record evidence, a witness having personal knowledge may testify as to who were the stockholders at a given time. Tying *v.* U. S. Submarine, etc., Co., 1 Hun, 161.

The resignation of a director of a corporation need not necessarily be written. In re Kisner, 254 Pa. 597, 99 Atl. Rep. 168.

[51] Nelson, J., Clark *v.* Farmers' Woolen Manuf. Co., 15 Wend. 256; Litchfield Iron Co. *v.* Bennett, 7 Cow. 234. Where the authority of an officer of a public corporation comes incidentally in question in an action in which he is not a party, it is sufficient to show that he was an acting officer, and the regularity of his appointment of election cannot be made a question. Proof that he is an acting officer is *prima facie* evidence of his election or appointment, as well as of his having duly qualified. But if proof of a due election or appointment is

held him out as its officer, or permitted him to assume the office without objection, or had ratified his acts as such,[52] it is sufficient *prima facie* evidence; and slight evidence is allowed in the case of subordinate officers and servants.[53]

Evidence that officers acting as such, and recognized by the corporation or board, had no regular or valid title to the office, does not avail. Even when the question is of their right to sue in the name of the corporation, defendant cannot sustain an objection to their right of recovery, on the ground that they are not such officers, *de jure*, without evidence that the State has proceeded to a judgment of ouster against them.[54]

44. Evidence of Express Authority.

The power of an agent, for whatever purpose, may be proved by a vote or resolution without the seal.[55] The fa-

alone relied on, such election or appointment must be legally established. 1 Dill. M. C. 295, note, and cases cited.

[52] Thus the authority of an officer or agent to draw bills, may be proved by showing a report to the board, adopted by it, containing a statement of the drafts. Partridge *v.* Badger, 25 Barb. 173.

[53] Thus it is sufficient proof of the employment of the plaintiff as engineer of a corporation, to show that he was recognized and consulted by the officers of the company as its agent, and that his plans, etc., were accepted and acted upon. 2 Greenl. Ev., 13th ed. 87, note, citing Moline Water Power, etc., Co. *v.* Nichols, 26 Ill. 90. So the presence of a servant on a steamer is some evidence of his employment there. Svenson *v.* Pacific Mail Steamship Co., 57 N. Y. 108. The dress of a railroad brakeman indicates his character as such. Hughes *v.* N. Y. & N. H. R. R. Co., 36 Super. Ct. (J. & S.) 222. Appearance of clerk behind desk is some evidence of agency. Leslie *v.* Knickerbocker Ins. Co., 63 N. Y. 27, affi'g 2 Hun, 616. Person at work on locomotive, with his coat off, presumed a servant of the company. McCoun *v.* N. Y. Central, 66 Barb. 338.

[54] Trustees of Vernon Soc. *v.* Hills, 6 Cow. 23; All Saints' Church *v.* Lovett, 1 Hall, 198.

[55] Green's Brice's Ultra V. 365, n.*, and cases cited. For the rule, that one dealing with an officer may be charged with notice of limits of authority in the by-laws, etc., see Dabney *v.* Stevens, 10 Abb. Pr. N. S. 39, s. c., 2 Sweeny, 415.

"The mere fact that a corpora-

miliar rule by which a sealed power is required to authorize an agent to execute a sealed instrument, does not apply to a power conferred by a corporate vote.

45. Implied Scope of Authority.

Acts done by the directors, which required the sanction of a meeting of the corporation, may be sustained by proof of lapse of time and no dissent on the part of the corporation, or from their not producing the record of the proceedings had at the meeting where action should have been taken.[56] Upon similar principles, acts of an officer or agent may be sustained by proof that they are such as he has usually and customarily performed. It is a general principle, applicable to open and ordinary acts in the course of the corporate business, that a general agency is defined, not by the authority which the agent or officer receives from his principal, but by that which the latter allows the former habitually to assume and exercise.[57] And this principle applies to the officer of a municipal corporation, whose duties are not defined by law, at least so far as to throw on the city the burden of disproving authority.[58] Hence authority

tion has lost money does not subject the directors to individual liability therefor." Schmid *v.* Neuberger, 174 App. Div. 670, 160 N. Y. Supp. 701.

[56] 1 Redf. on Rys. 600 (3).

A director whose interest in a matter disqualifies him from voting upon a resolution concerning it cannot be counted for the purpose of ascertaining whether a quorum is present when the vote is taken. A director so disqualified loses *pro hac vice* his character as a director. Enright *v.* Heckscher, 240 Fed. Rep. 863, 153 C. C. A. 549.

[57] Bridenbecker *v.* Lowell, 32 Barb. 9, 18, ALLEN, J.

Proof that an agent was in the habit of executing assignments and contracts on behalf of the corporation, with the knowledge, assent and acquiescence of the board of directors, is evidence that he had authority to execute assignments and contracts. Reid *v.* Clay, 134 Cal. 207, 66 Pac. Rep. 262.

[58] Hall *v.* City of Buffalo, 2 Abb. Ct. App. Dec. 301.

Directors of a corporation are simply agents selected by the stockholders of the corporation, and being limited in the exercise of power by the by-laws they cannot create an office not authorized thereby. Kramer *v.* State (Ala. App.), 75 So. Rep. 185.

from the corporation for an act of its officer may be proved by showing that he had openly exercised the power, and by showing either corporate acts from which it must be inferred that the corporation or the directors, as the case may be, must have contemplated the legal existence of the necessary delegated authority for the purpose,[59] or that, with knowledge of the act, they affirmatively ratified it or tacitly acquiesced in it. Especially in respect to such of the ordinary powers of business corporations as are by common usage, if not of necessity, exercised by means of officers and agents—such as the implied power of a trading company to make bills and notes—the law presumes, in the absence of evidence to the contrary, that general authority to do such acts, when the exigencies of the company require, has been duly vested in the person who has been held out as their agent and allowed to do such acts.[60] And the jury may presume the authority in such case, for an act done openly in the usual course of business at the office of the company, without evidence of actual knowledge on the part of the company or directors, or of express ratification;[61] or, where

[59] Olcott *v.* Tioga R. R. Co., 27 N. Y. 546, 559, and cases cited.

Evidence that there was no resolution of the directors of a corporation authorizing its president to make a contract, is not *prima facie* evidence, that the contract was not in fact authorized. Ætna Explosives Co. *v.* Bassick, 176 App. Div. 577, 163 N. Y. Supp. 917.

[60] Narragansett Bk. *v.* Atlantic Silk Co., 3 Metc. 289, Shaw, Ch. J. So the authority of an agent to disseize so as to acquire an adverse possession for the corporation, and the acceptance of his act, may be proved by the acts and conduct of the corporation, whether manifested by it collectively or through its officers, agents, tenants, etc. Ang. & A. on Corp. 159, § 186.

In the absence of any evidence, it will not be presumed that the general manager of a corporation has no authority to make a contract for the sale of certain merchandise in which the corporation was dealing. Walnut Ridge Mercantile Co. *v.* Cohn, 79 Ark. 338, 96 S. W. Rep. 413.

[61] Conover *v.* Mut. Ins. Co., 1 N. Y. 292. *Contra*, 1 Redf. on Rw. 590.

"Any person taking checks made payable to a corporation, which can act only by agents does so at his peril and must abide by the consequences if the agent who in-

knowledge and acquiescence is shown, they may presume the authority from the open exercise of substantially similar powers—for example, they may presume authority to buy gold from the usual buying of exchange.[62]

46. Authority Implied in Title of Office.

In the absence of any other evidence of authority, the law presumes certain limits as marking the scope of the authority of various officers, varying both with the character of the corporation, and the public and general usages of corporate business within the jurisdiction. It must suffice here to say that it is now generally agreed that in the absence of any statute to the contrary, the president, together with the secretary or cashier, are presumed, in favor of third persons purchasing in good faith and for value, to have power to convey property of the corporation in its name, in the ordinary course of its business. Other officers, except the board of directors, have not this power. The president has presumable authority to direct a suit to be brought;[63] and

dorses the same is without authority, unless the corporation is negligent or is otherwise precluded by its conduct from setting up such lack of authority." Standard Steam Specialty Co. *v.* Corn Exchange Bank, 220 N. Y. 478, 116 N. E. Rep. 386.

[62] Merchants' Bank *v.* State Bank, 10 Wall. 104.

[63] American Ins. Co. *v.* Oakley, 9 Paige, 496; Mumford *v.* Hawkins, 5 Den. 355.

When the president or general manager of a corporation does an act within the domain of the general objects or business of the corporation, and within the scope of the usual duties of the chief officer, it will be presumed that he had authority to do it, and whoever would assert the contrary must prove it. Cushman *v.* Cloverland Coal & Mining Co., 170 Ind. 402, 84 N. E. Rep. 759, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 402.

Officers of corporations organized for, and engaged in, commercial pursuits, without special authority, cannot charge the corporation with the employment of physicians and surgeons to attend upon sick or injured employees. Cushman *v.* Cloverland Coal & Mining Co., 170 Ind. 402, 84 N. E. Rep. 759, 127 Am. St. Rep. 402, 16 L. R. A. (N. S.) 1078.

Where the president of a corporation is given general management and control of its property

so has the treasurer or cashier, upon things in action stand-

and affairs, the corporation is *prima facie* bound by contracts entered into by him in the name of the corporation. Third parties are not bound by secret limitations of his authority contained in the by-laws. Ætna Explosives Co. *v.* Bassick, 176 App. Div. 577, 163 N. Y. Supp. 917.

Where the evidence makes it plain that the secretary of a corporation has been entrusted with the general management the name with which his office is labeled is of small moment. The inference of authority is to be drawn from the things he was allowed to do. Barkin Construction Co. *v.* Goodman, 221 N. Y. 156, 116 N. E. Rep. 770.

A president of a corporation who is clothed by its charter or by-laws with the management of every department has implied authority to commence an action for conversion of corporate funds. No formal resolution of the board of directors is necessary. Green Bay Fish Co. *v.* Jorgensen, 165 Wis. 548, 163 N. W. Rep. 142.

Where a deed in its body purports to be the deed of a corporation, and its attesting clause recites that it is signed by the corporation, and that its seal is affixed, the authority of its president to execute the same is presumed where he signed his name as such officer after the corporate name, not using the word "by" in connection therewith. Bickart *v.* Henry (Ind. App.), 116 N. E. Rep. 15.

The president of a corporation by virtue of his office merely is not authorized or does not have the power to execute a deed in its behalf conveying its real estate. Bickart *v.* Henry (Ind. App.), 116 N. E. Rep. 15.

An order for goods written upon the letter head of a corporation and signed by one as president is not conclusive evidence that the order is for the corporation. Oil-Well Supply Co. *v.* West Huntsville Cotton Mills Co. (Ala.), 73 So. Rep. 899.

Where the president of a corporation on different occasions advanced money to it for the purpose of meeting its expenses, for which loans he executed notes as president of the corporation payable to himself as an individual, he had implied authority so to act when it was the common knowledge of the directors and stockholders that he was doing so and no objection was ever made. Their acquiescence amounted to a complete ratification of the acts, and the corporation is estopped from attacking the validity of the notes and, in the absence of fraud, creditors of the corporation are also estopped from questioning them. In re Eastman Oil Co., 238 Fed. Rep. 416.

Although there is no direct evidence showing the authority of the president of a corporation to execute an instrument he will be presumed to have had authority so to do if it bears the seal of the

ing in his name as such,[64] or intrusted to his management in the ordinary course of business.[65] The vice-president's

corporation and is properly signed. Stauffer *v.* Koch, 225 Mass. 525, 114 N. E. Rep. 750.

In the case of a non-business corporation the production of a note signed by its president or other officers does not, in itself alone make out a *prima facie* case against the corporation, but the production of a promissory note purporting to have been made and delivered by a business corporation for a consideration and signed by the president thereof in the name of the corporation, will make out a *prima facie* case. Westchester Mortgage Co. *v.* Thomas B. McIntire, Inc., 174 App. Div. 446, 161 N. Y. Supp. 390.

Where a contract is made in the name of a business corporation by its president, which is of such a nature that the directors of the corporation could authorize or ratify it legally, there it is not necessary to show *prima facie* that the contract was in fact authorized by specific authority of the corporation, but the want of authority must be pleaded and proved as a defense. Westchester Mortgage Co. *v.* Thomas B. McIntire, Inc., 174 App. Div. 446, 161 N. Y. Supp. 390.

The president of a corporation has no inherent power by virtue of his office to execute commercial paper for it. Bloomingdale *v.* Cushman (Minn.), 159 N. W. Rep. 1078.

[64] Howard *v.* Hatch, 29 Barb. 297.

Where the evidence shows that the proceeds of a note signed by the treasurer of a corporation in the corporate name, were received by the corporation or that the corporation received the benefit thereof, it may not assert the lack of authority in the treasurer to sign the note. Hubbard *v.* Syenite-Trap Rock Co., 178 App. Div. 531, 165 N. Y. Supp. 486.

The treasurer of a manufacturing corporation has no implied power by virtue of his office to make promissory notes in its name, and no presumption of such power exists. In an action against the corporation upon such a note the plaintiff must show either that the defendant's treasurer did have such authority, or that the defendant was estopped from denying it. Hubbard *v.* Syenite-Trap Rock Co., 178 App. Div. 531, 165 N. Y. Supp. 486.

The authority of a treasurer of a corporation to sign an order on a creditor for money due where such authority has not been questioned by the corporation, will be presumed until proven otherwise. Wright Ogden Co. *v.* Strayer, 165 N. Y. Supp. 569.

[65] Bridenbecker *v.* Lowell, 32 Id. 9. See many of the conflicting cases on the implied powers of cashiers collected in 3 Am. Law Rev. 612.

One is not chargeable with the duties and obligations of a director of a corporation until he is noti-

authority needs some evidence of usage or other sanction.[66] A clerk acting as an officer, in the officer's absence, is not presumed to have any other powers than necessary for the usual and ordinary business in his temporary service.[67] The powere of superintendents and managing agents depend too much upon special usages to be here discussed.[68] A "financial agent" may be presumed empowered to negotiate a loan, but not to state an account.[69]

47. Testimony of Officer or Agent.

The declarations of the officer or agent cannot suffice to show the existence or scope of his authority,[70] but he may be called as a witness to prove it. If implied authority is essential to the cause of action, he should be required to state the facts relied on as raising implied authority, and should not be asked whether or not he had authority to do the act in question, for this is asking for a conclusion.[71] But to disprove alleged express parol authority, the testimony of the president that none was given is competent.[72]

fied of his election as such. Woodman *v.* Butterfield (Me.), 101 Atl. Rep. 25.

[66] Shimmel *v.* Erie Ry. Co., 5 Daly, 396; and see 5 Bosw. 293.

No presumption of authority to sell the lands of a corporation arises from the general character of the agency of one who is vice-president and general manager of a corporation. Hurlbut *v.* Gainor, 45 Tex. Civ. App. 588, 103 S. W. Rep. 409.

[67] Potter *v.* Merchants' Bank, 28 N. Y. 647.

[68] See Abb. Dig. Corp., tit. Agents, Officers, President, etc.

Although the president of a corporation is its general administrative agent, his powers are by no means without limits; and he cannot bind the corporation to a contract unless it is within its corporate powers. West Penn Chemical & Mfg. Co. *v.* Prentice, 236 Fed. Rep. 891, 150 C. C. A. 153.

[69] Grant *v.* Franco-Egyptian Bank, Eng. Ct. of App. 1877.

[70] Stringham *v.* St. Nicholas Ins. Co., 4 Abb. Ct. App. Dec. 315.

Declarations of the vice-president that he had authority to act constitute no evidence against the corporation unless brought to its notice and ratified. Henderson Mercantile Co. *v.* First National Bk., 100 Tex. 344, 99 S. W. Rep. 850, rev'g (Civ. App.) 93 S. W. Rep. 510.

[71] Prov. Tool Co. *v.* U. S. Manuf. Co., 120 Mass. 35; Short Mountain Coal Co. *v.* Hardy, 114 Id. 197.

[72] Graves *v.* Waite, 59 N. Y. 161.

48. Ratification.

Ratification by the corporation or its officers may be proved or presumed in the same manner as in case of agencies for natural persons. It may be inferred from informal acquiescence merely, after notice of the facts,[73] of actual intent to ratify is not essential.[74] And an express ratification

[73] Olcott *v.* Tioga R. R. Co., 27 N. Y. 546, affi'g 40 Barb. 179; People ex rel. Smith *v.* Flagg, 17 N. Y. 584, rev'g 16 Barb. 503; Hoyt *v.* Thompson, 19 N. Y. 207; Abb. Dig. of Corp., tit. Ratification.

When a railroad company does not promptly repudiate the acts of its agents which are brought to its notice, the assumption is that the agent had authority and the corporation will be bound thereby. Freygang *v.* Vera Cruz, etc., R. Co., 154 Fed. Rep. 640, 83 C. C. A. 414.

Misappropriation of corporate funds cannot be ratified as against the corporation by a majority of the stockholders or as against the rights of the creditors by a vote of all the stockholders. Martindale *v.* DeKay, 166 N. Y. Supp. 405.

Misappropriation of the funds of a corporation cannot be ratified as against the rights of creditors by all the stockholders. Such a ratification even by all but one of the stockholders would not be binding upon the corporation itself. E. Moch Co. *v.* Security Bank of New York, 176 App. Div. 842, 163 N. Y. Supp. 277.

The action of a board of directors in granting compensation to agents and employees who are also directors, even though it be ratified and made valid by acquiescence of the stockholders, is subject to review by a court of equity when called in question by a minority stockholder. Sotter *v.* Coatsville Boiler Works (Pa.), 101 Atl. Rep. 744.

Where information has been withheld from minority stockholders as to the acts of its offices no ratification of such acts can be made by the other stockholders alone. Du Pont *v.* Du Pont, 242 Fed. Rep. 98.

[74] Hazard *v.* Spears, 2 Abb. Ct. App. Dec. 353.

The acceptance of the benefits of the unauthorized acts of an agent constitute a ratification by the corporation, whether it intended to ratify or not. Bauersmith *v.* Extreme Gold Mining, etc., Co., 146 Fed. Rep. 95.

Where it appeared that an officer of a corporation had undertaken to renew a lease, and the corporation continued to occupy the premises and paid rent pursuant to the renewal agreement, the adoption or ratification of the contract was sufficiently shown. Fudickar *v.* Glenn, 237 Fed. Rep. 808, 151 C. C. A. 50.

is competent, although not communicated.[75] But the ratification may be rebutted by evidence either of actual mistake or of incomplete knowledge of the facts.[76]

VII. ADMISSIONS, DECLARATIONS AND NOTICE

49. Admissions and Declarations of Members.

The admissions and declarations of a member of a corporation, even if made at a corporate meeting, are not competent evidence against the corporation, unless made concerning some transaction in which such member was the authorized agent of the corporation;[77] and in such case their competency depends on the rules applicable to the admissions of officers and agents.

50. Admissions and Declarations of Officers and Agents Authorized to Speak.

Evidence of declarations and admissions made by offi-

[75] Dent *v.* N. A. S. Co., 49 N. Y. 390.

Evidence of knowledge, actual or constructive, on the part of the board of directors is sufficient to warrant the finding that the corporation was bound on the contract. Smith *v.* Bank of New England, 72 N. H. 4, 54 Atl. Rep. 385.

[76] Owensboro Savings Bank *v.* Western Bank, 4 Law & Eq. 695, and cases cited, 47 N. Y. 199.

There can be no ratification by the board of directors unless they have full and complete knowledge of the terms and conditions of the contract proposed to be ratified. Conqueror Gold Mining, etc., Co. *v.* Ashton, 39 Colo. 133, 90 Pac. Rep. 1124.

Where an officer and general manager of a corporation imposes upon it obligations forbidden by its charter he is liable for the damages, if any, resulting to the company therefrom. His acts could only be ratified by the unanimous action of all the stockholders after full knowledge of the facts, and the burden is upon him to show such ratification. Fergus Falls Woollen Mills Co. *v.* Boyum (Minn.), 162 N. W. Rep. 516.

[77] 2 R. S. N. Y. 407, § 80; REDFIELD, in 1 Greenl. Ev., 13th ed. 206, § 175; 1 Phill. Ev. 487, note 134, 30 Me. 157.

Private individual knowledge of an officer of a corporation acquired in the transaction of his own business while dealing as if he had no official relation to the corporation, will not operate as notice to the corporation. Bank of Florala *v.* American Nat. Bank (Ala.), 75 So. Rep. 310.

cers and agents of corporations is competent against the corporation in two classes of cases. First, when the declarations were made by an officer or agent in response to timely inquiries properly addressed to him, and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information.[78] Upon this principle, what is said by the proper officer or agent to receive and act on a demand or complaint—whether it be the secretary or treasurer who signed a money obligation, and to whom it is presented for payment;[79] or the general superintendent or managing agent to whom complaint is duly made of a nuisance caused by the company's property, or of the conduct of its servants[80] or by the proper conductor, baggage master, or station agent, on inquiries made with resonable prompitude for lost baggage or freight;[81] or what is said upon the like inquiry by a subordinate to whom the inquirer is referred for information by the principal officer of the department[82]—is competent against the corporation.

[78] Thus, in a bank's action on a note held by it, an admission by the president that the note had been paid, made to the defendant, in consequence of an examination of accounts, caused by the president's asking for payment and the defendant's insisting that he had already paid, is competent evidence for the defendant, as having been made while acting within the scope of a bank president's ordinary powers. Bank of Monroe *v.* Field, 2 Hill, 445, Nelson, Ch. J. Compare Horrigan *v.* First Nat. Bank, 5 Reporter, 188. A paymaster of a railroad company is a servant, and not an agent, of the company, he having no discretion, and his duties being purely ministerial, and therefore his loose declarations are not binding upon the company. Baltimore, etc., Relief Ass'n *v.* Post, 122 Pa. St. 579, 9 Am. St. Rep. 147, 15 Atl. Rep. 885.

[79] Pusey *v.* N. J., etc., R. R. Co., 14 Abb. Pr. (N. S.) 441.

[80] McGenness *v.* Adriatic Mills, 116 Mass. 177; Malecek *v.* Tower Grove R. Co., 57 Mo. 17. Evidence of custom of agent of receiving railroad not to receive freight unless in good condition, and to check it "all right," if in good condition, is admissible to prove that goods were in good condition when received by him. Knott *v.* Raleigh, etc., G. R. Co., 98 N. C. 73, 2 Am. St. Rep. 321, 3 S. E. Rep. 735.

[81] Morse *v.* Conn. Riv. R. R. Co., 6 Gray, 450.

[82] Gott *v.* Dinsmore, 111 Mass. 51.

But the officer or agent must be one having the duty to perform. A communication by an officer of what others have done, on an application he could not or would not act on, is not within the rule.[83] Thus, in an action on a draft, drawn by one officer of a corporation and accepted by him in the name of the corporation, the declarations of another officer thereof, made after such acceptance, are inadmissible in evidence to show the former officer's authority to bind the corporation.[84] Evidence that a third person by his declarations and acts assumed to be the agent of a corporation does not amount to proof of such agency.[85]

51. Admissions and Declarations Made as Part of the Res Gestæ.

Again, the declarations and admissions of officers and agents may also be proved against the corporation as part of the *res gestæ*, but only when made during the agency, and in regard to a transaction depending at the very time, so as to constitute a part of the act.[86] They cannot be admitted on this ground, if subsequently made, as a narrative of a past act, even though they relate to the official duty of the declarant, or were intended in the interest of the corpora-

[83] Bank of Grafton *v.* Woodward, 5 N. H. 301; Soper *v.* Buffalo, etc., R. R. Co., 19 Barb. 310.

[84] Rumbough *v.* Southern Improvement Co., 112 N. C. 751, 34 Am. St. Rep. 528, 17 S. E. Rep. 536.

[85] Eaton *v.* Granite State Prov. Ass'n, 89 Me. 58, 35 Atl. Rep. 1015.

[86] Anderson *v.* Rome, etc., R. R. Co., 54 N. Y. 334, and cases cited. Compare Norwich Transp. Co. *v.* Flint, 13 Wall. 3; Baptist Ch. of Brooklyn *v.* Brooklyn Fire Ins. Co., 28 N. Y. 153; Superintendent of Cortland *v.* Superintendent of Herkimer, 44 N. Y. 22. A corporation cannot invoke § 829, Code Civ. Pro., in order to exclude testimony of a conversation had by a party with its managing director, as that section has no application to personal transactions with deceased officers or agents of a corporation. Flaherty *v.* Herring-Hall-Marvin Safe Co., 22 Misc. (N. Y.) 329.

A telephone conversation admitted as part of *res gestæ*. General Hospital Society *v.* New Haven Rendering Co., 79 Conn. 581, 65 Atl. Rep. 1065, 118 Am. St. Rep. 173, 9 Ann. Cas. 168.

tion.[87] Hence the declarations of members of a board or committee as to what the board or committee have done, are not competent.[88] It must affirmatively and explicitly appear that the declaration was made at the time, and not afterwards, or its reception in evidence will be error.[89] The rule excludes acts done as well as declarations made subsequent to the controversy.[90]

52. Admissions and Declarations before Incorporation.

Where a corporation adopts and acts on the negotiations and inchoate contracts of the promoters who formed it, their acts and declarations, so far as they would have been competent against themselves, are competent against the cor-

[87] First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278; Goetz *v.* Bank of Kansas City, 119 U. S. 551, 560; Barker *v.* St. Louis, etc., R. Co., 126 Mo. 143, 47 Am. St. Rep. 646, 28 S. W. Rep. 866; Merchants' Nat. Bank *v.* Clarke, 139 N. Y. 314, 319, 34 N. E. Rep. 910; Cosgray *v.* New England Piano Co., 22 App. Div. (N. Y.) 455; Gilmore *v.* Mittineague Paper Co., 169 Mass. 471, 48 N. E. Rep. 623; East Tennessee Telephone Co. *v.* Simms' Ex'r, 99 Ky. 404, 36 S. W. Rep. 171. "Here, it is true, the declarations introduced were those of the president. But the name of the officer cannot change the rule. It is a question not of name but of authority. Officers of corporations, from the highest to the lowest, are only the agents of such corporations. What acts they perform and what contracts they make for their principals are binding if within the scope of their particular authority, express or implied; but the scope of the authority of one officer or agent, as to a past transaction at least, cannot be proved by the unsworn declaration of another officer or agent." Rumbough *v.* Southern Improvement Co., 112 N. C. 751, 34 Am. St. Rep. 528, 17 S. E. Rep. 536. Declarations of a servant are more jealously guarded as evidence against the principal than are those of an agent. Baltimore, etc., Relief Ass'n *v.* Post, 122 Pa. St. 579, 9 Am. St. Rep. 147, 15 Atl. Rep. 885.

[88] Soper *v.* Buffalo, etc., R. R. Co., above; Jex *v.* Board of Education, 1 Hun, 157. Compare, however, as to fraud promoted by individual members, Marigny *v.* Union Bank, 5 Rob. (La.) 354.

[89] Whitaker *v.* 8th Ave. R. R. Co., 51 N. Y. 299, rev'g 5 Robt. 650.

[90] Clapper *v.* Town of Waterford, 131 N. Y. 382, 390, 30 N. E. Rep. 240.

poration. So where a corporation is formed by the consolidation of other companies, thereby succeeding to their rights, the previous admissions and declarations of the previous corporation binding on itself in respect to such right, are competent, though slight evidence against the new corporation.[91] Such cases are not regarded as falling within the principle applicable to assignor's declarations, for there is an identity of interest.[92] The new organization is the same actual entity under a new legal form.

53. Notice.

Notice to a corporation can be proved by showing notice given either, 1, to its officer or agent, who was at the time acting for the corporation in the matter in question, and within the range of his authority or supervision; or, 2, to one whose duty it was to receive and communicate such information to his principal; or, 3, to the board of directors, or a previous board;[93] but not to a single director, unless he is the one charged with the duty to be affected by the notice, or acting in the board at the time, upon the matter in ques-

[91] Phil., etc., R. R. Co. *v.* Howard, 13 How. (U. S.) 333.

Declarations and admissions of the promoter of a corporation made during negotiations by him are admissible against the subsequently formed corporation. Chilcott *v.* Washington State Colonization Co., 45 Wash. 148, 88 Pac. Rep. 113.

[92] See ch. 1, p. 15.

[93] Fulton Bank *v.* N. Y. & Sharon Canal Co., 4 Paige, 127; s. p., 34 N. Y. 30, 84; Whart. Ag., §§ 184, 673; Abb. Dig. of Corp., tit. Notice. Where the officers or agents of a public corporation have no power or duties with respect to a given matter, their individual knowledge or the individual knowledge of the inhabitants or voters, does not bind or affect the corporation. The mayor is chief executive officer of the city, and notice to him of a nuisance is sufficient, when it would not be to the clerk, who is only a recording officer, not authorized to act upon the notice. 1 Dill. M. C. 296, note.

Where the officer of a corporation is engaged in doing an act which is against the corporation's interest, his knowledge cannot be imputed to the corporation. Brooklyn Distilling Co. *v.* Standard Distilling, etc., Co., 120 N. Y. App. Div. 237, 105 N. Y. Supp. 264.

tion.[94] For the purpose of proving such notice, evidence of the declarations and admissions of the officer or agent in question is competent, within the limits previously stated.[95]

VIII. BOOKS AND PAPERS

54. Corporation Books and Papers as Evidence.

The traditional statement found in many authorities,[96]

[94] North Riv. Bk. *v.* Aymar, 3 Hill, 262; Bank of U. S. *v.* Davis, 2 Id. 451. Compare U. S. Ins. Co. *v.* Shriver, 3 Md. Ch. 381.

Notice to a director or stockholder before incorporation will not affect the corporation. If notice is given to a director it must be shown that it is his proper business to attend to the matter in reference to which the notice is given. Reed *v.* Munn, 148 Fed. Rep. 737, 80 C. C. A. 215.

Notice to a director when acting solely in his private interest, is not notice to the corporation of which said director is an officer. Allmon *v.* Salem Building & Loan Ass'n, 275 Ill. 336, 114 N. E. Rep. 170.

The mere fact that a director of a corporation has knowledge of a fact does not charge the corporation with such notice. To do so, the director must have acquired the knowledge officially as a member of the board and in the course of business as a director or for the purpose of being communicated by him to the board. Anthony *v.* Jeffress, 172 N. C. 378, 90 S. E. Rep. 414.

[95] Wilson *v.* McCullough, 23 Pa. St. 440; Chapman *v.* Erie Ry. Co., 55 N. Y. 579, rev'g 1 Supm. Ct. (T. & C.) 526; Commercial Bank *v.* Wood, 7 Watts & S. 89.

[96] See 1 Greenl. Ev. 549, § 493, 2 Phill. Ev. 295, notes 4 and 343, Rosc. N. P. 228, 231, 1 Whart. Ev. 626, § 662; Starkie, 412, 2 Tayl. Ev. 1519. The initial authority usually cited is Mayor of London *v.* Lynn, 1 H. Blacks. 214. The American, and I presume the present English law, would now admit such books as competent towards showing that the corporation made the demands of toll, but would require other evidence that the strangers had submitted to those demands, in order to prove the usage. In Owings *v.* Speed, 5 Whart. 420, it was settled that the books of a corporate body, established by the legislature for a *public* purpose—such as trustees of proprietary lands—are competent evidence of the proceedings of the body therein recorded, and ought to be admitted whenever those acts are to be proved (MARSHALL, C. J.); and the same principle is constantly applied not only to the statutory records, but also to the deliberative minutes of private corporations, within the limits indicated in the text.

that corporate books are not evidence against strangers, was not originally a sound generalization, and is no longer a safe guide in practice. Considered for purposes of evidence, the records of a corporation are chiefly of three classes:

1. Statutory records—or those required by law for the purpose of preserving exclusively written evidence of important acts—such as subscription books for stock, registers of shareholders, annual reports, etc., and their quality as evidence depends largely upon the statutes by which they are required.

2. Minutes of deliberative proceedings—which are properly made at the meetings of the corporation and of boards and committees—and the quality of these as evidence depends on common-law rules peculiar to the records of bodies of corporate form, but modified often by the statute governing the corporation.

3. Account books and other books of entries kept by the officers or agents of the corporation, as records of transactions in the course of their agency, such as would be kept by the agents of an individual or partnership carrying on a like business; and these account books are subject to the common-law rules applicable generally to the accounts of individuals and partnerships.

55. Statutory Records.

The mere fact that a statute requires a record to be made does not make the books the only evidence,[97] but where the

[97] Inglis *v.* Great N. Ry. Co., 16 Eng. L. & Eq. 55; s. c., 1 McQ. H. L. 112, 119; Bank of U. S. *v.* Dandridge, 12 Wheat. 70. "In addition to the evidence authorized by the statute, the original books would be admissible, and in case of loss or destruction the contents might be proven, and under certain circumstances, where there is an omission to make any record on the subject, parol evidence may be heard." Ratcliff *v.* Teters, 27 Ohio St. 66; Bank of United States *v.* Dandridge, 12 Wheat. 64. "The original books, and the evidence provided for by sections 15 and 18 of the statute, are original evidence, and evidence of a secondary nature is not to be resorted to where there is in the possession of a party evidence of a higher and more satis-

record itself constitutes the act—as in the case of a subscription for stock in the commissioners' books, or the making an annual report, or the adoption of a municipal by-law—the fact to be proved, when directly in issue, is the existence of the statutory record; and consequently, if the act is competent to be proved, between whatever parties, production of the statutory record is a competent mode of proof. And parol evidence cannot be received in a collateral proceeding to contradict the records of a public corporation, which are required by law to be kept in writing, or to show a mistake therein as recorded.[98]

56. Minutes of Proceedings.

Whenever the action of a deliberative body—whether that of the corporation at large, its board, or a committee—is competent to be proved, either in favor of or against the corporation, its officers, members, or strangers, the contemporaneous corporate record of their action is competent,[99] though not always alone sufficient. Thus the act

factory character. Proof of the papers, entries, and records of a private corporation in possession of that corporation cannot be shown by an opinion or conclusion of a witness. The evidence must be primary, original evidence." Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 45 Am. St. Rep. 124, 40 N. E. Rep. 462.

The usual evidence of who are stockholders in a corporation is the stock record of the corporation. One whose name appears on the corporate records as a stockholder is *prima facie* subject to the liabilities of a stockholder, but this is not conclusive. If he voluntarily assumes the relation of stockholder, and procures or permits his name to be recorded as such on the corporate records, he fixes his own status and is liable for the conquences. Bartlett *v.* Stephens (Minn.), 163 N. W. Rep. 288.

[98] Everts *v.* District Township of Rose Grove, 77 Iowa, 37, 14 Am. St. Rep. 264, 41 N. W. Rep. 478.

[99] This is the modern rule founded in reason, and essential to public convenience. See cases cited under this and following paragraphs of this chapter, and Smith *v.* Natchez Steamboat Co., 2 Miss. (1 How.) 492, Rosc. N. P. 228, 231; Bank of U. S. *v.* Dandridge, 12 Wheat. 64; Grant *v.* Henry Clay Co., 80 Pa. St. 208; Schell *v.* Second Nat. Bank, 14 Minn. 43; Rayburn *v.*

of organizing may be proved in favor of the corporation or creditors, and against members [1] and strangers,[2] by the books; and in an action between strangers, one claiming a professional degree may prove it by the books of the college that granted it,[3] and one claiming as assignee of a corporation may prove the assignment by the corporate books.[4] So where it is competent, in an action against a corporation for negligence, for it to prove its own precautions taken by the appointment of a committee, etc., the books are competent

Eldod, 43 Ala. N. S. 700. As previously indicated, numerous dicta, and perhaps some authority, to the contrary will be found in the reports. See for instance, Jones *v.* Trustees of Florence, 46 Ala. 626. The maxim that the books of a corporation are not competent in its favor against a stranger, to establish a matter of private right, is undoubtedly correct so far as it applies to the corporate accounts. That which is peculiar in the competency of statutory records and corporate minutes, may be illustrated thus. The diary of an *individual* is evidence against him but not in his favor. He may often prove an act of his own in his own favor, but he cannot prove it by showing an entry of the fact in his own books. But *corporate minutes* of deliberative proceedings are competent, not only against the corporation, but against any person whatsoever, if the deliberative act which is the subject of the record, is competent against him. The reason of the rule is that the entry of the individual is a mere *declaration;* the vote of a corporation is an *act.* Often, however, the corporate act must be connected with other proof to complete its competency.

Records of transactions of boards of directors of a corporation may be proved by the production of the original records. Cantwell *v.* Welch, 187 Ill. 275, 58 N. E. Rep. 414.

Minutes written on a sheet of paper signed by the secretary and initialed by the president are admissible, even though not transcribed into a book. Chott *v.* Tivoli Amusement Co., 114 Ill. App. 178.

[1] Ryder *v.* Alton, etc., R. R. Co., 13 Ill. 523; Penobscot, etc., R. R. Co. *v.* Dunn, 39 Me. 90; Highland Turnpike Co. *v.* McKean, 10 Johns. 156; Coffin *v.* Coffin, 17 Me. 442.

[2] For instance, even in an action for tolls. Duke *v.* Cahawba Nav. Co., 10 Ala. N. S. 82.

[3] Moises *v.* Thornton, 8 T. R. 303.

[4] Edgerly *v.* Emerson, 23 N. H. 566.

The stock book is evidence of the right to vote the stock shown to be in the name of its owner. Walsh *v.* State (Ala.), 74 So. Rep. 45.

for this purpose.[5] It is very commonly the case, that the act of a private corporation is not competent unless shown to have been communicated to the other party, and in such case the books are competent to show the act, provided other evidence of communication is given to connect. The first question therefore to be determined is, whether the corporate act is competent under the issue, and between the particular parties; if so, the minutes may be resorted to as evidence of it.[6]

It is the duly authenticated record in the books of the corporation, which is the best evidence, and the rough notes of the meetings are as much secondary evidence as the testimony of witnesses, and, in the absence of an authenticated record, any competent secondary evidence may be admitted to show what the act of the board was.[7]

Of course, the books of municipal corporations are competent as evidence of the election of their officers, and of other corporate proceedings there recorded,[8] and are thus competent between strangers.[9]

57. Against whom Evidence of Corporate Acts is Competent.

In general, a resolution or other deliberative act of a

[5] Weightman *v.* Corporation of Washington, 1 Black, 39, 46.

[6] This principle is expressly recognized by the act as to foreign corporations. N. Y. Law, 1869, c. 589.

Minutes of the proceedings of the board of directors are competent evidence on the question of the ratification of the acts of its officers and agents. Teeple *v.* Hawkeye Gold Dredging Co., 137 Iowa, 206, 114 N. W. Rep. 906.

[7] Boggs *v.* Lakeport Agricultural Park Ass'n, 111 Cal. 354, 43 Pac. Rep. 1106.

Ordinarily the official acts of a corporation should be shown by the minutes or other records kept, but where no records are kept oral evidence is admissible in their stead. Fields *v.* Bullington (Ga. App.), 92 S. E. Rep. 653.

[8] But the entry relied on must be the primary one; and the record of an incidental and secondary proceeding is not the best evidence of the date and performance of the primary act which should have preceded it. See Litchfield *v.* Vernon, 41 N. Y. 123; Post *v.* Logan, 1 N. Y. Leg. Obs. 59.

[9] Deming *v.* Roome, 6 Wend. 651.

corporation may be proved in its own favor, or in favor of a stranger, against any one who takes issue upon it—as where the existence of a corporation, depending on organization under a general law, or on acceptance of a charter, is denied, or where it is denied that the body had conferred authority on officers or agents—and therefore in such cases the minutes are competent. So such an act is competent as between its members, in respect to all matters within the corporate tie that unites them; and as between them the corporate books are of the nature of public books.[10] Such an act is also, in general, competent against a member and in favor of the corporation or its creditors, as to matters within the same limits, as for instance where a receiver or a creditor, after judgment against the corporation, sues a member or officer upon his subscription or individual liability. The mere fact that a person is a director or stockholder of a corporation does not make him chargeable with actual knowledge of its business transactions or of entries made in its books.[11] The business transactions of a corporation with its members and trustees or directors are on the same footing as those with strangers, and business entries in its books of account are no more evidence against them than against strangers.[12] And

[10] 1 Greenl. Ev. 548, § 493. By-laws are evidence against an agent or servant who had opportunity to know and a duty to obey them. See Ang. & A. on Corp. 347, § 324. "The stock exchange is a private corporation, and the weight of authority and the better rule is, that the entries in its books, as independent evidence against third persons, must stand upon the same footing as entries made in the books of companies, partnerships, and individuals." Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 30 Am. St. Rep. 87, 9 So. Rep. 299.

The by-laws of the corporation are admissible in evidence to show that a contract had not been executed in the manner prescribed by the by-laws. Northwestern Packing Co. *v.* Whitney, 5 Cal. App. 105, 89 Pac. Rep. 981.

[11] Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. Rep. 1046.

Mandamus will not lie at the instance of stockholder to enforce the right to inspect corporation books, where he shows no evidence of any demand and refusal of such inspection. Rowe *v.* Border City Garnetting Co. (R. I.), 101 Atl. Rep. 223.

[12] Id. Compare Blake *v.* Gris-

books of a private corporation are not admissible as original evidence against third persons of facts therein stated, when the person who made the entries in such books is alive, and may be, but is not called upon to testify concerning the facts detailed therein.[13]

58. The Minutes not Exclusively the Best Evidence.

The records of the corporate proceedings are not generally called for or produced on the trial.[14] The principle now commonly received in those jurisdictions where the law of corporations is most developed is that where their proceedings are collaterally or incidentally in issue, parol evidence is equally primary; but on the contrary, the record or a proper copy should be deemed the best evidence, to be produced or accounted for before parol evidence can be adduced, whenever the action or defense is founded directly on the act or proceeding in question,[15] or when a written act or resolution

wold, 103 N. Y. 429, 9 N. E. Rep. 434, see § 66.

A corporation is chargeable with the knowledge and conduct of its officers intrusted with the transaction of its business, as well as with notice of the entries on its books of account. Donnelly *v.* Levers & Sargent Co. (Mass.), 115 N. E. Rep. 252.

[13] Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 30 Am. St. Rep. 87, 9 So. Rep. 299.

[14] See Partridge *v.* Badger, 25 Barb. 146. Chief Justice REDFIELD says: "In practice it is not one time in ten where the record books of a corporation are ever referred to in court, unless to fix a date or the precise form of a vote upon which a power is made to depend." 1 Redf. on Ry. 228 (3).

The minutes of a corporation are insufficient to establish a corporate agreement where they merely show that a motion relating to the agreement in question was made and seconded, but do not show that it was voted upon or adopted. Asbury *v.* Mauney (N. C.), 92 S. E. Rep. 267.

[15] As in case of a prosecution on a municipal ordinance, see 1 Dill. M. C. 443, § 355; compare Woolsey *v.* Village of Rondout, 4 Abb. Ct. App. Dec. 639, 642, IV; or a suit for relief against fraudulent representations as to the organization or condition of the corporation. Warner *v.* Daniels, 1 Woodb. & M. 106; or an action on a contract made by a resolution embodying terms of proposal, followed by assent on the part of the contracting party. Paragraph 30, above.

Under c. 53, § 52 of the Code

is pleaded and in issue, or when the contents of the record were communicated and the terms of the communication is the material fact. In other words, the primariness of the minutes does not depend on their being corporate records, but on general principles applicable to other classes of papers.[16] In a suit against a corporation the minutes of the board of directors are conclusive against it, and testimony is inadmissible on its behalf to prove that certain individual directors under the corporation were not to be bound by the resolution as written.[17] Where no records are kept or the proceedings are not recorded, parol evidence is admissible to show what was resolved upon, or the vote by which it was carried.[18]

of West Virginia requiring corporations to keep records of their proceedings, such records are the best evidence of the facts therein recorded, and oral evidence is inadmissible, where no explanation is given for not producing the records. Ramsdell *v.* National Rivet, etc., Co., 104 Fed. Rep. 16.

[16] Conflicting authorities, too numerous to be cited here, abound. The incertitude of opinion may easily be seen by comparing 1 Whart. Ev., § 77, and Id., §§ 661, 663, 1 Redf. on Ry. 228 (2), and Ang. & A. on C. 66, § 83, p. 394, § 368; Field on Corp., § 224; Partridge *v.* Badger, 25 Barb. 146, and Clark *v.* Farmers' Woolen, etc. Co., 15 Wend. 256, and cases cited; Lumbard *v.* Aldrich, 8 N. H. 31, and Edgerly *v.* Emerson, 23 N. H. 566, and see 36 Id. 138.

[17] McGowan *v.* Lincoln Park, etc. Co., 181 Pa. St. 55, 37 Atl., Rep. 1119. See also State *v.* Main, 69 Conn. 123, 37 Atl. Rep. 80.

If minutes of a corporate meeting were written out, they may be proved by any witness who can testify to their correctness, whether or not he was a secretary *de jure*. If no minutes were preserved, then the transactions may be proved by any one who was present and can recall them either from memory or by the aid of notes taken by him at the time. Edward Davis, Inc., *v.* Adler, 164 N. Y. Supp. 65.

[18] Zalesky *v.* Iowa State Ins. Co., 102 Iowa, 512, 514–515, 70 N. W. Rep. 187, 71 N. W. Rep. 433; Ten Eyck *v.* Railroad Co. (Mich.), 41 N. W. Rep. 905; Cram *v.* Bangor House Proprietary Co., 12 Me. 354; Bank *v.* Dandridge, 12 Wheat. 69; Dillon Mun. Corp. (4th ed.), §§ 300, 301; Powesheik County *v.* Ross, 9 Iowa, 511; Athearn *v.* Independent District, 33 Iowa, 105. See also Lawson's note to Wertheim *v.* Cont. Ry. & Trust Co., 15 Fed. Rep. 716.

Where no minutes have been kept of the proceedings of a corporation parol evidence may be

59. Authentication of Corporate Books when Produced.

To introduce the corporate books in evidence, their character as such must be properly shown by testimony, unless conceded.[19] For this purpose it is usual to call the secretary or other officer who made the record; but this is not essential,[20] for without him they may be admitted on their production by a witness who can testify of his own knowledge that they are the books of the corporation; that they have been regularly kept by the proper officer, or by some person in his necessary absence; that they come from the proper custody; and that he knows of his own knowledge that the entries offered are correct records of the transactions they profess to record,[21] or, in lieu of such knowledge, other competent presumptive evidence, such as—that the entries are in the hand-

given as to what was transacted. Birmingham R., etc., Co. *v.* Birmingham Traction Co., 128 Ala. 110, 29 So. Rep. 187.

In the absence of a record, the adoption of a resolution by the board of directors may be proved by persons who attended the meeting adopting it. Hendrie, etc., Mfg. Co. *v.* Collins, 29 Colo. 102, 67 Pac. Rep. 164.

[19] If produced by the corporation on notice, proof of authenticity is necessary as against a stranger; but is not necessary as against the corporation or its members, nor between it and one who is a party to the paper produced or claims under it, or the State proceeding to enforce rights under it. Commonwealth *v.* Woelper, 3 S. & R. 43.

[20] Hathaway *v.* Inhabitants of Addison, and other cases in next note. The *contrary* held where the corporation offered their own books without producing or accounting for the recording officer. Union Gold M. Co. *v.* Rocky M. Nat. Bank, 2 Col. Ter. 565.

[21] Highland Turnpike Co. *v.* McKean, 10 Johns. 154; St. Lawrence Mut. Ins. Co. *v.* Paige, 1 Hilt. 430; Hathaway *v.* Inhabitants of Addison, 48 Me. 440, 2 Phil. Ev. 442, 1 Whart. Ev., § 639, 1 Greenl. Ev., § 483, and cases cited. The minutes of the subscription commissioners may be proved by their secretary. Ryder *v.* Alton, etc, R. R. Co., 13 Ill. 523. The books dedicated to the use of the corporate records are competent, though the original volumes were purchased, and are claimed, as the individual property of a member. State *v.* Goll, 32 N. J. L. 285, and see Sawyer *v.* Baldwin, 11 Pick. 492. Documents may also be produced by a corporator who has custody of them. Stark. Ev. 456.

writing of a person proved to be the proper recording officer,[22] or that the book containing them has been handed down in actual and continuous use in the corporation, as the guide and authority for its officers.[23] Such evidence being given, it is presumable that the entries were made at the dates they bear; but if grounds of suspicion appear, the party should be provided with evidence on that point.[24] An erasure will be presumed to have been made before the entry was signed.[25] The degree of this proof is a preliminary question for the court. More latitude is allowable in the proof, in proportion as the books are ancient.[26] The signature of the appropriate officers to the minutes of proceedings even of a public corporation or municipal board, though required by law, is not in the nature of an official certificate of the matters stated in the minutes; but rather an attestation of their authenticity; and though they lack the required signature, their authenticity may be proved by testimony.[27] The same principle applies to the records of a private corporation.

It is competent to rebut the evidence of authenticity by any proper evidence, for instance, by producing and proving another set of records, incompatible with those first put in.[28]

60. Rough Minutes.

Rough notes taken by the recording officer, at the meeting, for the purpose of being afterward extended in the books, are, until so extended, competent in place of a formal

[22] If the minutes were made by a former clerk, since deceased, his handwriting, and the fact that he was the proper recording officer, must both be proved by extrinsic evidence. Highland Turnpike Co. *v.* McLean, 10 Johns. 153; Owings *v.* Speed, 5 Wheat. 427.

[23] Union Bank *v.* Ridgely, 1 Har. & G. 410.

[24] Haynes *v.* Brown, 36 N. H. 567.

[25] Rosc. N. P. 141, citing 15 Ir. Ch. R. 405. But see 1 Phil. Ev. 606, 2 Id. 458, 21 N. Y. 541.

[26] Union Canal Co. *v.* Lloyd, 4 Watts & S. 398, and see 1 Tayl. Ev. 105.

[27] People *v.* Eureka Lake Co., 48 Cal. 143; West Springfield *v.* Root, 18 Pick. 318.

[28] Goodwin *v.* U. S. Annuity, etc., Co., 24 Conn. 600.

record;[29] and, if lost without being entered, parol evidence of the transactions of the meeting is competent.[30] But, after the formal record has been made out from them by the proper officer, within a reasonable time, that becomes the original record, and the rough minutes are no longer the best evidence.[31]

61. Competency of Copies.

Where the entries are of a public character, so that the public generally have a right to resort to them, the court will not require their production, but allows, in lieu, the production of a copy by a witness who can swear to its accuracy,[32] or a copy certified by some officer who is made by law a certifying officer for the purpose.[33] Entries not of such a public nature cannot be proved by copy at common law,[34] unless the copy is one that has been issued or received as such by the corporation or other party against whom it is adduced.[35] By a recent statute in New York, the books of a foreign corporation are admissible in evidence to prove transactions of such corporation in *any* court of the State.

[29] Waters *v.* Gilbert, 2 Cush. 27.

[30] Wallace *v.* First Parish, 109 Mass. 264; Protho *v.* Minden Seminary, 2 La. Ann. 939.

[31] Board of Education *v.* Moore, 17 Minn. 422.

[32] A seal will not authenticate it. Stark, Ev. 457, n.; Whitehouse *v.* Bickford, 29 N. H. (9 Fost.) 471.

A copy of a carrier's printed schedule of freight rates on file with the Interstate Commerce Commission is the best evidence of such rates. Oral evidence in regard to them will not be received. Sloop *v.* Wabash R. Co., 117 Mo. App. 204, 84 S. W. Rep. 111.

[33] Commonwealth *v.* Chase, 6 Cush. (Mass.) 248.

[34] A copy of a vote of a corporation is not competent evidence of such vote, unless either sworn to or certified by some person who is made by law a certifying officer for such purpose. Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178, Rosc. N. P. 141. Where the law requires a public record to be kept by officers, which all persons interested are entitled to a copy of, some courts, for reasons of convenience, have received a copy authenticated by the officers. Eastport *v.* East Machias, 35 Me. 404.

[35] Atlantic Mut. Fire Ins. Co. *v.* Sanders, 36 N. H. 252, 1 Redf. on Ry. 467; State Bank *v.* Ensminger, 7 Blackf. (Ind.) 105.

And copies of such books may be proved by deposition on commission, or by any other competent evidence, on giving ten days' previous notice, except in favor of the corporation where it is a party.[36]

62. Reports.

An official statement or report received by the corporation or board from one acting as officer, and accepted and adopted by them, is competent evidence against the corporation, and those bound by its acts, without futher proof of the appointment of the officer;[37] but a report to a corporation or board is not made admissible in evidence against it by the mere fact that it was received and "accepted" by it,[38] except for the purpose of charging it with notice of the contents.

63. Foundation for Secondary Evidence.

Where proof of loss is required, as it may be when the corporation offers secondary evidence in its own behalf, testimony of the proper custodian, that he has the control of all the books and papers of the company, and has made most diligent search for the book, and inquiry of every person concerned with the matter, but could get no clue to it, is enough,[39] and if the proper custodians testify to their proper search for a book which they had allowed to be removed, and the inability of themselves and of the person to whom it was lent to find it, and their ignorance as to where it is,

[36] L. 1869, c. 589, amending § 1 of L. 1863, c. 206; repealed by L. 1909, c. 65, and superseded by N. Y. Code Civ. Pro., §§ 929–931. The Illinois act admitting copies, has been held merely to make certified copies admissible in lieu of originals, and not to make such books and records evidence as were not so previously. Pittsfield, etc., Plank Road Co. *v.* Harrison, 16 Ill. 81. As to records out of the jurisdiction, proved by deposition, see 4 Allen, 122, and King *v.* Enterprise Ins. Co., 45 Ind. 43, 59.

[37] Partridge *v.* Badger, 25 Barb. 172.

[38] 1 Dill. M. C. 357, § 242; see also paragraph 36.

[39] Graff *v.* Pittsburgh, etc., R. R. Co., 31 Pa. St. 494; Board of Education *v.* Moore, 17 Minn. 412.

this is sufficient in the absence of suspicious circumstances, without calling such third person.[40]

64. Notice to Produce.

A person not entitled to the custody of the books or papers is not bound, as against the corporation, to call its officer as a witness before offering secondary proof against it, but may give its attorney notice to produce,[41] and, in default of compliance, may prove the contents by secondary evidence. A written authority of an officer or agent, if delivered to him by the corporation as his evidence of appointment, should be called for by *subpœna duces tecum* to him; but if simply entered in their records as the act of the corporation, although kept in his custody, should be called for by notice to produce.[42] The failure of the corporation to produce its books upon due notice entitles the adverse party to favorable presumptions in aid of his secondary evidence; [43] but it does not preclude them from producing the books on their own behalf for another matter.[44]

65. Parol Evidence to Vary Corporate Minutes.

Where the record of meetings of a municipal corporation is kept pursuant to law, parol evidence, although admissible to apply the language to its subject-matter, is not competent to enlarge or contradict the terms or meaning of proceedings which are recorded; [45] and in general, where the law, for the purpose of preserving authentic evidence, prescribes the keeping of official minutes of public proceedings of a corporate nature, parol evidence is not competent to con-

[40] Partridge *v.* Badger, 25 Barb. 173, S. P., Indianpolis, etc., R. R. Co. *v.* Jewett, 16 Ind. 273.

[41] Thayer *v.* Middlesex Mutual Ins. Co., 10 Pick. 326, 1 Redf. Rw. 228 (2).

[42] Westcott *v.* Atlantic Silk Co., 3 Metc. 291.

[43] SHAW, Ch. J., Thayer *v.* Middlesex (above); Wylde *v.* Northern Rw. Co., 53 N. Y. 156. Compare 18 Wall. 544.

[44] Tyng *v.* U. S. Submarine, etc., Co., 1 Hun, 161.

[45] See 1 Dill. M. C. 349, and cases cited pro and con.

tradict the minutes.[46] In respect to minutes of private corporations, the better opinion is that parol evidence is competent, except where the minutes are held the best evidence, and even then, unless the issue is between the corporation and another party to the act which they are adduced to prove.[47] Moreover, the restriction on such parol evidence applies only to the records of the proceedings of the corporate body itself; but not to those of the directors of private corporations. They are but agents of the body, and their minutes are not (unless by contract or estoppel) conclusive on the corporation, but may be contradicted by parol.[48] And a witness, an officer of the corporation, may be asked if he knew of any reason why the assent given informally by the directors was not recorded. The mistake or neglect of the secretary, or the direction of the board to delay the entry, may be proved against the corporation.[49] But even where parol evidence is admissible, testimony as to the sense in which the recorded vote was understood by an officer or member is not competent,[50] nor are his declarations as to its meaning competent, except against himself.[51]

[46] See People *v.* Zeyst, 23 N. Y. 140; and as to supplying omissions by parol, compare Andrews *v.* Inhabitants of Boston, 110 Mass. 214; as to amending, compare 1 Dill. M. C. 346, §§ 233, 234. Parol evidence is admissible, in an action to collect a subscription for corporate stock, to show that the written subscription was by express agreement not to be delivered to the corporation or to be binding on the subscriber until a certain number of other persons had each subscribed for a like amount. Gilman *v.* Gross, 97 Wis. 224, 72 N. W. Rep. 885.

[47] See p. 52.

[48] Goodwin *v.* U. S. Annuity, etc., Co., 24 Conn. 601.

A witness who knows that certain bonds were never delivered to a corporation may testify to that fact; and it does not matter if the minutes of the corporation are in writing and show that the bonds were delivered. Fouche *v.* Merchants' National Bk., 110 Ga. 827, 36 S. E. Rep. 256.

[49] Bay View Assn. *v.* Williams, 50 Cal. 353.

[50] Ehle *v.* Chittenango Bank, 24 N. Y. 548, 1 Greenl. Ev. 323, n.

[51] Bartlett *v.* Kinsley, 15 Conn. 334; Tyng *v.* U. S. Submarine Co., 1 Hun, 161.

66. Accounts and Business Entries.

The third class of corporate books, constituting the accounts of the transactions of a private corporation had through agents and officers, are competent between members, and between the corporation and members on any question which concerns them in their interest as such,[52] and between third persons at issue in respect to the condition and solvency of the corporation.[53] Beyond this, their corporate character gives them no competency in favor of the corporation, nor between third persons,[54] but their admission for these purposes must be sought on grounds common to the accounts of individuals and firms—for instance, by producing the person who made the entry, and reading it as a memorandum in aid of his testimony to its correctness,[55] or by showing that the entry was made when the party, being a member, was present and presumably assenting to the entry;[56] or by showing that the memorandum was made by the common agent of the parties, at their request,[57] or that it was made in the course of duty by a person since deceased, who had means of knowledge, and no interest to falsify.[58] In case of a public corporation, admission of accounts may be sought on grounds common to

[52] Hubbell *v.* Meigs, 50 N. Y. 480; Merchants' Bank *v.* Rawls, 21 Geo. 334.

[53] See paragraph 58, n. 3 (above).

[54] Except when they are the books of a foreign corporation within the statute. N. Y. Law, 1869, c. 589; N. Y. Code Civ. Pro., §§ 929–931 and 3343, or perhaps when the books of a bank the property of the State. Crawford *v.* Bank, etc., 8 Ala. N. S. 79. See § 58.

[55] Farmers' & Mech. Bank *v.* Boralf, 1 Rawle, 152; Chenango Bridge Co. *v.* Lewis, 63 Barb. 111.

[56] And such an entry is equally competent against those claiming under the member. Union Canal Co. *v.* Lloyd, 4 Watts & S. 398. And even where the very question is whether he was a member, *prima facie* evidence on that point is enough to let in the entry made in his presence and assent. Graff *v.* Pittsburg, etc., R. R. Co., 31 Pa. St. 495.

[57] New England Co. *v.* Vandyke, 1 Stockton (N. J.), 498; compare Black *v.* Shreve, 13 N. J. Ch. 455.

[58] Ocean Bank *v.* Carll, 55 N. Y. 440, 9 Hun, 239; Wheeler *v.* Walker, 45 N. H. 355; Chenango Br. Co., etc., *v.* Lewis, 63 Barb. 111.

the accounts of public officers; [59] and as *against* the corporation, entries in the corporate books, made by an officer in the discharge of his duty, are competent on proving the books by the secretary or by other regular proof. It is not necessary to produce the officer who made the entries.[60]

[59] See Cabot *v.* Waldron, 46 Vt. 11.

[60] N. Am. Building Asso. *v.* Sutton, 35 Pa. St. 466.

CHAPTER IV

ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS

1. Nature of official character and title.
2. Necessity of proof of title under pleadings.
3. Appropriate mode of proof.
4. Effect of letters as evidence.
5. Impeaching the letters.
6. Best and secondary evidence of authority.
7. Representatives' declarations and admissions competent against the estate.
8. The decedent's declarations and admissions.
9. Judgments.
10. Testimony of the representative.
11. Testimony of interested persons against the estate.
12. The New York rule.
13. What parties are excluded.
14. What interested witnesses are excluded.
15. Assignor or source of title excluded.
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17. Insanity.
18. Objecting to the testimony.
19. Preliminary question of competency.
20. Moving to strike out incompetent part of testimony.
21. Proof of an interview.
22. What is a personal transaction or communication.
23. Indirect evidence.
24. Effect of objecting party testifying in his own behalf.
25. Form of offer of testimony in rebuttal.
26. The United States courts rule.

1. Nature of Official Character and Title.

By the modern law, executors and administrators are no longer the presumptive and contingently ultimate owners of the assets, but are constituted trustees of all the property in their hands; [61] and an executor, though designated

[61] Dox *v.* Backenstose, 12 Wend. 542; Babcock *v.* Booth, 2 Hill, 181.

The administrator of an estate stands in the relation of a trustee to all those interested in the estate. Pierce *v.* Holzer, 65 Mich. 263, 32 N. W. Rep. 431; Huddleston *v.* Henderson, 181 Ill. App. 176.

An administrator is merely an agent or trustee, acting immediately under the direction of the law regulating his conduct and defining

by the will, derives his power, as truly as an administrator, from letters granted by the probate court.[62] In respect to liability to action, he stands in the place of the deceased, and a creditor is now entitled to judgment without alleging or proving that there are any assets; for the judgment only liquidates the debt.[63] On the other hand, the creditor cannot recover against an executor who has not taken out pro-

his authority. Collamore *v.* Wilder, 19 Kan. 67.

The administrator is a statutory officer having authority to sue for the benefit of the estate which he represents; but there is no authority for him to sue for the use of a stranger. Thrift *v.* Baker, 144 Ga. 508, 87 S. E. Rep. 676.

An executor cannot maintain a bill for the construction of a will when he has no interest which may be affected by the construction sought. Tapley *v.* Douglass, 113 Me. 392, 94 Atl. Rep. 486.

[62] Hood *v.* Ld. Barrington, L. R. 6 Eq. 222.

The matter of recognizing the nomination of an executor named in a will lies within the sound discretion of the court, but the person so named will usually be granted letters unless a rather strong showing is made against the appointment. In re Doolittle, 169 Iowa, 639, 149 N. W. Rep. 873.

Where there is an uncertainty regarding the appointment of an executor, the intent of the testator must be sought and slight expressions in his will may suffice to determine such intent. In re Robitscher, 156 N. Y. Supp. 265, 92 Misc. 653.

When a widow asks for administration and upon proof is found to have been the wife of the intestate, her right to letters of administration is absolute. In re Judson, 156 N. Y. Supp. 270, 92 Misc. 136.

The intention of the testator as to the nomination of his executor being clear, the court will lay hold of slight circumstances to give legal effect to such intention. Smith *v.* Haines, 86 N. J. Eq. 224, 98 Atl. Rep. 317.

An executor named in a will may renounce his rights thereunder by express renunciation or by acts and conduct *in pais*. State *v.* Holtcamp, 267 Mo. 412, 185 S. W. Rep. 201.

The statute of limitations begins to run against an administrator from the date of the letters of administration which are to be considered as issued only as of the date of the approval of his bond. Knight *v.* Grant, 219 Mass. 199, 106 N. E. Rep. 853.

[63] Allen *v.* Bishop, 25 Wend. 414; Parker *v.* Gaines, 17 Id. 558; Covington *v.* Barnes, 1 Dill. Cin. Ct. 16, and cases cited.

A probate court may order an administrator as such to bring an action against himself individually on his own note which was an asset of the decedent's estate. Powell *v.*

bate, even on proof of his having assets.[64] Letters must be issued, and it is for the holder of letters to proceed against those who meddle with the estate without having letters. The authority of the executor or administrator to enable him to sue cannot be shown by letters granted by a court of another State.[65] Such letters are often relevant for the purpose of justifying his acts without suit, done within this State,[66] his acts done elsewhere,[67] and his suits and proceed-

Jackson, 60 Ind. App. 597, 111 N. E. Rep. 208.

Where an executor has entered into a contract without authority and the estate has received the benefit of the same, the creditor may recover from the estate. Lund *v.* Riggs, 174 Iowa, 79, 156 N. W. Rep. 161.

An executor may be sued where he resides or may be found though it be in another county than the one in which letters were issued. People's Bank *v.* Wood, 193 Ill. App. 442.

Executors or administrators may, in good faith and with proper prudence submit to arbitration the matters in controversy touching the estate they represent. Murry *v.* Hawkins, 144 Ga. 613 ,87 S. E. Rep. 1068.

[64] As to the exception in equitable actions of a certain class, see Metcalf *v.* Clark, 41 Barb. 45, and cases cited; Haddow *v.* Lundy, 59 N. Y. 320.

If an executor has grounds for believing that conveyances made by his testator were procured by undue influence it is his duty to bring an action in his representative capacity to determine that question. Hatch *v.* Hatch, 46 Utah, 218, 148 Pac. Rep. 433.

[65] Doolittle *v.* Lewis, 7 Johns. Ch. 45, and cases cited; Noonan *v.* Bradley, 9 Wall. 394. *Contra*, Carmichael *v.* Saint, 16 Ark. 28.

Where there are no creditors, the heirs or legatees may collect the estate and make such distribution among themselves as they may agree to; but administration becomes necessary in order to enforce the payment of debts owing to the estate. Brobst *v.* Brobst, 190 Mich. 63, 155 N. W. Rep. 734.

[66] Parsons *v.* Lyman, 20 N. Y. 103, affi'g 28 Barb. 564, and rev'g 4 Bradf. 268.

The appointment of an administrator by the probate court is conclusive of the necessity for administration. Chambers *v.* Cunningham, 122 Ark. 590, 184 S. W. Rep. 49.

[67] Middlebrook *v.* Merchants' Bank, 3 Abb. Ct. App. Dec. 295, affi'g 41 Barb. 481, 18 Abb. Pr. 109.

In determining questions arising out of the administration of decedents' estates, courts would not be justified in permitting an injustice to be sustained upon mere technical questions of practice.

ings in the State where the letters issued; [68] and when thus relevant, they are competent if authenticated agreeably to the act of Congress,[69] or to the law of the forum.[70]

Executors and administrators are not public officers, and the rule of protection to those dealing with them, is more restricted than when applied to public officers.[71] The executor or administrator is thus the official and sole trustee of the estate. He is not, however, a public officer within the rules as to evidence. His actual title must be shown; and, although in the absence of evidence to the contrary, he is presumed to have acted in good faith,[72] the presumption of regularity accorded to official acts does not aid his proceedings.[73] The law distinguishes between his interest and his acts, as representative of the estate, and those in his individual capacity or other official capacity; and acts done in one capacity are not necessarily conclusive against him in the other.[74]

Hancock *v.* Hancock, 111 N. E. Rep. (Ind. App.) 336.

[68] Clark *v.* Blackington, 110 Mass. 369, 374.

[69] U. S. R. S., § 905; Spencer *v.* Landon, 21 Ill. 192; Graham *v.* Whitely, 26 N. J. L. 260.

[70] N. Y. Code Civ. Pro., § 952.

[71] Roderigas *v.* East River Savings Inst., 76 N. Y. 316, 32 Am. Rep. 309.

[72] Sherman *v.* Willett, 42 N. Y. 146.

Administrators are liable for debts due the succession which are no longer collectible but which they might have collected by proper diligence, and their sureties are also liable in a proper case for such neglect. Reilly *v.* American Bonding Co., 138 La. 315, 70 So. Rep. 237.

[73] Bank of Troy *v.* Topping, 13 Wend. 563; Hathaway *v.* Clark, 5 Pick. 490.

Where an administrator brings an action to foreclose a mortgage claimed to have been owned and held by his intestate at his decease, the burden is upon him of proving an existing mortgage indebtedness. Shannon *v.* Mereness, 90 Conn. 28, 96 Atl. Rep. 173.

Where the complaint sets forth a cause of action against an executor or administrator personally, and also in his representative capacity, a judgment for the plaintiff must distinctly show whether it is awarded against the defendant personally or in his representative capacity. An adjudication that the plaintiff recover of the defendant a stated sum could not be enforced. Legget *v.* Pelletreau, 213 N. Y. 237, 107 N. E. Rep. 509.

[74] So held of ratification of a contract. Caughey *v.* Smith, 47

2. Necessity of Proof of Title, Under Pleadings.

If the allegations of the complaint do not show explicitly

N. Y. 244, 50 Barb. 351. So of a judgment, see Rathbone *v.* Hooney, 58 N. Y. 463. *Contra*, of notice, Burr *v.* Bigler, 16 Abb. Pr. 177. So of an appearance and accounting. Larrour *v.* Larrour, 2 Redf. 69. So of a receipt. Wilcox *v.* Smith, 26 Barb. 316, 350. The rule is usually different where his individual interest is represented by him in his official character. McGovern *v.* N. Y. Central, etc., R. R. Co., 67 N. Y. 417; but then it may be necessary that his *cestuis que trustent* be parties.

An action at law upon a contract made by the deceased must be brought in the name of his executor or administrator as such, but an action brought upon a contract made by the executor or administrator must be brought by him individually. Ehrman *v.* Bassett, 159 N. Y. App. Div. 752, 144 N. Y. Supp. 976.

Where the administrator is also an heir it is not a misjoinder of parties plaintiff if he sues both in his individual and representative capacity. Rogers *v.* Schlotterback, 167 Cal. 35, 138 Pac. Rep. 728.

The testator, and not the executor, is liable for a libel contained in the will which is published by the probate. Harris *v.* Nashville Trust Co., 128 Tenn. 573, 162 S. W. Rep. 584, 49 L. R. A. N. S. 897, Ann. Cas. 1914 C. 885.

Where in the absence of a statute providing otherwise, an executor or administrator sells personal property of the State to himself in his individual capacity, while he does a thing which he has no right to do, he nevertheless has the capacity so to do and title to the property passes. The transaction is not void, but only voidable at the option of those interested. Williams *v.* Cobb, 219 Fed. Rep. 663, 134 C. C. A. 217.

Where at the express request of the residuary legatees, executors make investments that are not authorized by statute, the legatees are estopped from asserting any personal liability against such executors in case of loss. Villard *v.* Villard, 219 N. Y. 482, 114 N. E. Rep. 789.

Where a sole executrix has a legal life estate in the real property of the decedent and brings an action in her representative capacity to recover for an overpayment of taxes thereon, and fails, the costs should be awarded against her personally. Van Pelt *v.* New York, 155 N. Y. Supp. 9, 91 Misc. 550.

If an executor disregards the provisions of the will or a rule of law relating to investments, he takes the risk of any loss that may result, without the right to any profit that he may make by reason of such investment." Villard *v.* Villard, 219 N. Y. 482, 114 N. E. Rep. 789.

whether the party sues or is sued in the representative or the individual character, resort will be had to the designation in the title of the pleading. If it is there indicated that he sues, or is sued, "*as*" representative—for example, if he is named "A. B. *as* executor of C. D.," this is enough to characterize the action.[75] But if he is named with a mere addition—for example, A. B., executor, etc., of C. D., this is matter of description only, and does not alone show that the action is in his official capacity,[76] but in connection with allegations in the complaint, may suffice to sustain the action in either capacity. Under the new procedure, a representative suing even on a cause of action accruing on a contract made with himself, or founded on his own actual possession, should be prepared with evidence of his appointment, if his character as such is alleged in his pleading, and not admitted, especially if the recovery will be assets; but, in courts where the common-law rule is still followed, this proof may not be essential in such cases.[77]

[75] Stilwell *v.* Carpenter, 2 Abb. N. C. 240, 261; Austin *v.* Munro, 47 N. Y. 367; Scranton *v.* Farmers' Bank, 33 Barb. 527.

In an action for an accounting it is proper for an executor or administrator to proceed both in his individual and representative capacity. Such a joinder puts any defendant who wishes to asset a claim at no disadvantage and the complaint is not demurrable upon the ground of a misjoinder of parties plaintiff or of causes of action. Metropolitan Trust Co. *v.* Stallo No. 2, 166 App. Div. 649, 152 N. Y. Supp. 173.

Where one sues executors individually and in their representative capacity, alleging demand upon the testator and the executors, he should also allege the date of each demand. Noble *v.* Haff, 155 N. Y. Supp. 560.

[76] Merritt *v.* Seaman, 6 N. Y. 168; Carpenter *v.* Stilwell (above); 3 Wms. Ex'rs, 6 Am. ed. 2052–5, Id. 1981, n. b., 1986.

Though there be nothing in the title of the complaint to give a representative character to the plaintiff, the averments and scope of the complaint may be such as to affix to him such character and standing in the litigation. The word "as," if omitted in the title between the name of the executor and the description of his capacity, will not preclude him from recovering in his representative capacity. Beers *v.* Shannon, 73 N. Y. 292.

[77] Wms. Ex'rs, 6 Am. ed. 2002, etc. The regulation of this sub-

3. Appropriate Mode of Proof.

The appropriate proof of the official character is the production of the letters testamentary, or of administration, granted to him by the appropriate tribunal within the State where he sues; [78] and the rule is the same whether he seeks to prove it in his own favor,[79] or it is to be proved against him,[80] or proved by a third person as the source of title.[81] Unless foundation is laid for secondary proof, parol evidence is incompetent.[82] But upon well-settled general principles, direct proof may be dispensed with by estoppel,[83] and where

ject varies much in different jurisdictions, according to the extent to which the statutes have embodied the modern principle, that the representative is a mere trustee.

It is not enough to allege that the representative "was duly appointed by the surrogate's court." The surrogate's court being one of inferior and limited jurisdiction the facts upon which its jurisdiction is founded should be set out in the pleadings, *e. g.*, that the deceased died intestate, that he was a resident at the time of his death in a place within the jurisdiction of the court, or that he had property in such place. Otto *v.* Regina Music-Box Co., 87 Fed. Rep. 510.

[78] Noonan *v.* Bradley, 9 Wall. 394.

Letters of administration are evidence that the administrator has authority incident to his office; and they are conclusive evidence of the right of the administrator to maintain an action affecting the estate. Rogers *v.* Tompkins (Tex. Civ. App.), 87 S. W. Rep. 379.

Under Georgia Civil Code, §§ 4247, 4250, a transcript of letters of administration which is made by an ordinary who is also the clerk of his own court, must show on its face that it was signed by the ordinary himself acting as clerk, in order to be admissible in evidence. Lay *v.* Sheppard, 112 Ga. 111, 37 S. E. Rep. 132.

[79] Belden *v.* Meeker, 47 N. Y. 307, affi'g 2 Lans. 470, and auth. cited.

A foreign executor who has filed the requisite papers under § 1836a of the New York Code of Civil Procedure to enable him to sue in a New York court, may also sue in a federal court in New York to recover debts due the estate. Provident Life & Trust Co. *v.* Fletcher, 237 Fed. Rep. 104.

[80] Armstrong *v.* Lear, 12 Wheat. 175.

[81] Pinney *v.* Pinney, 8 Barn. & C. 335, 1 Wms. Ex'rs, 6 Am. ed. 349; Remick *v.* Butterfield, 31 N. H. 70, 84.

[82] Williams *v.* Jarrot, 6 Ill. (1 Gilm.) 120, 129.

[83] As where defendants had covenanted with the executors as such, Farnham *v.* Mallory, 2 Abb. Ct. App. Dec. 100; or where the alleged representative had as such con-

direct proof is impossible, indirect evidence may suffice to raise a presumption that letters were duly granted.[84]

The letters, since they are founded on a decree granting administration, are not the only evidence; the decree itself may be proved.[85] The letters, however, are competent without the decree.[86] Unless the statute makes letters testamentary sufficient evidence, an executor must produce also the probate of the will.[87] The identity of the party with the one named in the letters may be presumed by the court from absolute identity of name,[88] but not from identity of sur-

veyed to defendant, Bratt *v.* Bratt, 21 Md. 578; or had procured the action to be revived, by an order of court, reciting his character as such. McNair *v.* Ragland, 1 Dev. (N. C.) Eq. 539. *Contra*, Shorter *v.* Urquhart, 28 Ala. N. S. 360, 366.

[84] Marcy *v.* Marcy, 6 Metc. (Mass.) 360; Battles *v.* Holley, 6 Greenl. (Me.) 145.

[85] Farnsworth *v.* Briggs, 6 N. H. 561; Elden *v.* Keddell, 8 East, 187, Ld. Ellenborough. But if the decree grants administration on condition, the letters should be produced. Dale *v.* Roosevelt, 8 Cow. 349. In some courts, however, performance of the condition will be presumed. See paragraph 4, n. 1.

Where the whole record of probate proceeding is introduced in evidence without objection to establish the appointment of the executor, it is improper to attack it collaterally on cross-examination. Nickles *v.* Seaboard Air Line Ry. Co., 74 S. C. 102, 54 S. E. Rep. 255.

Where there is a controversy as to the regularity of the appointment of an administrator, the court will regard his status settled upon production of proof that he was appointed and qualified, that he filed annual reports to the county court for a number of years, that he was fully recognized by said court as administrator, that after a contest with the heirs he made a compromise with them in which they agreed to his final settlement and discharge. Halbert *v.* Carroll (Tex.), 25 S. W. Rep. 1102.

[86] Remick *v.* Butterfield, 31 N. H. 70, 84.

An administrator has the right to sue for personal injuries to his intestate who was an alien, although he himself is an alien. In re Bagnola (Iowa), 154 N. W. Rep. 461.

[87] 3 Phil. Ev. 75.

By statute a certified copy of letters testamentary is sufficient evidence of the appointment of the executor, which statute supersedes the necessity of introducing the whole record of the court of probate. Nickles *v.* Seaboard Air Line Ry. Co., 74 S. C. 102, 54 S. E. Rep. 255.

[88] Hatcher *v.* Rocheleau, 18 N. Y.

name.[89] In case of ambiguity or difference, parol evidence is admissible to identify.[90]

4. Effect of Letters as Evidence.

Letters in due form, granted by a court, within the State, and having jurisdiction, are at common law presumed to have been regularly issued, and to qualify the holder to sue and be sued;[91] and the giving of bond and taking of oath may be presumed.[92] In New York and some other States, such letters are conclusive evidence of the authority of the representative, until reversed on appeal, or revoked,[93] and

86. *Contra*, 3 Wms. Ex'rs, 6 Am. ed. 2060.

Without the aid of a statute an executor cannot be sued outside of the State which granted his letters. Thorburn *v.* Gates, 225 Fed. Rep. 613.

[89] Fanning *v.* Lent, 3 E. D. Smith, 206. *Contra*, Trimble *v.* Brichta, 10 La. Ann. 778.

[90] See 3 Abb. N. Y. Dig., 2d ed. 95.

[91] Westcott *v.* Cady, 5 Johns. Ch. 334, 343; even though the death of the decedent was presumed from absence for less than seven years. Newman *v.* Jenkins, 10 Pick. 515. The seal of the surrogate may be affixed even pending the trial, Maloney *v.* Woodin, 11 Hun, 202.

Before issuance of letters the surrogate can make judicial inquiry into the facts upon which his jurisdiction is based; the letters, when granted, are conclusive evidence of the authority of the administrator, and innocent persons dealing with him will be protected, even though it should develop later that the person upon whose estate the letters were issued is still alive. Roderigas *v.* East River Savings Inst., 63 N. Y. 460, 20 Am. Rep. 555.

[92] Brooks *v.* Walker, 3 La. Ann. 150. So also may a prior resignation creating the vacancy filled by the letters, Gray *v.* Cruise, 36 Ala. N. S. 559; but only if the surrogate had power to accept a resignation. Flinn *v.* Chase, 4 Den. 85.

Where the plaintiff sued as administratrix to recover for the death of her husband, a denial of the allegation that the letters were "duly issued" raised an issue and enabled the defendants to introduce evidence of fraud or collusion. Webster *v.* Kellogg Co., 168 App. Div. 443, 153 N. Y. Supp. 800.

[93] N. Y. Code Civ. Pro., § 2560; 1 Wms. Ex'rs, 6 Am. ed. 620, n. (h), and cases cited.

The introduction of letters testamentary to the plaintiffs is sufficient evidence of the death of the testator, and of an order of the court appointing them as his executors. Garthwaite *v.*

at common law they are conclusive as to the authority of the representative over the personalty.[94] The recital, in the letters, of the jurisdictional facts is *prima facie* evidence that they existed,[95] but if the record shows that the statutory notice to parties in interest was not given, jurisdiction fails.[96] The fact that a contest is pending in the probate court as to the validity of the letters, does not impair their effect, whether *prima facie* or conclusive, if it be under statutes which impose the burden of proof on the contestants.[97] Letters taken out pending the suit, although competent at common law,[98] and in chancery,[99] especially where no objection was made by pleading, are not sufficient under the modern practice,[1] except in favor of or against one who has been substituted as representative,[2] or who is enabled to avail himself of the fact of appointment under supplemental pleading or pleadings equivalent in effect.[3]

What has been said as to the effect of letters is applicable to letters issued as of course, on producing and recording foreign letters in the probate court, unless the statute authorizing this proceeding, or the foreign statutes under which the original letters were granted, indicate a different rule.[4]

Bank of Tulare, 134 Cal. 237, 66 Pac. Rep. 326.

The appointment of an administrator *de bonis non* can be attacked collaterally by proof that there never was a vacancy in the administration. Sands *v.* Hickey, 135 Ala. 322, 33 So. Rep. 827.

[94] Allen *v.* Dundas, 3 T. R. 125.

[95] Farley *v.* McConnell, 52 N. Y. 630, affi'g 7 Lans. 428; Belden *v.* Meeker, 47 N. Y. 307, affi'g 2 Lans. 470.

[96] Randolph *v.* Bayne, 44 Cal. 366.

[97] Brown *v.* Burdick, 25 Ohio St. 266.

[98] Thomas *v.* Cameron, 16 Wend. 579.

[99] Osgood *v.* Franklin, 2 Johns. Ch. 1; Doolittle *v.* Lewis, 7 Id. 45; Goodrich *v.* Pendleton, 4 Johns. Ch. 549.

[1] Thomas *v.* Cameron, 16 Wend. 579; Varick *v.* Bodine, 3 Hill, 444; Berlinger *v.* Ford, 21 Barb. 311.

[2] French *v.* Frazier's Ad., 7 J. J. Marsh. 425, 432.

[3] Haddow *v.* Lundy, 59 N. Y. 320.

[4] See on this subject Parker *v.* Parker, 11 Cush. 519; Dublin *v.* Chadbourn, 16 Mass. 433.

Where a copy of the letters testamentary or of administration,

5. Impeaching the Letters.

The burden of proof is upon one who disputes the authority of an executor or administrator, on the ground of want of jurisdiction.[5] The jurisdictional facts are defined by statute, and are usually death and assets, under the prescribed conditions as to domicile and location.[6] These matters may be disproved if the validity of appointment is in issue.[7] But the

duly authenticated, is filed as provided by § 1836a of the New York Code of Civil Procedure, there is a constitutional and proper authorization for an action against foreign executors to determine ownership of property located within the State and within the jurisdiction of its courts. Holmes *v.* Camp, 219 N. Y. 359, 114 N. E. Rep. 841.

[5] Welch *v.* N. Y. Central R. R. Co., 53 N. Y. 610.

The probate court having recognized the administrator for eighteen years, and all parties interested in the estate, including the appellants, having unequivocally so treated him, it must be conclusively presumed that he was the legal administrator of said estate in all actions where his acts are collaterally attacked. Halbert *v.* De Bode, 15 Tex. Civ. App. 615, 40 S. W. Rep. 1011.

To same effect Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. Rep. 1002.

[6] Comstock *v.* Crawford, 3 Wall. 403, 2 R. S. of N. Y. 73, § 23, L. 1837, ch. 460, § 1, same stat. 3 R. S., 6th ed. 326, § 2; Farley *v.* McConnell, 52 N. Y. 630, affi'g 7 Lans. 428.

Where the statutes provide that no person shall be appointed administrator who is neither of kin to the intestate, nor a creditor, nor otherwise interested in the grant of administration, the prohibition is imperative. An order disregarding it is a transgression of authority, is utterly null and void, and may be so declared at the suit of anyone lawfully concerned. Jennings *v.* Smith, 232 Fed. Rep. 921.

The petition for the removal of an administrator is not in itself evidence and where there is merely discussion by the court and counsel on proceedings for removal and no witnesses are sworn or other testimony adduced under sanction of an oath, the removal should not be ordered. In re Bagnola (Iowa), 154 N. W. Rep. 461.

[7] Redf. on W. 57. But doubted, see 67 N. Y. 380, 63 Id. 460. The weight of the decisions on this point is impaired by two considerations: Many of the English cases are the refusal of common-law courts to hold themselves bound by purely ecclesiastical adjudications. And many of the American cases arose at a time when probate was little more than *prima facie* authentication, like the acknowl-

letters cannot be impeached by proving that the surrogate did not comply even with the requirements of the statute expressed to be conditions precedent of his action, such as examination of parties in oath,[8] much less that they issued to a person not entitled,[9] if these requirements do not enter into the definition of the jurisdiction of the court, and do not relate to the notice necessary to bind the adverse party. Nor can the letters be impeached, as to personalty at least, by showing that the testator was incompetent,[10] or that the

edgment or proof of a deed. The tendency of recent legislation is to make the decree of the probate court an adjudication in the fullest sense. See 63 N. Y. 460. Whether disproving death avoids the letters so far as to deprive those who have acted on them in good faith, of their protection, see Jochumsen *v.* Suffolk Bank, 3 Allen (Mass.), 87, in the affirmative; and Roderigues *v.* East River Bank, 63 N. Y. 460, rev'g 48 How. Pr. 166, in the negative. See later decision in 76 N. Y. 316.

Adminsitration of an estate of one supposed to be dead but actually living is void. Stevenson *v.* Montgomery, 263 Ill. 93, 104 N. E. Rep. 1075, Ann. Cas. 1915, C. 112.

[8] Farley *v.* McConnell, 52 N. Y. 630, affi'g 7 Lans. 428.

When a person dies intestate leaving no widow and no indebtedness and there is nothing to be done by way of administration of the estate except the division of it among the heirs, such heirs may settle the estate without an administrator, and they may resist the appointment of one or may bring suit to set aside the appointment if one is made, and thereby remove him. Under such circumstances there being no administrator, the heirs sue in their individual names to recover a demand due the decedent in his lifetime, but it is necessary in such cases to allege and prove that there is no administration pending and no administrator. Craig *v.* Norwood, 61 Ind. A. 104, 108 N. E. Rep. 395.

[9] Comstock *v.* Crawford, 3 Wall. 403.

[10] 3 Redf. on W. 57, 1 Wms. on Ex'rs, 6th Am. ed. 618. *Contra*, see 2 Whart. Ev., § 811.

Where the statutes have specifically defined all of the acts and facts justifying a refusal to issue letters to one otherwise entitled, the courts have no right to add any other grounds of incompetency or disqualification. In re McCausland, 170 Cal. 134, 148 Pac. Rep. 924.

The mere fact that a person is both administrator and a creditor of an estate, is not a legal objection to his acting as administrator. Metropolitan Trust Co. *v.* Stallo, 156 App. Div. 639, 152 N. Y. Supp. 183.

will was forged; [11] but fraud in obtaining the letters is competent,[12] unless the statute affords an exclusive remedy in the probate court. The minutes of the surrogate are not rendered incompetent because the statute provides that the testimony must be entered in a book and preserved as part of the record.[13]

6. Best and Secondary Evidence of Authority.

If the pleadings require a party to prove his adversary's authority as executor or administrator, it is best to give him notice to produce at the trial the letters or probate, or both, as the case may require, unless the party is prepared to produce the decree or an exemplified copy of the letters as primary evidence. But it is not necessary, in order to let in secondary evidence, to prove that the probate or letters are in the adversary's possession; for proof that he has been duly appointed executor or administrator raises a sufficient presumption that they are in his possession to let in secondary proof.[14]

[11] Allen *v.* Dundas, 3 T. R. 125, Steph. Ev. 48.

A foreign counsel generally has the initial right to administer upon the property of a subject of the county he represents, but the courts have power to remove him as such. In re Bagnola (Iowa), 154 N. W. Rep. 461.

Informality in a petition for the appointment of an administrator does not subject the appointment to collateral attack. Christianson *v.* King County, 239 U. S. 356, 36 S. Ct. 114, 60 L. ed. 327.

[12] Ex parte Joliffe, 8 Beav. 168, and see Stilwell *v.* Carpenter, 3 Abb. N. Cas. 263.

Where letters were granted to one claiming to be the widow of the decedent and the evidence shows admissions by her that she had never been married to him, the letters will be revoked if such admissions remain undenied. In re Morris, 157 N. Y. Supp. 472, 92 Misc. 630.

[13] Haddow *v.* Lundy, 59 N. Y. 320.

[14] Wms. Ex'rs, 6th Am. ed. 2059. A paper imperfectly showing the will and its probate, if shown to have been acted on as such by the representative, may be competent secondary evidence against him of an admission in the will binding the estate, notice to produce the original probate having been given to him and disregarded. 3 Wms. Ex'rs [2004], citing Gordon *v.* Dyson, 1 Brod. & B. 219.

7. Representative's Declarations and Admissions Competent Against the Estate.

The admissions and declarations of an executor or administrator, made while he was clothed with official authority as such, are competent in evidence against the estate while represented in the action, either by him [15] or by his successor in the administration.[16] But an admission by an administrator or executor is not binding as against the estate, unless made while he was engaged in his representative capacity in the performance of a duty to which the admission was pertinent so as to constitute it a part of the *res gestæ*.[17]

[15] Faunce *v.* Gray, 21 Pick. 243; Eckert *v.* Triplett, 48 Ind. 174, s. c., 17 Am. R. 735, 1 Greenl. Ev. 215. *Contra*, Allen *v.* Allen, 26 Mo. 327; Crandall *v.* Gallup, 12 Conn. 372, and cases cited. The contrary has also been held of loose oral declarations to a third person, because the representative was deemed to have no interest, no adequate information, and no legal duty. Hueston *v.* Hueston, 2 Ohio St. 488; and in Ciples *v.* Alexander, 2 Const. (Treadw. S. C.) 767, it was held that a bare oral admisson is not enough to sustain a recovery; s. p., Jones *v.* Jones, 21 N. H. 219. The better opinion is that the admission is competent, and if explicit and unexplained, sufficient to go to the jury. As to an account stated with the representative, see 1 Wms. Ex'rs [1947], n. f.; N. Y. Code Civ. Pro., § 395; Young *v.* Hill, 67 N. Y. 192, and cases cited.

[16] Lashlee *v.* Jacobs, 9 Humph. 718; Eckert *v.* Triplett (above); Matoon *v.* Clapp, 8 Ohio, 248; *contra*, Pease *v.* Phelps, 10 Conn. 62, 68.

[17] Davis *v.* Gallagher, 124 N. Y. 487, 26 N. E. Rep. 1045.

An admission by an administrator with respect to the allowance of a claim against the estate, having been made in the discharge of his duties as such, binds the estate to that extent. Meinert *v.* Snow, 3 Ida. (Hasbr.) 112, 27 Pac. Rep. 677.

The admissions of an administrator in a legal proceeding in which he resists claims to take away part of the estate and answers legitimate inquiries relating to the subject of his trust, are competent and part of the *res gestæ*. Whiton *v.* Snyder, 88 N. Y. 299.

The conversation of an administrator at a time when he was not acting in the discharge of his duties as such, and when no business was transacted, connected with or relating in any way to the estate, is not binding upon the estate. The act should be such as called for and made the declarations or statements pertinent, and the declarations or statements should ac-

Mere declarations or admissions, as distinguished from acts, do not bind the representative,[18] but he may explain or contradict them. Declarations and admissions made before he was fully clothed with the trust,[19] or after he was removed are not competent, as against the estate, to affect the parties beneficially interested other than himself, except perhaps to prove his knowledge of the fact admitted. Where there are several co-representatives, the admissions and declarations of one are not competent against the others, either to establish the demand as an original one,[20] or to revive the debt after the limitation has passed.[21] But proof

company such act, so as to constitute a part of the *res gestæ* Church *v.* Howard, 79 N. Y. 415.

[18] To this extent the principle in Rush *v.* Peacock, 2 Moody & Rob. 162, is sound.

[19] Moore *v.* Butler, 48 N. H. 161, 170; Fenwick *v.* Thornton, M. & M. 51, Abbott, C. J.; Legge *v.* Edmonds, 25 L. J. Ch. 125, 141, 1 Greenl. Ev. 217, § 179. See *contra*, Tindal, J., in Smith *v.* Morgan, 2 M. & Rob. 257. "Perhaps the admissibility of statements made by executors, assignees, and others filling an official character, but before they were invested with that character, will be found to depend on the nature of the facts stated by them. So an admission, before probate, by an executor named in a will may perhaps be entitled to more consideration than the admission of a mere stranger who has afterwards obtained letters of administration." Rosc. N. P. 72.

Declarations made by one before he qualified as administrator are not binding upon the estate. Gaines *v.* Alexander, 7 Gratt. (48 Va.) 257.

One who interferes with the property of a deceased person and sells a portion thereof without right, and is afterwards appointed administrator of the estate of such deceased person, will not be estopped by his prior acts from recovering the property for the estate. Gilkey *v.* Hamilton, 22 Mich. 283.

Evidence of transactions with an administrator occurring after the death of the deceased, is competent. Parrish *v.* Vancil, 132 Ill. App. 495.

[20] 1 Greenl. Ev. 215, § 176. This rule, originally founded on the fact that otherwise those not admitting might be rendered personally liable, Hammon *v.* Huntley, 4 Cow. 493, has been reiterated since the reason failed. Elwood *v.* Diefendorf, 5 Barb. 407.

[21] Tullock *v.* Dunn, Ry. & Moo. 416; Bloodgood *v.* Bruen, 8 N. Y. (4 Seld.) 362, rev'g 4 Sandf. 427. *Contra*, Shreve *v.* Joyce, 36 N. J. Law, 44; s. c., 13 Am. Rep. 417. Otherwise of an act such as part

of an admission of a fact by one is admissible, because it may be followed up by proof of a similar admission by all the others. If not thus followed, the judge should instruct the jury to disregard it.[22]

8. The Decedent's Declarations and Admissions.

If the executor or administrator sues or defends, by virtue of his character as such, evidence of the declarations and admissions made by the decedent in his lifetime is competent against the representative,[23] and even the decedent's declarations as to the value of his property are competent on the inquiry whether the administrator has made proper effort to administer the estate; but they are not binding, as declarations, upon the administrator, so as to charge him with that amount of assets. Upon a question of due administration, an executor or administrator is not concluded by the statements of the deceased, but is only bound to a faithful attempt to realize the largest amount from the assets which have come to his knowledge.[24] But the decedent's admissions and declarations are not competent in favor of the representative, unless some rule of evidence would admit them in favor of the decedent if living, as, for instance, where they were part of the *res gestæ* of an act properly in evidence.[25]

payment, made before the statute has run. Heath *v.* Grenell, 61 Barb. 190; see also 3 Wms. Ex'rs, 6th Am. ed. 2063.

[22] Forsyth *v.* Ganson, 5 Wend. 558.

[23] Smith *v.* Smith, 3 Bing. N. C. 29; s. c., 7 C. & P. 401; Cunningham *v.* Smith, 70 Penn. St. 458, citing Newman *v.* Jenkins, 10 Pick. 515. As to proving a trust, compare Harrisburgh Bank *v.* Tyler, 3 Watts & S. 373; Barker *v.* White, 58 N. Y. 204.

[24] Ginochio *v.* Porcella, 3 Bradf. 277, 280.

[25] Chase *v.* Ewing, 51 Barb. 597, 615; Rickets *v.* Livingston, 2 Johns. Cas. 97; Cheeseman *v.* Kyle, 15 Ohio St. 15. In an action by an executor to establish the ownership of property claimed to be the property of the testator, declarations made by the testator to a third person are not evidence to establish the executor's claim. Phila. Trust., etc., Co. *v.* Phila., etc., R. Co., 177 Penn. St. 38, 35 Atl. Rep. 688.

The delivery of property, necessary to the validity of a gift in view of death, cannot be proved by subsequent declarations of the deceased, shortly before death, to a person not connected with the gift. But subsequent declarations made to the donee, are competent.[26] And when the words of the decedent accompanying the gift are ambiguous, parol declarations of his intention, made previously or afterward, are competent to explain the intent.[27]

9. Judgments.

The executor or administrator is bound by a judgment recovered by or against the decedent, or by or against the representative's predecessor in administration.[28] And where an administrator, or administrator with the will annexed, is appointed here, upon application of the foreign executors or administrators of the same decedent, he is regarded as an ancillary administrator; and a decree of the foreign courts of competent jurisdiction against the foreign representatives is competent and *prima facie* evidence against him.[29]

10. Testimony of the Representative.

Where an executor or administrator is examined under

[26] 1 Wms. Ex'rs, 6th Am. ed. 858, n. Compare Hunter *v.* Hunter, 19 Barb. 631.

"Declarations of a donor after a gift and in derogation of that gift are incompetent." Hilton *v.* Rahr, 161 Wis. 619, 155 N. W. Rep. 116.

[27] Smith *v.* Maine, 25 Barb. 33, 48. As to proving a gift, see also p. 19 of this vol.

When a party to an action by or against an administrator or executor appears as a witness in his own behalf, or offers evidence of statements made by the deceased against the interest of the deceased, statements of the deceased concerning the same subject-matter in his own favor may also be proven, under § 732, L. O. L., subd. 2. Beard *v.* Beard, 66 Ore. 526, 133 Pac. Rep. 795.

[28] Steele *v.* Lineberger, 59 Penn. St. 308, 313; Manigault *v.* Deas, 1 Bailey Eq. 283, 295, 3 Wms. Ex'rs, 6th Am. ed. 2115.

[29] Cummings *v.* Banks, 2 Barb. 602; and see 26 N. Y. 146; and is conclusive here on the parties to the foreign suit. 3 Bradf. 233.

A judgment against an administrator is not a lien on his individual property. Lane *v.* Cohen, 141 Ga. 501, 81 S. E. Rep. 128; Collier *v.* Gannon, 40 Okla. 275, 137 Pac. Rep. 1179.

oath by an adverse party, his whole statement must be taken together; and a part tending to charge him cannot be separated from a part tending to explain it and operating in his favor.[30]

11. Testimony of Interested Persons Against the Estate.

Since the common-law incompetency resulting from interest has been removed, the question of the value of an interested witness' testimony against a decedent's estate has been much discussed. The English courts, without any express statute, hold that the testimony of a party to personal transactions with the deceased, which exonerate himself, is not sufficient, at least in equity, to sustain a decree, unless corroborated.[31]

[30] Ogilvie *v.* Ogilvie, 1 Bradf. 356. For the limits of this rule, see Rouse *v.* Whited, 25 N. Y. 170, rev'g 25 Barb. 279.

An administrator cannot testify as to statements made by the decedent as to the sale of certain goods upon which he is endeavoring to enforce a lien. Watson *v.* Appleton, 183 Ala. 514, 62 So. Rep. 765.

[31] Hill *v.* Wilson, L. R. 8 Ch. App. 888, s. c., 7 Moak's Eng. 449; Gray *v.* Warner, L. R. 16 Eq. 577; s. c., 7 Moak's Eng. 591. "Nobody would be safe in respect to his pecuniary transactions, if legal documents found in his possession at the time of his death, and endeavored to be enforced by his executors, could be set aside, or varied, or altered, by the parol evidence of the person who had bound himself. It would be very easy, of course, for anybody who owed a testator a debt to say, . . . 'I met the testator and gave him the money.' The interests of justice and the interests of mankind require that such evidence should be wholly disregarded." James, L. J., in Hill *v.* Wilson (above). *Contra*, Ford *v.* Haskell, 32 Conn. 489, 492, where the court say it is a question of credibility, as in case of testimony of an accomplice in a criminal case.

In Alaska the restriction against testimony concerning transactions and communications with a decedent has not always existed. Corbus *v.* Leonhardt, 51 Circ. Ct. App. 636, 114 Fed. Rep. 10; Summers *v.* United States, 231 U. S. 92, 34 Super. Ct. 38, 58 L. ed. 137.

In order to disqualify a witness under Rev. St., § 6354, he must be both interested in the event and a party. Ham, etc., Lead, etc., Inv. Co. *v.* Catherine Lead Co., 251 Mo. 721, 158 S. W. Rep. 369.

The general policy of the American statutes is to restrain the admission of the testimony of a party or interested witness, as against the estate of a deceased person or the interest of one succeeding to his right. The ground of the rule is, that, although parties and interested witnesses are made generally competent, some exception should be made where the adversary in the controversy is deceased. The law prefers to admit all parties; but when death silences one, the law will silence the other as to matters peculiarly within their sole knowledge. The statutes for this purpose are very diverse. Some reach the result by forbidding parties and interested witnesses from testifying in all actions where the opposite party is an executor or administrator. Others where the action is on a contract, etc., with one since deceased. Others attempt to define the line with more discrimination. Where the statute is a mere proviso or saving clause in the act abolishing the common-law disqualification of interest, it does not make incompetent such testimony as would be competent at common law; [32] but where it is a new, independent and affirmative provision, it does exclude the kind of testimony described by it, although such as would have been previously competent.[33] Whatever be

[32] Sheetz *v.* Norris, 2 Weekly Notes (Pa.), 637. The common-law exception, from necessity, in case of contents of baggage, etc., was admitted in Sykes *v.* Bates, 26 Iowa, 521; S. P., Nash *v.* Gibson, 16 Id. 305.

A witness who is qualified to testify at common law will not be disqualified by the statute prohibiting testimony concerning transactions with a decedent. Fink *v.* Hey, 42 Mo. App. 295.

The statute prohibiting testimony as to communications with a deceased person is an enabling, rather than a disabling statute, and all witnesses who were competent before its passage will be competent thereafter. Packer *v.* Noble, 103 Pa. 188.

Where there is no evidence that witnesses were necessarily parties to the issues or that they had any interest in the controversy which was adverse to the estate it is error to refuse to allow them to testify. Craig *v.* Norwood (Ind. App.), 108 N. E. Rep. 395.

[33] Mattoon *v.* Young, 45 N. Y. 696.

Under R. & B. Code, § 1211, a party to an action brought by an administrator cannot testify as to

the frame of the statute, its object and the general guide in its construction is to apply the exclusion in such manner as to put both parties on an equality; [34] but the court will not do violence to the plain language of the statute for the purpose of securing this effect.[35] Difficulties of this kind are less frequent in proportion as the statute is so framed as to define the exclusion by the kind of testimony rather than by the class of actions or parties. The New York statute, and those modeled from it, have been the most successful in this respect. That act addresses the prohibition to the actual source of danger, viz., the version by an interested person, of his interview with one who can no longer contradict him.

communications with the deceased. Shorett *v.* Knudson, 74 Wash. 448, 133 Pac. Rep. 1029.

The testimony of a witness, since deceased, in an action of ejectment brought by a life tenant against a defendant in possession, will be admitted in evidence in a subsequent action brought by the remaindermen of such life tenant against the same defendant. Shook *v.* Fox, 126 N. Y. App. Div. 565, 110 N. Y. Supp. 951.

[34] McGeehee *v.* Jones, 41 Geo. 123; Brown *v.* Brightman, 11 Allen (Mass.), 226; Louis *v.* Easton, 50 Ala. 470; Jones *v.* Jones, 36 Md. 457; Poe *v.* Domic, 54 Mo. 124; Hubbell *v.* Hubbell, 22 Ohio St. 208; Key *v.* Jones, 52 Ala. 238; Latimer *v.* Sayre, 45 Geo. 468.

Under Revised Code, 1893, p. 798, neither party to an action by or against administrators shall be allowed to testify against the other as to transactions with the deceased. Green *v.* Wilmington Trust Co., 27 Del. 232, 87 Atl. Rep. 885.

Civ. Code, 1910, § 5858, makes the restriction against testimony as to communications with a decedent absolute, and permits no exceptions. Jarrard *v.* Hawes, 13 Ga. App. 470, 79 S. E. Rep. 373.

Under How. Ann. St., § 7545, the restriction against testimony as to transactions with a decedent is absolute. Barker *v.* Hebbard, 81 Mich. 267, 45 N. W. Rep. 964.

[35] For cases where the courts have refused to do so, see Brown *v.* Lewis, 9 R. I. 497; Roberts *v.* Yarboro, 41 Tex. 451; Howe *v.* Merrick, 11 Gray (Mass.), 129; Ballou *v.* Tilton, 52 N. H. 607; Graham *v.* Howell, 50 Geo. 203; Crawford *v.* Robie, 42 N. H. 162.

No exceptions will be made to the rule preventing interested witnesses from testifying as to transactions with a decedent unless expressly allowed by the statute. Blair *v.* Ellsworth, 55 Vt. 415.

Where the statute speaks only of actions against an administrator it applies also to actions *by* an administrator. Ewing *v.* White, 8 Utah, 250, 30 Pac. Rep. 984.

To prevent evasion, the prohibition is made applicable not only to parties on the record and parties having an interest in the result, but to assignors and others through whom a party claims. To prevent unequal application, it is not enforceable against one side when the other side has put forward the testimony of the person since deceased.

12. The New York Rule.

The statute is as follows: "Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee, or person so deriving title or interest, is examined in his own behalf,—or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof." [36]

[36] N. Y. Code Civ. Pro., § 829, A stockholder in a bank which is a party is not deemed interested. Id. In a proceeding to settle an executor's account, the executor is precluded from testifying to conversations with the testator concerning the basis of the claim of a third person against the estate, which has been paid by the executor and for which he is seeking to be allowed credit, as against contesting residuary legatees. Matter of Smith, 153 N. Y. 124.

Code Civ. Pro., § 829, will apply to a trial by a jury of a special question in an equitable action, which is a judicial investigation

13. What Parties are Excluded.

A party to the action or proceeding cannot be thus examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest.[37]

equivalent to the "trial of an action." Parks *v.* Andrews, 56 Hun (N. Y.), 391, 10 N. Y. Supp. 344.

One is not "a person interested in the event" under § 829 of the Code merely because the outcome may save him the trouble of another law suit. There is a difference between an interest in the event and an interest merely in the question. To make out an interest in the event, the judgment must not merely leave open the possibility of another action. It must be evidence in the other action, and evidence adverse to the witness. Franklin *v.* Kidd, 219 N. Y. 409, 114 N. E. Rep. 839.

An interest sufficient to disqualify him must not be "uncertain, remote or contingent." Gain or loss must result to him from the judgment in its direct or immediate operation. Id.

[37] Where the statute is not in terms restricted to a party called on his own behalf, etc., etc., the courts do not restrict it by construction, but exclude a party called for a co-party. Bennett *v.* Austin, 5 Hun, 536; Alexander *v.* Dutcher, 7 Hun, 439; Blood *v.* Fairbanks, 50 Cal. 140; and even though he has no interest adverse to the executor or administrator, as, for instance, where they are co-defendants, Blood *v.* Fairbanks (above); and though he might have been sued separately, *e. g.*, the indorser, sued with the maker. Fox *v.* Clark, 61 Barb. 216, n.; Alexander *v.* Dutcher (above). The better opinion is that after an action against two has been practically severed for the purposes of trial—for example, by a dismissal of the action against one on his discharge in bankruptcy, Hayden *v.* McKnight, 45 Geo. 147; or by a judgment against them on default being opened in favor of one only, to allow him to set up a defense personal to himself, Simpson's Ex'r *v.* Bovard, 74 Penn. St. 351, 360—the disqualification of the one who will not be affected by the trial is terminated; but in New York, on the contrary, it was held that though the court might in its discretion sever the action, a party on the record could not, so long as he remained a party, be thus examined, against or for another party. Genet *v.* Lawyer, 61 Barb. 211; and the fact that the defendant who was offered as a witness, did not put in an answer, but suffered default, did not sufficiently sever the action or discontinue it as to him. Id. Nor did the fact that the plaintiffs executed a release to him affect the question.

In Hubbell *v.* Hubbell, 22 Ohio St. 208, 226, the court sanctioned practically severing any action and admitting the evidence against

14. What Interested Witnesses are Excluded.

No person can be thus examined in his own behalf or in-

one and excluding it as against the other, wherever separate judgments would be proper. Under a statute which excludes only in a case where judgment might be rendered for or against an executor or administrator, it is held that, on the entire abatement of an action as to an administrator not served, or as to a party dying, he ceases to be a party within the rule. Hall *v.* The State, 39 Ind. 301; Roberts *v.* Yarboro, 41 Tex. 451. The word "party" has been held to include a party in interest, though not on the record. Stallings *v.* Hinson, 49 Ala. 92. Especially if his interest is such that it will be necessary to bring him in as a party. McKaig *v.* Hebb, 42 Md. 227.

One who is not a party and not interested in any way cannot be excluded from testifying. Espalla *v.* Richard, 94 Ala. 159, 10 So. Rep. 137.

Testimony concerning a personal transaction with the deceased and bearing comprehensively and pertinently on the vital issue in controversy, is inadmissible under § 829 of the New York Code of Civil Procedure. Tillman *v.* Rayner, 125 N. Y. App. Div. 309, 109 N. Y. Supp. 443.

In an action to rescind a deed, the grantor will not be permitted to testify as to transactions with the deceased grantee. Curd *v.* Bowron, 32 Ky. Law Rep. 369, 105 S. W. Rep. 417.

The payee of a check, being interested in the event, cannot testify in regard to it after the death of the maker. Harney *v.* McCann's Estate, 175 Ill. App. 250.

The beneficiary under a will who, if the will were defeated, would receive nothing, and who takes the stand on behalf of the contestants, will nevertheless not be permitted to testify as to communications with the deceased for the reason that he is a party interested in the event under Code, § 4604. In re Martin (Iowa), 142 N. W. Rep. 74.

Under § 506, Burns' Ann. St. 1901, one who had a claim for care and attention given to the decedent is not a competent witness in support of such claim. Scott *v.* Smith (Ind.), 82 N. E. Rep. 556.

In an action by or against an administrator, testimony by the adverse party as to conversations with the deceased is objectionable under § 5991, Ballinger's Ann. Codes & St. (Pierce's Code, 937). Moylan *v.* Moylan, 49 Wash. 341, 95 Pac. Rep. 271.

Where one party to a contract is dead the other is incompetent to testify as to it under Code Pub. Gen. Laws, 1904, Art. 35, § 3. Temple *v.* Bradley, 119 Md. 602, 87 Atl. Rep. 394.

A tenant cannot testify to a verbal modification of a lease with a deceased landlord, on the ground that the matters to be testified to were equally within the

terest,[38] or in behalf of a party succeeding to his title or interest, if he or his predecessor in interest is, at the time of the

knowledge of the decedent. Goebel *v.* Look, 153 Mich. 204, 116 N. W. Rep. 1078.

The maker of a promissory note cannot testify as to payments thereon made to the deceased payee, which payments were not endorsed on the note. Jennings *v.* Roberts, 130 Mo. App. 493, 109 S. W. Rep. 84.

A party suing an executor to recover property alleged to have been stolen by the decedent will not be permitted to testify that the decedent was present at the time of the alleged theft. Ten Broeck *v.* Jackson, 73 N. J. Eq. 734, 69 Atl. Rep. 490.

One bringing action against an estate for personal services rendered the deceased may testify as to such services. Gardner *v.* Young, 163 Wis. 241, 157 N. W. Rep. 787.

Where a decedent representative had allowed a claim for services rendered by himself for decedent, his testimony is incompetent on a final accounting as to conversations with decedent. In re Rikers, 85 N. J. Eq. 122, 94 Atl. Rep. 622.

His wife however is a competent witness. Id.

Where one of the parties to a contract is dead, the wife of the other party is not incompetent to testify as to the transaction between her husband and the deceased, under Civ. Code, 1910, § 5858, ¶ 4, § 5859. Dean *v.* Dean, 13 Ga. App. 798, 80 S. E. Rep. 25.

The wife of an heir of a decedent is incompetent to testify as to transactions between the decedent and claimants against his estate. Hyde *v.* Honitor, 175 Mo. App. 583, 158 S. W. Rep. 83.

[38] Before this qualification was expressly made, it was held that the fact that the interest was in favor of the executor or administrator against whom the witness was called, and was against the success of the party calling him, did not take the case out of the statute. Le Clare *v.* Stewart, 8 Hun, 127. A party cannot testify to a conversation between himself and a deceased grantor, under whose conveyance the opposite party claims, although the latter was not the immediate grantee of the deceased, but derived title through one or more mesne conveyances. Pope *v.* Allen, 90 N. Y. 298.

Under Code 1896, § 1794, one who has a pecuniary interest in the result of a suit by an administrator is incompetent to testify as to any statement by or transaction with the deceased. Cobb *v.* Owen, 150 Ala. 410, 43 So. Rep. 826.

Testimony of a wife to the effect that her deceased husband had contracted with her to have the beneficiary of his insurance policy changed from his mother to his wife is incompetent. Franken *v.* Supreme Court, I. O. F., 152 Mich. 502, 116 N. W. Rep. 188.

In a suit by the guardian of an insane woman against the admin-

trial, [39] interested in the event of the action or proceeding, whether directly interested in the cause of action, or whether

istrator of her deceased husband the guardian will not be permitted to testify, for the reason that if successful in the suit he would be entitled to commissions and if unsuccessful he would be liable for costs. Code 1896, § 1794. Holloway *v.* Wilkerson, 150 Ala. 297, 43 So. Rep. 731.

Parties who under the statute (Hurd's Rev. St. 1905, c. 51, § 2, p. 1034) are incompetent to testify will not be permitted to take the stand to refute the testimony of certain witnesses concerning statements made to them by the decedent in the absence of said parties. Wickes *v.* Walden, 228 Ill. 56, 81 N. E. Rep. 798.

No party shall be examined as a witness in regard to any personal transaction or communication between such witness and the decedent in an action against the executor. Tebbs *v.* Jarvis, 139 Iowa, 428, 116 N. W. Rep. 708.

In an action by a mortgagee against the executor of the deceased mortgagor the mortgagee will not be permitted to testify as to what was the preliminary agreement leading up to the execution of the mortgage. Code, § 4604. Whitley *v.* Johnson, 135 Ia. 620, 113 N. W. Rep. 550.

Under subsection 2 of § 606 of Civ. Code Practice, parties cannot testify as to verbal statements of and transactions with the deceased. Owsley *v.* Boles, 30 Ky. Law Rep. 1016, 99 S. W. Rep. 1157.

In an action against the estate of a deceased person testimony as to conversations and transactions between the plaintiff and the decedent is incompetent. Moore *v.* Moore, 30 Ky. Law. Rep. 383, 98 S. W. Rep. 1027.

Under § 4609, St. 1898, evidence, of a transaction had by the defendant personally with a deceased person through whom the plaintiff as trustee derived his title is excluded. Jackman *v.* Inman, 134 Wis. 297, 114 N. W. Rep. 489.

A husband who conducts his business entirely in his wife's name for the obvious purpose of evading payment to his creditors will not be permitted to testify as to a transaction between his wife and a deceased creditor, the husband being the *alter ego* of his wife. In re Neufeld, 50 N. Y. Misc. 215, 100 N. Y. Supp. 444.

In a suit by an executor to foreclose a mortgage, the mortgagor may not testify as a witness in respect to any transaction or communication by him personally with the deceased mortgagee, where no witness has been examined in behalf of the opposite party concerning such transaction or communication. Hilton *v.* Rahr, 161 Wis. 619, Rep. 155 N. W. 116.

[39] Farnsworth *v.* Ebbs, 2 Hun, 438, s. c., 5 Supm. Ct. (T. & C.) 1. As the N. Y. statute now refers only to examination at the trial or hearing, it may perhaps be claimed that such testimony

merely liable to be legally affected by the judgment,—as, for instance, where he stands in such a position that the effect of a recovery in the action may be to diminish a fund in which he has an interest,[40] or make his co-defendant liable jointly with him,[41] or may aid the party unsuccessful in the action to bring and maintain an action against the witness

may be taken on deposition, and the question of its competency determined at the trial, according to the existence of interest, etc., at the time of trial.

Code § 4604, excludes testimony as to any communication between the witness and a deceased person at the commencement of the examination. Tebbs *v.* Jarvis, 139 Iowa, 428, 116 N. W. Rep. 708.

[40] Le Clare *v.* Stewart, 8 Hun, 127; but the statute has been held not to exclude the foreign administrator of the same decedent in a suit against the administrators here appointed, for the former is not interested. 1 Whart. Ev. 451, § 471, citing Stearns *v.* Wright, 51 N. H. 606.

The husband of a party to an action who acted as agent for his wife is competent to testify as to a transaction between himself and the decedent, as he is not considered to be interested in the event. Savercool *v.* Wilsey, 5 N. Y. App. Div. 562, 39 N. Y. Supp. 413.

On the theory that a wife immediately upon the seizin of her husband becomes entitled to an inchoate right of dower, the wife of the contestant of a will cannot testify as to transactions or conversations with the deceased, the devolution of whose real estate is in controversy. Linebarger *v.* Linebarger, 143 N. C. 229, 55 S. E. Rep. 709, 10 Ann. Cas. 596.

The testimony of an officer of a mutual benefit corporation in an action brought by the representatives of a deceased member, as to a personal transaction with the decedent is not incompetent under the statute. Raab *v.* National Slavonic Society, 152 N. Y. Supp. 1033, 90 Misc. 379.

In an action brought by representatives of a decedent against a corporation, one who has in good faith extinguished his interest in the corporation by a sale of his stock before being called upon to testify is a competent witness as to any matter occurring before decedent's death. Isenberg *v.* Huntington M. & L. Co., 62 Pa. Super. 491.

[41] Wilcox *v.* Corwin, 117 N. Y. 500, 23 N. E. Rep. 165.

The prohibition of the statute is against testimony by a party to an action in which an executor or administrator is also a party.

The provisions of the statute cannot be annulled simply for the reason that the party testifying is a co-defendant with the executor or administrator. Cardiff *v.* Marquis, 17 N. D. 110, 114 N. W. Rep. 1088.

for indemnity;[42] or, to take another instance, where the effect of a recovery may be to exonerate the witness from liability for a tort, by giving the plaintiff satisfaction from another person.[43] But interest in the question is not enough. Thus, where the question is whether a deed shall be set aside as against one heir, another heir, not a party, is not excluded.[44] Nor is the mere fact that the witness or the deceased was the agent of the party in making the very contract sued on sufficient to disqualify.[45] The test of in-

[42] Stallings *v.* Hinson, 49 Ala. 92; Wooster *v.* Booth, 2 Hun, 426. Compare Cousins *v.* Jackson, 52 Ala. 262.

A child of the testator, who is not called to testify against his interest, in not a competent witness. Hartrick *v.* Hartrick, 272 Ill. 613, 112 N. E. Rep. 364.

[43] Andrews *v.* Nat. Bank of North America of N. Y., 7 Hun, 20.

[44] Hobart *v.* Hobart, 62 N. Y. 83; Hooper *v.* Howell, 52 Geo. 321.

Under Tex. Rev. St. 1895, art. 2302, evidence of conversations and transactions between a deceased and his heirs, during his lifetime, are inadmissible. Duncan *v.* Jouett (Tex. Civ. App.), 111 S. W. Rep. 981.

One suing as the heir of a grantee in a deed cannot testify as to declarations of such grantee concerning the consideration for the deed. Wolf *v.* King, 49 Tex. Civ. App. 41, 107 S. W. Rep. 617.

One who claims title to the property of a deceased under a deed from him is incompetent as a witness in support of such deed. Burnett *v.* Smith, 93 Miss. 566, 47 So. 117.

[45] Scurry *v.* Cotton States Life Ins. Co., 51 Geo. 624; Am. Life Ins. Co. *v.* Schultz, 2 Weekly Notes (Pa.), 665; Spencer *v.* Trafford, 42 Md. 17.

In Virginia, the agent of the plaintiff, who sold and delivered goods to the testator of the defendant executor, will be allowed to testify in behalf of the plaintiff as to the transaction. Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. Rep. 504.

An agent cannot testify in an action between his principal and the executor of a deceased customer as to conversations had with the decedent. Wood *v.* Kaufman, 135 Mich. 5, 97 N. W. Rep. 47.

Under § 400 of Code Civ. Pro. an agent of a party in interest will not be permitted to testify as to conversations and transactions with a deceased, in an action by the deceased's administrator. Clarke *v.* Home Fund Life Ins. Co., 79 S. C. 494, 61 S. E. Rep. 80.

The attorney for the plaintiff is not disqualified from testifying as to communications with the deceased but his credibility is open to attack by virtue of his relation to the case. Domm *v.* Hollenbeck,

terest is that the witness will either gain or lose by the direct legal operation of the judgment, or that the record will be

259 Ill. 382, 102 N. E. Rep. 782, Ann. Cas. 1914, B. 1272.

Section 7253, Rev. Codes 1905, does not exclude the testimony of the agent of a party or person whose testimony would be excluded. First National Bk. *v.* Warner, 17 N. D. 76, 114 N. W. Rep. 1085, 17 Ann. Cas. 213.

Under § 5242, Rev. St. 1906, the general manager of a corporation is not disqualified from testifying in an action against an administratrix as to transactions by him in behalf of the corporation with the deceased. Cockley Milling Co. *v.* Bunn, 75 Ohio St. 270, 79 N. E. Rep. 478, 116 Am. St. Rep. 741, 9 Ann. Cas. 179.

In an action against a corporation testimony concerning the statements of a deceased officer will be admitted if it is shown that another officer was present. Kinney Rodier Co. *v.* National Parlor Furniture Co., 176 Ill. App. 282.

An agent will be allowed to testify as to transactions had with a deceased buyer. Shaub *v.* Smith, 50 Ohio St. 648, 35 N. E. Rep. 503; Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. Rep. 504.

An agent of an insurance company cannot testify for his company in an action against the administrator of a deceased policyholder concerning any agreements made as to the policy. Insurance Co. of North America *v.* Brim, 111 Ind. 281, 12 N. E. Rep. 315.

Under § 500, Rev. St. 1881, an attorney is not disqualified from testifying as to conversations of his deceased client whom he represented at the making of a contract. Piper *v.* Fosher, 121 Ind. 407, 23 N. E. Rep. 269.

In Illinois a witness may testify as to a payment made to a deceased agent, as the statute excludes only testimony concerning conversations and not transactions. Helbig *v.* Citizens' Ins. Co., 120 Ill. App. 58.

In an action by the executor of a deceased employee of a railroad against the latter for the death of the employee, the foreman of the railroad who gave the employee orders may testify concerning those orders, the foreman being neither a party nor interested in the event. Lake Shore & M. S. Ry. Co. *v.* Rohlfs, 51 Ill. App. 215.

A clerk of an insurance agent may testify concerning a conversation between the agent and a deceased policyholder as to a change to be made in the policy, the clerk not being a party and not interested. Krause *v.* Equitable Life Assoc. Soc., 105 Mich. 329, 63 N. W. Rep. 440.

Where, in an action brought by the personal representative of a decedent, it appears that the defendant's witness was his agent and likewise interested in the result of the suit, the exclusion of his testimony is proper. McIntyre *v.* Jones, 17 Ga. App. 760, 88 S. E. Rep. 419.

legal evidence for or against him in some other action.[46] And it must be a present, certain, and vested interest, and not

[46] Connelly *v.* O'Connor, 117 N. Y. 91, 22 N. E. Rep. 753.

The prohibition of the statute (Code, § 4604) extends no farther than to forbid the examination of a party or person interested as a witness respecting transactions or communications between such witness and a person since deceased as against a person bearing to such deceased some one of the relationships specified in the statute, and where the relationship is not one falling within the specified classes the witness will be allowed to testify. Culbertson *v.* Salinger & Brigham (Ia.), 117 N. W. Rep. 6.

Under Hurd's Rev. Stat. 1905, p. 1034, c. 51, § 2, the test of interest that disqualifies when an heir is a party to the suit is whether the witness would immediately gain or lose by the event of the suit, or whether the verdict could be given in evidence, either for or against him, in another suit. Jones *v.* Abbott, 235 Ill. 220, 85 N. E. Rep. 279. In a will contest the contestant will not be permitted to testify that he loaned the testator money, under Rev. Civ. St. 1911, art. 3690. Ross *v.* Kell (Tex. Civ. App.), 159 S. W. Rep. 119.

The relatives of the proponent of a will are competent to testify in a contest under Mills Ann. St., § 4816. Burnham *v.* Grant, 24 Colo. App. 131, 134 Pac. Rep. 254.

One whose claim against the estate of a decedent has been paid is competent to testify as to such claim, as he is not interested in the event of a proceeding on a contested accounting in which the rightful payment of such claim is disputed. But his testimony, unless corroborated by others, will be insufficient. Matter of Mulligan, 82 N. Y. Misc. 336, 143 N. Y. Supp. 686.

The parent of one who was killed in an accident is not disqualified from testifying against the party who was responsible, under Revisal 1905, § 1631. Irvin *v.* Southern Ry. Co., 164 N. C. 5, 80 S. E. Rep. 78.

Under evidence act May 23, 1887 (P. L. 159, § 5), no person whose interest shall be adverse to the right of a deceased party shall be a competent witness to any matter occurring before the death of such party. Munson *v.* Crookston, 219 Pa. 419, 68 Atl. Rep. 962.

One who is a party to a contract which is made solely for the benefit of others will not be disqualified from testifying as to conversations with the decedent who made the contract, on the theory that the witness is not testifying in his own favor. Howard *v.* Hardy, 128 Mo. App. 349, 107 S. W. Rep. 466.

Under Sayles' Ann. Civ. St. 1897, Art. 2302, in an action by or against executors neither party may testify against the other as to any communication with the deceased, unless called by the opposite party. Huff *v.* Powell, 48 Tex. Civ. App. 582, 107 S. W. Rep. 364.

Where an action is dismissed as

one that is uncertain, remote, or contingent.[47] Hence, in an action upon an alleged agreement on the part of defendant's

against one of the parties defendant, such party will not be disqualified from testifying when the case is reached for trial, as to transactions with the deceased under § 2303, R. S. 1895, for the reason that at the time of the trial he is not a party to the suit. McKeon *v.* Roan (Tex. Civ. App.), 106 S. W. Rep. 404.

One whose claim has been paid by the administrator is a competent witness, in the proceeding on a contested accounting, as to his transaction with the deceased. Matter of McNeany, 5 N. Y. App. Div. 456, 38 N. Y. Supp. 1093.

In Ohio an exception has been made in actions which involve the validity of a deed, in which the grantee of a decedent was not disqualified from testifying against the administrator. Doney *v.* Dunnick's Adm'r, 8 Ohio Cir. Ct. R. 163, 4 Oh. Cir. Dec. 380.

In an action against the administrator of an estate, the wife of plaintiff is a competent witness to testify to transactions with or statements by the intestate. Wooster *v.* Eagan, 88 N. J. L. 687, 97 Atl. Rep. 291.

The interest which will disqualify a witness from testifying as to a transaction with the deceased must be direct and present. An interest which can be affected by the result of the suit only in some remote or merely possible contingency will not disqualify. A stockholder of a corporation which is a creditor of one of the parties is competent. Kyle *v.* Kyle, 175 Iowa, 734, 157 N. W. Rep. 248.

A stockholder of a corporation is not a competent witness to testify against the representative of a deceased person, where the corporation will gain or lose as a result of the suit. Scott *v.* O'Connor-Couch, 271 Ill. 395, 111 N. E. Rep. 272, L. R. A. 1916, D. 179.

A witness interested in the question as to whether a sale was made to the deceased or to himself, is a competent witness to testify against the defendant executors, respecting a personal transaction with their deceased, where it is clear that any judgment in the action could not affect the witness by direct legal operation, nor the record be legal evidence for or against him in any other action. West End Brewing Co. *v.* Utica Trust & Deposit Co., 175 App. Div. 477, 162 N. Y. Supp. 537.

[47] Connelly *v.* O'Connor, 117 N. Y. 91, 22 N. E. Rep. 753. "It is claimed, however, that Freedman was examined in his own behalf, and had an interest in the event of the action by reason of his position as indorser. But the fact of his indorsement merely did not make him liable on the note, and we think not even presumptively so. Until the note was duly presented and protested for non-payment and due notice given, the indorser was not liable at all. At the date of the trial the note was

intestate to pay plaintiff for the care and support of the intestate's illegitimate child, the mother of the child, who was not a party to the action, was held competent to testify as to the contract with the intestate.[48] So, in an action of ejectment wherein plaintiff claimed as only son and heir of his father, and the only question at issue was as to the marriage of his parents before his birth, it was held that his mother was a competent witness to prove the marriage.[49]

long past due, and Freedman charged as indorser or discharged by the omission of protest and notice. He says he received no notice. Presumptively, therefore, none was sent. If the plaintiffs had shown that his liability as indorser had arisen, or possibly even that a claim of protest and notice in good faith existed, so as to leave the question of liability open, it might be urged that he had an interest in proving payment, but until something of the kind appeared, he stood not at all in the attitude of one interested in the event of the action and examined in his own behalf." Nearpass *v.* Gilman, 104 N. Y. 506, 510–511, 10 N. E. Rep. 894.

One who is the son of a defendant in an action to foreclose a mortgage, and resides upon the mortgaged premises without paying rent, has no legal interest in the land nor in the event of the action, and will not be disqualified from testifying against the executor of the deceased mortgagee as to transactions with the latter. Bennett *v.* Best, 142 N. C. 168, 55 S. E. Rep. 84.

In a will contest to which the executor is a party, a legatee will not be prevented from testifying as to the testator's mental capacity. Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. Rep. 253.

[48] Connelly *v.* O'Connor, 117 N. Y. 91, 22 N. E. Rep. 753. The payee of a note is not a successor to the title or interest of the maker. Wilcox *v.* Corwin, 117 N. Y. 500, 23 N. E. Rep. 165. Neither a mortgagee nor his assignee derives his title from, through, or under the mortgagor. Holcomb *v.* Campbell, 118 N. Y. 46, 22 N. E. Rep. 1107.

Acts 1904, p. 1168, c. 661, will not be so construed as to make incompetent, witnesses who prior to its passage were competent.

Where a mother testifies as next friend of her children in a contest of her deceased husband's will she has no interest in the proceeding and will not be disqualified from testifying as to transactions with him. Johnson *v.* Johnson, 105 Md. 81, 65 Atl. Rep. 918, 121 Am. St. Rep. 570.

[49] Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. Rep. 1024. "Under the rule of the common law on the subject of interest it is plain that the mother in this case would have been a competent witness.

To warrant the exclusion the disqualification must clearly appear and not be a matter of inference.[50]

A release which absolutely extinguishes the interest of the witness restores competency, where the disqualification resulted from being interested, but not where it resulted from the mere fact of being a party.[51]

She had no interest in the event of the suit, as that expression has been defined by the courts, and the judgment would not have been any evidence for or against her in any action she might bring. I think the expression 'interest in the event,' as used in our statute, was never intended to enlarge the class to be excluded under it beyond that which the common law excluded in using the same language." Id., PECKHAM, J.

One who falls within none of the classes of persons declared to be incompetent, under § 5269, Civ. Code, 1895, to testify as to communications with a decedent, will be allowed to give testimony.

The fact that a daughter of the witness may profit by the witness' testimony will not exclude the witness. Jackson *v.* Gallagher, 128 Ga. 321, 57 S. E. Rep. 750.

[50] Whitman *v.* Foley, 125 N. Y. 651, 26 N. E. Rep. 725.

A witness who is a brother and an heir of the decedent, and whose interest is not adverse, and who is not a party to the suit, is a competent witness under § 506, Burns Ann. St., 1901, to testify as to transactions with the deceased. Sallee *v.* Soules, 168 Ind. 624, 81 N. E. Rep. 587.

Where the witness is not a party to the suit nor interested in the result, he will not be disqualified from testifying. Morehead *v.* Allen, 127 Ga. 510, 56 S. E. Rep. 745.

Where an administrator is only an indifferent party to a suit, Code, § 4604, does not apply to prevent the other parties from testifying to transactions with the deceased. City National Bk. *v.* Crahan, 135 Iowa, 230, 112 N. W. Rep. 793.

A father who has emancipated his infant daughter is not thereafter, by § 23, ch. 130, Code, 1899 (Code, 1906, § 2945), disqualified, in a suit by her against the estate of a decedent for the value of services rendered the latter in his lifetime, to give evidence on her behalf of a personal transaction or communication between the witness and the decedent. Weese *v.* Yokum, 62 W. Va. 550, 59 S. E. Rep. 514.

The competency of a witness is to be determined by the court. Campbell *v.* Hunt, 60 Pa. Super. Ct. 332.

[51] Genet *v.* Lawyer, 61 Barb. 211.

One whose claim against the estate of a decedent had been paid is competent to testify as to such claim, as he is not interested in the event of a proceeding on a contested accounting in which the rightful payment of such claim is

The execution of a general release by one of two plaintiffs, the effect of which is to vest the interest released in his co-plaintiff, does not render him a competent witness in behalf of his co-plaintiff, as to such a transaction or communication.[52]

15. Assignor, or Source of Title Excluded.

No person, from, through, or under whom such a party or interested person derives his interest or title, by assignment or otherwise,[53] can be thus examined, in his own behalf or interest, or in behalf of the party succeeding to his title or interest,[54] if the interest or title thus derived is in the par-

disputed. But his testimony, unless corroborated by others, will be insufficient. Matter of Mulligan, 82 N. Y. Misc. 336, 143 N. Y. Supp. 686.

[52] O'Brien *v.* Weiler, 140 N. Y. 281, 35 N. E. Rep. 587.

[53] Even where the statute does not expressly exclude the transferrer of the cause of action, the courts have sometimes excluded him, upon the equity of the statute. Louis *v.* Easton, 50 Ala. 470, 1 Whart. Ev. 452, § 473. The rule of exclusion does not apply in a replevin suit against a purchaser from the administrator at public sale. Durham *v.* Shannon, 116 Ind. 403, 9 Am. St. Rep. 860, 19 N. E. Rep. 190.

[54] The owner of chattels transferred the title, and became agent for his transferee, and then bailed them with defendants, without disclosing his agency. *Held*, that in his principal's action against the defendants, he could not testify to a demand made on one of them who had since died. Conway *v.* Moulton, 6 Hun, 650. A partner having assigned or released to his co-partner is within the rule. Lyon *v.* Snyder, 61 Barb. 172. A child emancipated by his father does not derive title to subsequent earnings "from, through, or under" the father, in such sense that the father is incompetent. Shirley *v.* Bennett, 6 Lans. 512.

Persons from, through, or under whom a party derives his interest or title are precluded from giving evidence of any transaction or communication with a deceased person in a cause of action, wherein the opposite party derives his title or sustains his liability to the cause of action from, through, or under such deceased person. (§ 4609, St. 1898.) Dreger *v.* Budde, 133 Wis. 516, 113 N. W. Rep. 950.

Under § 4562, Rev. St., 1899 (Ann. St., 1906, p. 2520) where one of the parties to a deed or contract in issue is dead, the other party to such deed or contract will not be permitted to testify as to the nature of the deed or contract and the purpose for which it was given. Gibbs *v.* Haughowout,

ticular claim affected by the transaction or communication.[55]

16. What Persons are Protected.

The ground of the exclusion is the intervening incapacity of the other party to the personal transaction or communication.[56] For this purpose, death is held to be sufficiently established by *prima facie* evidence,—for instance, the pro-

207 Mo. 384, 105 S. W. Rep. 1067.

[55] This qualification is consonant to the principle of the statute, and seems supported by the doctrine of Cary *v.* White, 59 N. Y. 336, and Van Tuyl *v.* Van Tuyl, 8 Abb. Pr. N. S. 5, s. c., 57 Barb. 235. *Contra*, Lyon *v.* Snyder (above).

In an action by a grantor to set aside a conveyance to a grantee since deceased, the grantor will not be permitted to testify as to conversations with the grantee concerning the conveyance. Hagan *v.* McDermott, 134 Wis. 490, 115 N. W. Rep. 138.

Where the grantor named in a deed is dead, the grantee, in an action to prove his title, may after introducing the deed in evidence testify that he bought the land from the decedent and that he paid him for it. (§ 400, Code Civ. Pro., 1902.) Langston *v.* Cothran, 78 S. C. 23, 58 S. E. Rep. 956.

In an action on contract against the administrators of the other party thereto one who is the real party in interest to the contract although not a party to the suit is not competent to testify as to any transactions between himself and the decedent. Stone *v.* Fry, 191 Mo. App. 607, 178 S. W. Rep. 289.

[56] See paragraph 11, above.

An executor, unless shown to have an interest in the subject-matter of the controversy, will not be disqualified from testifying under Code, § 606. Bright *v.* Bright, 30 Ky. Law Rep. 834, 99 S. W. Rep. 901.

In an action against a widow as executrix of her deceased husband, she may testify fully to transactions between him and the plaintiff, and she does not thereby waive her right to object to the plaintiff's testifying to the same transactions. O'Connor *v.* Slatter, 48 Wash. 493, 93 Pac. Rep. 1078.

In an action brought by an administrator, the defendant is not authorized to testify to statements made by the deceased unless called and examined by the plaintiff in regard thereto. (Code, Art. 35, § 3.) Koogle *v.* Cline, 110 Md. 587, 73 Atl. Rep. 672, 24 L. R. A. N. S. 413.

Where a claim against an estate is based upon a personal transaction between the decedent and the claimant, clear and convincing proof is needed. In re Gilman, 156 N. Y. Supp. 169, 92 Misc. 140.

duction of the letters under which the representative acts.[57] The fact that the action is in the name of the representative for formal reasons, although the estate has no interest as such, does not alter the case, if the interests of other parties are such that the reasons for protection equally apply.[58] And, on the other hand, the prohibition will apply for the protection of the estate, though the representative, being a party as such, be also made a party individually; [59] or, though he be sued only in his individual name, if he might have been sued in his representative character, or if the recovery will enhance or diminish the estate.[60] The words indicating the various personal relations and modes of succession protected by the statute, are liberally construed in furtherance of the equity of the rule; [61] and it is not essential

[57] Parhan *v.* Moran, 4 Hun, 717.

[58] Hollister *v.* Young, 41 Vt. 156.

If the estate of the deceased is neither a party to nor interested in the controversy, testimony as to transactions with the deceased will not be excluded. Hankey *v.* Downey, 10 Ind. App. 500, 38 N. E. Rep. 220.

In an action by the indorsee after maturity against the maker of a note, the latter may testify that he paid the note to the decedent payee, provided the indorsee is not a representative of the decedent. Woodson *v.* Jones, 92 Ga. 662, 19 S. E. Rep. 60.

[59] Dixon *v.* Edward, 48 Geo. 146. Nor does the fact that the representative, by verifying his pleading, has by virtue of a statute, cast the burden of proof on the other party. Id.

An executor may testify as to a conversation had with his testator in which the opposing party took part. Wakefield *v.* Wakefield, 47 N. Y. Misc. 87, 93 N. Y. Supp. 554.

[60] Louis *v.* Easton, 50 Ala. 470; Fitzsimmons *v.* Southwick, 38 Vt. 514. It has, however, been held that, in a probate proceeding, the executor is not protected, because it is said that before letters issued, he is not a party as such. Hamilton *v.* Hamilton, 10 R. I. 538; Dietrich's Estate, 1 Tuck. 129. On the other hand, it has been held that the protection in favor of the executor or administrator must be extended by the court to an heir, etc., if the object of the action is to establish a liability of the decedent or a benefit to his estate. Mountain *v.* Collins, cited in 50 Ala. 472; but see Bragg *v.* Clark, 50 Ala. 363.

[61] Thus, a husband, claiming by marital right of succession, has been treated as if he were next of kin to his wife. Dewey *v.* Goodenough, 56 Barb. 54. The term

that it appear in which of several classes protected by the statute the objector is, if his right or liability must be in one or another.[62] But the only derivative title regarded is one held by the deceased at the time of the transaction, and subsequently devolved upon the objecting party.[63]

17. Insanity.

For convenience of presenting the whole statute in one view, its application, where the incapacity is mental, should be here considered. A question may arise as to what degree of insanity will bring the case within the statute. At common law, the insane are not absolutely disqualified to testify. An insane person may be examined as a witness in a lucid interval, and may then testify even to what took place when he was insane; and even while under delusion, may be examined on the ground of necessity, especially for his own protection, and for the redress of an injury to himself. If the person is insane within the meaning of the language of the rules of evidence as to witnesses, testimony of the interested witness should not be admitted under the statute.[64]

"heir" extends to heirs of deceased heirs claiming by representation. Merrill *v.* Atkins, 59 Ill. 19. "Survivor" protects a surviving partner. Green *v.* Edick, 56 N. Y. 613; and "assignees" includes grantees of land. Mattoon *v.* Young, 45 N. Y. 696; and donees of personalty. Howell *v.* Taylor, 11 Hun, 214. A bank making a loan on stock borrowed by an officer and pledged for his own benefit, under a representation that the loan was for a third person,—*Held*, an assignee of its officer within the rule. Andrews *v.* Nat. Bank of N. Am., 7 Hun, 20. But a creditor, taking a collateral security by an assignment from a third person, obtained for him by his debtor, is not an assignee of the debtor within the rule. Barney *v.* Equitable Life Assur. Soc., 59 N. Y. 587. If defendant in trespass justifies as having entered as the agent of the true owners, who claim under a deceased person, plaintiff's grantor cannot testify against defendant to conversations with the deceased. Wheelock *v.* Cuyler, 4 Hun, 414.

[62] See Mosner *v.* Raulain, 66 Barb. 213.

[63] Cary *v.* White, 59 N. Y. 336.

[64] For these rules see People ex rel. Norton *v.* N. Y. Hospital, 3 Abb. New Cases, 229, note.

A person who is in no respect in-

And even if not, the existence of an inquisition or the appointment of a guardian *ad litem* in the action, on the ground of insanity, is *prima facie*, though only *prima facie*, evidence of incapacity to testify.[65]

18. Objecting to the Testimony.

The interested witness, when offered, should not be excluded merely because he is called against an executor or administrator, etc., unless it is clear that if sworn he could not testify to anything; until that appears, it is error to exclude him [66] under such a statute as that of New York, where, strictly speaking, the incompetency is not that of the witness, but of his testimony to particular facts.[67] Hence a general objection is not enough.[68]

terested in the subject-matter in controversy will not be disqualified under § 1631, Revisal, 1905, which prohibits persons interested from testifying in suits against the representative of an insane person as to communications with the latter. Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. Rep. 629.

[65] Id.; Little *v.* Little, 13 Gray, 264.

[66] Card *v.* Card, 39 N. Y. 317; and see Martin *v.* Jones, 59 Mo. 187; Leaptrol *v.* Robertson, 37 Geo. 586.

[67] But where the statute makes a general exclusion of the opponent of an executor or administrator, with specified exceptions, an offer of the testimony should show that it is within the exception. White *v.* Brown, 5 Reporter, 171; Hanna *v.* McVay, 77 Penn. St. 27, 31; and see Stewart *v.* Kirk, 69 Ill. 512.

[68] Lewin *v.* Russell, 42 N. Y. 251. Compare Somerville *v.* Crook, 9 Hun, 668. An objection in substance that the question calls for testimony relating to personal transactions with the deceased by an interested witness is sufficient, and it is not necessary to refer to the section of the Code or other authority by which the objection could be sustained. Sanford *v.* Ellithorp, 95 N. Y. 48, 52.

An objection to evidence on the ground that it is "immaterial, irrelevant, incompetent, and not within the issues" is not sufficient to exclude testimony concerning a transaction with a decedent. The objection must set forth clearly that the evidence contravenes the terms of the statute which excludes testimony as to such transactions. (Code Civ. Pro., § 829.) Hamlin *v.* Hamlin, 117 N. Y. App. Div. 493, 102 N. Y. Supp. 571.

19. Preliminary Question of Competency.

Whenever it appears that a witness who is within the statute is about to testify to an interview at which the deceased may have been present, the question whether the examination proposed relates to a personal transaction or communication between them, is, in strictness, one of preliminary proof, addressed to the judge, for the purpose of determining which, the witness may testify either negatively or affirmatively as to whether the deceased was present, and if so, whether anything passed between him and the deceased, and for this purpose may be asked such questions as are necessary to ascertain whether he merely overheard the conversation, or whether he was privy to it; [69] and the objecting party may be allowed to interpose with evidence to the contrary, to enable the judge to determine whether the witness could testify to what passed at the interview. But in ordinary practice, the examination is allowed to proceed as evidence for the jury, until it appears that the witness is stating a personal transaction or communication between him and the deceased; whereupon all the testimony vitiated by this fact will be struck out, if a proper and timely objection is made. The principle is the same under any statute which treats the witness as competent generally, but incompetent as to particular facts.

20. Moving to Strike out Incompetent Part of Testimony.

If a witness is inquired of generally as to a transaction, by a question not indicating that it was a personal transaction or communication with the deceased, he may properly be allowed to answer, reserving to the objecting party the right

[69] Otherwise any testimony might be objected to on the ground that if the deceased were alive he might contradict it. Isenhour *v.* Isenhour, 64 N. C. 640; Brower *v.* Hughes, Id. 642. The statute was not designed to exclude the testimony of a party, to an occurrence at which the deceased need not have been present. Franklin *v.* Pinkney, 18 Abb. Pr. 186, s. c., 2 Robt. 429.

to move to strike out,[70] and, if the testimony proves incompetent, the motion to strike out must be made at or before the close of the direct examination. Cross-examining the witness at large waives the motion to strike out.[71] If, however, the testimony does not show a personal transaction or communication—for example, if it simply states that the witness had paid what was due to the deceased—it is not to be struck out, unless on cross-examination the objector elicits the facts showing its incompetency; then it must be stricken out; and the circumstance that the cross-examination had not been confined to this point does not preclude the objector from moving to strike out all the incompetent testimony.[72]

21. Proof of an Interview.

Under the New York statute, and others which simply exclude all examination in regard to any personal transaction or communication, if the mere fact that a conversation was had between the witness and the deceased be the material fact, it may be error to allow the witness to state even that; but ordinarily, where the material fact is the substance of the interview itself, it is not error to allow the examination to proceed so far as to state that an interview was had, without proving what was said or done.[73] The ordinary test is, does the testimony tend to prove what the transaction was which was had personally by him with the deceased.[74] The exclusion is not, however, merely of testimony to prove what took place. It is equally incompetent to disprove all intercourse as to prove a particular transaction. Testifying that

[70] Kerr *v.* McGuire, 28 N. Y. 446, 452.

Compare Howell *v.* Van Siclen, 6 Hun, 115, 120.

[71] King *v.* Haney, 46 Cal. 560, s. c., 13 Am. Rep. 217.

The incompetency of a witness to testify concerning communications or transactions had with a person since deceased is waived if the objecting party shows on cross-examination that such a communication or transaction occurred. Poole *v.* Poole, 96 Kan. 84, 150 Pac. Rep. 592.

[72] Kerr *v.* McGuire (above).

[73] Hier *v.* Grant, 47 N. Y. 278.

[74] Strong *v.* Dean, 55 Barb. 337.

there never was an interview is equally testifying "in regard to" the supposed communications, as is testifying to what took place at an alleged interview.[75] This may seem inconsistent with what has just been said about testifying to the fact of an interview, when only the conversation is material, and about testifying that the deceased was not present at an act, or that a communication when he was present was not personal, between him and the witness; but the distinction, though refined, is clear. If what passed at the interview is the material fact, a witness who testifies only that an interview was had, but does not say what passed, is not considered as having testified in regard to the alleged personal transaction or communication. But if he is allowed to testify that no interview ever took place, he does negative the supposed personal transaction or communication. Proving an interview merely, does not prove personal communication; but disproving all interview does disprove personal communication. Hence the rule that the witness cannot testify, even negatively, as to interviews.

22. What is a Personal Transaction or Communication.

The interview, to be excluded, must have been a personal one. An interview solely with an agent since deceased, is

[75] Clarke *v.* Smith, 46 Barb. 30; Dyer *v.* Dyer, 48 Id. 190; Stanley *v.* Whitney, 47 Id. 586. Thus the witness cannot testify that he never paid money to the deceased, or that the deceased never paid money to him. The rule excludes testimony that an alleged personal transaction or communication was never had. Howell *v.* Van Siclen, 6 Hun, 115; Barrett *v.* Carter, 3 Lans. 68; or that witness did not see, or did not have a transaction with, the deceased. Mulqueen *v.* Duffy, 6 Hun, 299.

Under Civ. Code, 1895, § 5269, which provided that "where any suit is instituted or defended by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the deceased person, as to transactions or communications with such deceased person," the living party will be forbidden from testifying as to the non-existence of the transactions or communications. Webb *v.* Simmons, 3 Ga. App. 639, 60 S. E. Rep. 334.

unaffected by the statute.[76] The words "transactions or communications" as used in the statute include every method by which one person can derive any impression or information from the conduct, condition or language of another[77]

[76] Hildebrant *v.* Crawford, 65 N. Y. 107, affi'g 6 Lans. 502; Pratt *v.* Elkins, 80 N. Y. 198; Am. Life Ins. Co. *v.* Shultz, 2 Weekly Notes (Pa.), 665; Cheney *v.* Pierce, 38 Vt. 515, 528. But under statutes which exclude the surviving party to a contract, the death of a contracting agent has been thought to exclude the surviving party who contracted with him. 1 Whart. Ev. 451, § 469, citing First Nat. Bk. *v.* Wood, 26 Wis. 500. Where the action was by A. to reform his deed to B. and B.'s to C., *Held*, that A. might testify to what occurred between him and B., although C. was dead. Payne *v.* Elyea, 50 Geo. 395.

Where a contract was made with an agent, and the agent is dead, the other party to the contract cannot testify as to what was said by the agent in making the contract. Holcomb-Lobb Co. *v.* Kaufman, 96 S. W. Rep. 813, 29 Ky. L. 1006.

The death of a selling agent makes inadmissible evidence by one who purchased from him that the agent made fraudulent representations in effecting the sale. (§ 10,212, Comp. Laws, 1897.) Kessler *v.* Zacharias, 145 Mich. 698, 108 N. W. Rep. 1012.

One who contracted with a corporation through its agent is not competent to testify as to such transaction after the death of the agent. Baldwin Co. *v.* R. S. Howard Co., 233 Fed. Rep. 439.

[77] Holcomb *v.* Holcomb, 95 N. Y. 316.

West Virginia Code, 1906, § 3945, forbidding testimony as to a personal transaction with a decedent must be given a broad and liberal construction and the words "personal transaction" should include all work or labor performed or acts done for the deceased whether in his presence or not. McBride *v.* Kirkpatrick, 207 Fed. Rep. 893.

In Alabama a witness will not be permitted to testify that in his opinion the signature to a document is that of a deceased person, on the theory that proof of the signature would be a method of proving the fact that the decedent actually signed his name to the paper. Ware *v.* Burch, 148 Ala. 529, 42 So. Rep. 562, 12 Ann. Cas. 669.

The test in ascertaining what is a "transaction with" the deceased about which the other party to it cannot testify is to inquire whether, in case the witness testify falsely, the deceased, if living, could contradict it of his own knowledge. (Citing Smith *v.* Burnet, 35 N. J. Eq. 314; Woolverton *v.* Van Scykel 57 N. J. Law, 393, 31 Atl. Rep. 603; Provost *v.* Robinson, 58 N. J. Law, 222, 33 Atl. Rep. 204; Dickerson

and embrace every variety of affairs which can form the subject of negotiations, interviews or action between two persons.[78] Although, to come within the prohibition, the transaction or communication must have been a personal one, it need not have been private or confined to the witness

v. Payne, 66 N. J. Law, 35, 48 Atl. Rep. 528.) Van Wagenen *v.* Bonnot, 74 N. J. Eq. 843, 70 Atl. Rep. 143, 18 L. R. A. N. S. 400.

Since the amendment of July 1, 1899, to Hurd's Stat. 1903, ch. 51, § 4, p. 935, the restriction extends only to conversations with a decedent, the statute no longer referring to "transactions." Helbig *v.* Citizens' Ins. Co., 120 Ill. App. 58.

A conversation between the uncle and aunt, since deceased, of the witness but in which he took no part, but which conversation was obviously for the purpose of conveying information to the witness is a communication with a decedent. Tebbs *v.* Jarvis, 139 Iowa, 428, 116 N. W. Rep. 708.

[78] Heyne *v.* Doerfler, 124 N. Y. 505, 26 N. E. Rep. 1044. "It has been held with general uniformity that the section prohibits not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negativing the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from its surroundings and permitting the survivor to testify to what on its face may seem an independent fact, when in truth it had its origin in or directly resulted from a personal transaction. It is too broad a statement that where the ultimate fact cannot be proved under this section by a witness, he cannot testify to any of a series of facts from which the ultimate fact may be inferred; but if there is introduced into this statement the qualification that he cannot testify as to any of the particular facts, which originated in a personal transaction with the deceased, or which proceeded from such transaction as a cause, the statement so qualified may be substantially correct." Clift *v.* Moses, 112 N. Y. 426, 435, 20 N. E. Rep. 392.

The testimony of a witness as to the handwriting or the contents of a deed of a deceased grantor does not involve a personal transaction with the deceased under § 829, Code Civ. Pro. Simmons *v.* Havens, 101 N. Y. 427. 5 N. E. Rep. 73.

Where the party living kept an account book he will be permitted to testify in his own favor so far as to prove in whose handwriting his charges are and when made. (Sess. Acts, 1887, p. 287.) Jesse *v.* Davis, 34 Mo. App. 351.

and deceased.[79] The rule excludes not only testimony of transactions directly between the witness and the deceased and communications made by the latter to the former, but of any transaction between the deceased and others, in any portion of which the witness participated, or any conversation in his hearing, although not with or addressed to him.[80]

[79] Holcomb *v.* Holcomb, 95 N. Y. 316; Heyne *v.* Doerfler, 124 N. Y. 506, 26 N. E. Rep. 1044; Matter of Will of Dunham, 121 N. Y. 575, 577, 24 N. E. Rep. 932.

[80] In re Will of Eysaman, 113 N. Y. 62, 20 N. E. Rep. 613.

An interested witness may testify to communications between others and the deceased, but not between the witness and the deceased. Sarchfield *v.* Hayes (Ia.), 112 N. W. Rep. 1100.

One who is a party to an action may not testify that he heard a conversation between the decedent and a person who is interested in the event of the action, as that would be the indirect testimony of an interested witness as to a communication with the deceased. (§ 1631, Revisal, 1905.) Witty *v.* Barham, 147 N. C. 479, 61 S. E. Rep. 372.

Under § 1631 of the Revisal, the widow of a deceased grantee of a tract of land will be permitted to testify that she saw the decedent place the deed in his safe deposit box, and that she saw the deed in said box, these things not being communications or transactions with the deceased. Carroll *v.* Smith, 163 N. C. 204, 79 S. E. Rep. 497.

One having a direct legal interest in the event of a suit, such as the principal beneficiary under a will which is being contested, may testify to a conversation between the decedent and a third party. (§ 329, Code Civ. Pro.) Matter of Powers, 79 Neb. 680, 113 N. W. Rep. 198.

Section 329, Code Civ. Pro., does not prohibit the grantees of land, which the grantor has transferred to his wife by an unrecorded deed, from testifying after the death of the wife in regard to their ownership and open occupation of the land. Kime *v.* Krenek, 94 Neb. 395, 143 N. W. Rep. 473.

Section 829, Code Civ. Pro., not only forbids direct testimony by a survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing. Little *v.* Johnson, 117 N. Y. App. Div. 500, 102 N. Y. Supp. 754.

The donee of a gift *causa mortis* cannot testify that the gift was received through a third person as that would be indirect testimony as to a transaction with a decedent. Davis *v.* Davis, 104 N. Y. Supp. 824.

Under Revisal, 1905, § 1631, a party may not testify to a conver-

23. Indirect Evidence.

The prohibition is not to be evaded by questions of a general form, such as whether the witness was in the habit of borrowing from the deceased, where such habit might form a ground of presumption as to what passed at a supposed interview;[81] nor is it disregarded because testimony to facts necessarily or presumptively importing personal communications does not specify any particular interview. Thus a physician or attorney is incompetent to prove his own services as such to the deceased, as against the representative.[82] But the rule does not preclude the survivor

sation which he heard between an interested person and the decedent, as that would be the indirect testimony of an interested witness as to a transaction or communication with the deceased. Witty *v.* Barham, 147 N. C. 479, 61 S. E. Rep. 372.

[81] Alexander *v.* Dutcher, 7 Hun, 439. But compare Kerr *v.* McGuire, 28 N. Y. 452.

[82] Ross *v.* Ross, 6 Hun, 182; Somerville *v.* Crook, 9 Hun, 664. A party is competent against an administrator to identify his shop books offered in evidence. Strickland *v.* Wynn, 51 Geo. 600; Leggett *v.* Glover, 71 N. C. 211; Kelton *v.* Hill, 58 Me. 115. If the books can be deemed admissible as at common law, notwithstanding the death of the other party to the transactions, they should be introduced only upon the common-law proof of accuracy, etc. Knight *v.* Cunnington, 6 Hun, 100, 105. It has even been said that a witness who cannot prove a personal transaction, is equally incompetent to prove any state of facts from which such transaction might be presumed,—for instance, that to raise a presumption that he had made payments to the deceased, he could not testify that the deceased had no other sources of income than such payments. Jaques *v.* Elmore, 7 Hun, 675.

In an action against an administrator for services in nursing, caring for, and boarding the decedent, the plaintiff is an incompetent witness to prove the fact of their performance, unless the circumstances are shown to have been such that acquiescence by the decedent is not inferable therefrom. (§ 322, Civil Code [Gen. St., 1901, § 4770].) Heery *v.* Reed, 80 Kan. 380, 102 Pac. Rep. 846.

Medical attendance involves a transaction as well as a communication between the physician and the patient. Upon the death of the patient testimony from the physician as to the facts of that attendance in an action brought by him to recover for his services is inadmissible under § 829 of the New York Code of Civ. Pro. Kennedy

from testifying to extraneous facts or circumstances, which tend to show that a witness who has testified affirmatively to such a transaction or communication has testified falsely, or that it is impossible that his statement can be true, as, for instance, that the survivor was at the time absent from the country where the transaction is stated to have occurred; and, so long as the survivor refrains from testifying as to anything that passed, or did not pass, personally between himself and the deceased, it is not a valid objection to his testimony that the facts which he states bear upon the issue, whether or not the personal transaction in question took place, or upon the truth of the testimony by which such transaction is sought to be proved against him.[83]

The exclusion of the transaction or communication excludes all the incidents of it,[84] so far as they are connected with what affected the witness and the deceased together.

v. Mulligan, 173 App. Div. 859, 160 N. Y. Supp. 105.

[83] Pinney *v.* Orth, 88 N. Y. 447, 451. "It is difficult to lay down any general rule which shall cover all possible transactions, but it is safe to say when a party gives material evidence as to extraneous facts, which may or may not involve the negation or affirmation of the existence of a personal transaction or communication with a deceased person, that the adverse party although precluded from directly proving the existence of such communication or transaction, may give evidence of extraneous facts tending to controvert his adversary's proof, although those facts may also incidentally involve the negation or affirmation of such personal communications or transactions." Lewis *v.* Merritt, 98 N. Y. 206, 210.

Evidence of the surviving party is never received as to matters about which the deceased could have testified when his representative being a party to the suit does not elect to testify, unless it appears from evidence other than that of the party himself, that injustice will be done by its rejection. Howie *v.* Legro (N. H.), 99 Atl. Rep. 650.

[84] The witness cannot testify even to the fact that he carried an inkstand with him when he had a personal interview with deceased. Dubois *v.* Baker, 30 N. Y. 355, affi'g 40 Barb. 556. The fact that he saw an instrument in the possession of the assignee of the deceased, was held not incompetent, in Smith *v.* Sergent, 2 Hun, 107. So of his testimony that a document produced was a copy of a paper he obtained from the deceased. Moul-

24. Effect of Objecting Party Testifying, etc.

Where the party for whose protection the statute declares the testimony incompetent, is examined in his own behalf, as to the transaction or communication in question, or where the testimony of the deceased or lunatic as to it is given in evidence,[85] by the party adverse to the one calling the witness,[86] the prohibition does not apply; and this qualification is to be taken in connection with the general principle, that a party who puts in evidence concedes the right of the

ton *v.* Mason, 21 Mich. 371. Testimony that he had seen the deceased sign a paper was held incompetent, in Denman *v.* Jayne, 16 Abb. Pr. N. S. 317, on the authority of Ressique *v.* Mason, 58 Barb. 89, which has been superseded by amendment of the statute. The rule has been pressed so far as to exclude the witness from testifying to his own undisclosed intent in making a transfer to the deceased. Tooley *v.* Bacon, 8 Hun, 176, 70 N. Y. 37. But this conclusion is to be accepted with caution. Intent communicated to, or even legally presumable to have been shared by the deceased, at the interview, could not be proved by the witness; but if the transfer is proven *aliunde*, an undisclosed intent is no part of the communication or transaction between them, and, if relevant (see 40 N. Y. 221) might be proved by the witness.

A witness will not be permitted to testify as to the contents of a lost letter written to the decedent even though the decedent's reply thereto is produced, under Pub. Acts 1903, No. 30. Rohrig's App., 176 Mich. 407, 142 N. W. Rep. 561.

[85] As, for instance, by deposition. Munn *v.* Owens, 2 Dill. C. Ct. 477; Munroe *v.* Napier, 52 Geo. 388.

Where a decedent has testified at a trial prior to his death as to conversations had with the plaintiff, and the testimony has been preserved, the plaintiff will be permitted to testify to the same conversations. Myrick *v.* Purcell, 99 Minn. 457, 109 N. W. Rep. 995.

[86] Miller *v.* Atkins, 9 Hun, 9.

The testimony given at a former trial by a witness since deceased may be introduced in detail, and it will not be objectionable as a communication with a deceased person, under § 1794, Code 1896. Tutwiler *v.* Burns, 160 Ala. 386, 49 So. Rep. 455.

Under Art. 2302, Rev. Stat., 1895, in suits by or against the heirs or legal representatives of a decedent, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party. Davis *v.* Davis, 44 Tex. Civ. App. 238, 98 S. W. Rep. 198.

adverse party to tread the same ground in rebuttal, so far as it can be done without violating a positive prohibitory statute.[87] But the fact that a third person interested in the estate has testified for the representative does not open the door for the adversary. It is only giving the testimony of the decedent or incompetent person, or of the representative who is a party, that entitles the adversary to put in that of the interested witness.[88] And giving testimony as to one transaction or communication does not relieve the adversary from the prohibition in respect to a distinct and independent communication.[89] Where a party, who is excluded from

[87] Where one party gave evidence of admissions made by the grantor of the other—*Held*, that the grantor could testify to rebut this evidence, although it related to transactions with a deceased person through whom the former claimed title. Cole *v.* Denue, 3 Hun, 610. Where testimony to oral declarations of the deceased was admitted—*Held*, that counter declarations in writing were admissible. Smith *v.* Christopher, 16 Abb. Pr. N. S. 332. Plaintiff having put in evidence letters by defendant to a person since deceased—*Held*, that defendant was entitled to give testimony explaining away the letters, although such testimony related to a transaction with the deceased. Sanford *v.* Sanford, 61 Barb. 293. If the executor or administrator testifies to an admission by the plaintiff that the demand had been satisfied by the decedent, plaintiff can, by way of explaining or contradicting the testimony, testify that no such settlement was made. Cousins *v.* Jackson, 52 Ala. 265. If a witness testifies that a party admitted certain transactions with the deceased, the party may contradict this. Martin *v.* Jones, 59 Mo. 187.

An executor who claims money personally on the ground of its having been a gift from the testator is not competent to testify as to any fact occurring in the lifetime of the testator, except as to conversations or transactions testified to by the opposite party or party in interest as having occurred between them and him (the executor) under Rev. St., § 2, ch. 51. Platt *v.* Williams, 175 Ill. App. 1.

[88] Canaday *v.* Johnson, 40 Iowa, 587.

[89] Goodwin *v.* Hirsche, 37 Super. Ct. (J. & S.) 511. "Section 829 recognizes the right of a party, suing as executor or administrator, to testify in his own behalf to a personal transaction or communication between the witness and the deceased, if it is otherwise competent. In that case the adverse party may also testify against the executor or administrator, but the testimony, if it involves a personal

testifying in his own behalf as to a personal transaction with a deceased person, upon cross-examination of the adverse party draws out testimony in regard to such transaction, this does not bring him within the exception to the prohibition and permit him to testify; as in such case the adverse party is not "examined in his own behalf" within the meaning of the exception.[90]

25. Form of Offer of Testimony in Rebuttal.

Where the door is opened for the testimony of the party or interested witness, by the giving of that of the other, the offer need not be confined to the disputable part of the testimony which has been given. In this case, as in the case of an offer in the first instance, the witness may be sworn unless it appears that he could testify to nothing; and his examination should be restricted to the matters as to which the objecting party has given the evidence.[91]

26. The United States Courts Rule.

In the courts of the United States, no witness can be ex-

transaction or communication with the deceased, must be confined strictly to the same transaction or communication to which the executor or administrator has already testified in his own behalf. It was competent for the defendant, if he could, to testify in regard to the same transaction referred to by the plaintiff in her testimony. (McLaughlin *v.* Webster, 141 N. Y. 76.) Confining himself to that transaction he could testify to any fact or circumstance that was a part of or involved in it that tended to contradict or weaken the plaintiff's version of it. But he could not explain, impair or contradict the plaintiff's version by means of another and independent personal transaction or communication between himself and the deceased." Martin *v.* Hillen, 142 N. Y. 140, 144, 36 N. E. Rep. 803.

[90] Corning *v.* Walker, 100 N. Y. 547, 3 N. E. Rep. 290.

By cross-examining an interested party relative to conversations with a deceased person, the cross-examining party waives the right to exclude such testimony, and the party examined may give further testimony as to such conversations at any appropriate time in the trial, though not questioned relative thereto on redirect. Stair *v.* McNulty, 133 Minn. 136, 157 N. W. Rep. 1073.

[91] Brown *v.* Richardson, 20 N. Y. 472, rev'g 1 Bosw. 402.

cluded "in any civil action, because he is a party to or interested in the issue tried: Provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." [92]

[92] U. S. R. S., § 858. Under this act, if the decedent had been examined in his own behalf, and his deposition was read on the trial, by his representative, the adverse party is competent on his own behalf. Mumm *v.* Owens, 2 Dill. C. Ct. 475. But an *ex parte* order obtained by a party before process issued for his own examination, is not the requirement of the court intended. Eslava *v.* Mozange, 1 Woods, 623.

Section 858 of U. S. Revised Statutes (Comp. St., 1901, p. 659) was amended by Act of June 29, 1906, c. 3608, 34 Stat. 618, to read as follows:

"Sec. 858. The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held." Now U. S. Comp. Stat., § 1464.

In the federal court, although the witness may be disqualified under the local statute, he will nevertheless be allowed to testify if he is competent under U. S. Rev. St., § 858. Crawford *v.* Moore, 28 Fed. Rep. 824.

U. S. Rev. Stat., § 858, is applicable alone to suits by or against executors, administrators or guardians and does not apply to suits by or against assignees in bankruptcy. Hobbs *v.* McLean, 117 U. S. 567, 6 Super. Ct. 870, 29 L. ed. 940.

The restriction under U. S. Rev. St., § 858, does not apply to a proceeding for taking an account. Charlotte *v.* Soutter, 28 Fed. Rep. 733.

Under § 858, U. S. Rev. St., as amended in 1906 the claimant against the estate of a deceased bankrupt cannot testify concerning personal transactions with the decedent. Matter of Thompson, 205 Fed. Rep. 556.

Where the action is brought in the federal court, U. S. Rev. Stat., § 858, is paramount, and the State statute is not the test. Smith *v.* Au Gres Tp. (Mich.), 150 Fed. Rep. 257, 80 C. C. A. 145, 9 L. R. A. N. S. 876.

CHAPTER V

ACTIONS BY AND AGAINST HEIRS AND NEXT OF KIN, DEVISEES AND LEGATEES

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4. Circumstances raising a natural presumption of death.
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35. What facts are within the rule.
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39. General family repute.
40. Declarations in view of controversy.

I. DEATH

1. Direct Testimony.

Death, like birth and marriage, and the number and names of children, etc., may be proved by the testimony of a witness directly to the fact, and such testimony is not necessarily rendered incompetent by its appearing that his memory is aided by family records not produced,[93] nor even that he was not an eye-witness of the occurrence. When such testimony is offered the adverse party may, if he choose, interpose with cross-examination to ascertain if the witness has personal knowledge of the occurrence. If he has not,

[93] Secrist *v.* Green, 3 Wall. 750.

"Death may be established by direct testimony of witnesses who are able to say from personal knowledge that the party claimed to be dead is, in fact dead; that is upon proof of facts from which a presumption of death arises." Werner *v.* Fraternal Bankers' Reserve Society, 172 Iowa, 504, 154 N. W. Rep. 773.

the burden is thrown upon the party calling him to show the conditions of lapse of time, relationship or information which render hearsay competent under the rules stated below;[94] but such testimony, whether admitted after scrutiny or without objection, is not very cogent.[95] Its weight depends much on the absence of other evidence to the contrary. The declaration of a living person as to the fact of death cannot be received in lieu of his sworn testimony as a witness in the cause.[96] And the better rule excludes as evidence a general reputation of death among friends and acquaintances.[97]

[94] See paragraphs, 33, etc.

[95] See Scheel *v.* Eidman, 77 Ill. 301.

Death of a person may be proved by hearsay evidence. Turner *v.* Sealock, 21 Tex. Civ. App. 594, 54 S. W. Rep. 358.

Death is a fact which may be proved by circumstantial evidence. Harvey *v.* Fidelity & Casualty Co., 200 Fed. Rep. 925, 119 C. C. A. 221; Fidelity Mut. Life Assoc. *v.* Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. ed. 922; Metropolitan Life Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. Rep. 824.

Parol evidence is admissible even as an indirect proof of death. Bailey *v.* Bailey, 36 Mich. 181.

[96] Nolan *v.* Nolan, 35 App. Div. (N. Y.) 339, 341–342.

A declaration made by an administrator out of court has no probative force as evidence of the death of the intestate or of the time of such death. Harris *v.* State Bank, 49 N. Y. Misc. 458, 97 N. Y. Supp. 1044.

[97] In re Hurlburt's Estate, 68 Vt. 366, 381, 35 Atl. Rep. 77.

Common reputation in the family of one alleged to be dead is competent evidence not only of the death but also of the time of such death. Morrill *v.* Foster, 33 N. H. 379; Mason *v.* Fuller, 45 Vt. 29; American Life Ins., etc., Co. *v.* Rosengle, 77 Pa. 507.

Proof that there was a general belief and repute in the community that the absentee was dead is not competent to prove his death or to raise a presumption of death. Fidelity Mutual Life Assoc. *v.* Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. ed. 922; Vought *v.* Williams, 46 Hun (N. Y.), 638.

The rule as to the admission of hearsay evidence to prove the death of an individual is restricted to proving reputation of death by a surviving member of the family, and the reputation must be derived from the declarations of deceased members of the family. General reputation, even among the friends and acquaintances of the deceased is not admissible. Denbo *v.* Boyd, 194 Mo. App. 121, 185 S. W. Rep. 236.

2. Registry of Death or Burial.

Death may be proved by an official registry of *the death*, kept pursuant to statute,[98] or by a church or other registry *of burial*, shown to have been kept in the manner hereafter stated; [99] and upon the same principle the entry of death in a hospital register would be competent.[1] A burial registry kept without authority of statute is not, as an official registry of death may be, evidence of the *time* of death, any further than to show that it was presumably within a reasonable season previous to the burial, unless the time of death is shown to have been recorded by direction of a member of the family since deceased, so as to bring it within the rule hereafter noticed of declarations as to facts of pedigree.

3. Presumptions of Death and of the Time of Death.

He who founds his claim on an assertion of death, must give some evidence from which the law or the jury may infer that death has occurred; for as against him the presumption of law is that a person of whom nothing is known but that

[98] But a memorandum indicating death is not competent merely because found in an official record kept for other purposes. Ridgeley *v.* Johnson, 11 Barb. 527.

The courts of the State of Washington are not required to accept as *prima facie* evidence the certificate of death of a person, issued by the bureau of vital statistics of the State of Kentucky, or any sister State. Thompson *v.* Seattle, R. & S. Ry. Co., 71 Wash. 346, 128 Pac. Rep. 1070.

A certificate of death, certified from the state department of health is competent evidence of the death of a witness to a will. In re Hall, 154 N. Y. Supp. 317, 90 Misc. 216.

[99] See paragraph 41, below.

The record of a death certificate filed in the office of the clerk of a city where a body is found is admissible as evidence of the time and cause of death. Shamlian *v.* Equitable Acc. Co., 226 Mass. 67, 115 N. E. Rep. 46.

[1] See Doe *v.* Andrews, 15 Q. B. 759.

The fact that a will was filed, probated and the proceedings duly recorded, is presumptive evidence of the death of the testator. Keenon *v.* Burkhardt (Tex. Civ. App.), 162 S. W. Rep. 483.

A church record of a death is *prima facie* evidence thereof. Sandberg *v.* State, 113 Wis. 578, 89 N. W. Rep. 504.

he was living at a certain time, continues to live,[2] at least until he would reach the age of one hundred, after which he may be presumed to be dead in the ordinary course of nature.[3] When there is no definite evidence of the fact of death, as in the case of a person absent and unheard of, the law receives all proper evidence of the circumstances which can throw light upon motive, cause, and casualty, and in civil cases inquires not whether it is possible that he can be alive, but whether the circumstances do not warrant that strong probability of death upon which a court of justice should act.[4] And the tendency of such circumstances may be

[2] O'Gara *v.* Eisenlohr, 38 N. Y. 296, and cases cited; Duke of Cumberland *v.* Graves, 9 Barb. 595.

When one is shown to have been alive the presumption is that he continues to live. Rosenblum *v.* Eisenberg, 123 N. Y. App. Div. 896, 108 N. Y. Supp. 350; People *v.* Ryder, 124 N. Y. 500, 26 N. E. 1040; Grier *v.* Canada, 119 Tenn. 17, 107 S. W. Rep. 970.

A child once shown to have been alive will be presumed to be living. Lewis *v.* People, 87 Ill. App. 588.

The presumption that one who was living at an antecedent date is still living continues only for a reasonable period, when it must be presumed that he is dead. One who executed and acknowledged a deed eighty years ago will be presumed to be dead. Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. Rep. 135, 90 Am. St. Rep. 730.

One who has not been heard of for three years will be presumed to be living. Bartley *v.* Boston, etc., Ry. Co., 198 Mass. 163, 83 N. E. Rep. 1093.

There is no presumption that a person who was alive in 1865 is dead in 1895. Dworsky *v.* Arndtstein, 29 N. Y. App. Div. 274, 51 N. Y. Supp. 597.

[3] Hayes *v.* Berwick, 2 Martin (La.), 138; Watson *v.* Tindall, 24 Geo. 474; Sprigg *v.* Moale, 28 Md. 497, 505; Quaker Realty Co. *v.* Starkey, 136 La. 28, 66 So. Rep. 386, L. R. A., 1916, B 1201, Ann. Cas., 1916, D. 248.

The death of an absentee who is less than 100 years old must be established; it will not be presumed. Willett *v.* Andrews, 51 La. Ann. 486, 25 So. Rep. 391; Martinez *v.* Vives, 32 La. Ann. 305; Iberia Cypress Co. *v.* Thorgeson, 116 La. 218, 40 So. Rep. 682.

[4] Merritt *v.* Thompson, 1 Hilt. 550, 555, and cases cited.

"There is no presumption of death until the expiration of seven years after being heard from, and after seven years there is no presumption of either life or death at any particular time during the seven years in the absence of evidence raising such presumption."

aided by the presumption of innocence, as, for instance, where continued life would prove guilt in the party to a second marriage.[5]

Presumptions drawn from the circumstances of absence may, and often do suffice, to establish that a person was dead at and after a specific date, without affording any indication that in fact he died on that date, or on any given date. The law, which follows common reason in sifting this kind of evidence, often agrees with the family in giving up the lost one as dead, but the question at what date he died may remain inscrutable for the law as well as for the family. Upon the first question the law aids a decision by the convenient artificial rule that one absent and unheard of for seven years may be presumed no longer living. Whether any artificial rule exists aiding the decision of the question at what time his death shall be deemed to have occurred, is discussed below.

4. Circumstances Raising a Natural Presumption of Death.

Death within a very recent time may be inferred from the circumstances of absence, or disappearance. Sudden disappearance is not alone enough, in the case of a man without social or pecuniary ties, or fixed abode,[6] though it may be in that of one endeared to his home and fixed in his habits,[7]

White *v.* Brotherhood of Locomotive Firemen, 165 Wis. 418, 162 N. W. Rep. 441.

[5] Smith *v.* Knowlton, 11 N. H. 191, 196; Kelly *v.* Drew, 12 Allen, 107, 110. Compare O'Gara *v.* Eisenlohr, 38 N. Y. 296.

"A document thirty years old is presumed to be without living witnesses to its execution." In re Hall, 154 N. Y. Supp. 317, 90 Misc. 216.

[6] Hancock *v.* American Ins. Co., 62 Mo. 26, s. c., 3 Centr. L. J. 595.

Where a person has been absent less than seven years it is possible to overcome the presumption of the continuance of life by showing facts which are incompatible with that theory, *e. g.*, that he was fond of his family and friends, comfortably and happily situated, of cheerful temperament and good habits. Johnson *v.* Sovereign Camp Woodmen of World, 163 Mo. App. 728, 147 S. W. Rep. 510.

[7] Id.; and see 62 Mo. 121.

"Affections which usually con-

or having strong pecuniary motive to appear, according to his habit, if alive,[8] or in case of one who was last seen in proximity to danger, and left his effects in a situation suggestive of accident or suicide.[9] Where the presumption of death turns upon unexplained absence, all the circumstances surrounding the absentee within a reasonable time before his departure, or at any time afterward, which, in their nature, have reasonable bearing on the probabilities, are relevant—such as the state of his domestic and business relations, his habits, his health of body and mind, previous threats of suicide, the immediate and ultimate purposes of his departure, the circumstances of his correspondence and its cessation, etc.[10] The presumption of death from absence rests on the

trol conduct are competent to consider in determining whether death is to be presumed from absence and silence." N. Y. Life Ins. Co. *v.* Holck, 59 Colo. 416, 151 Pac. Rep. 916.

[8] In re Beasney's Trusts, L. R. 7 Eq. 498.

Evidence of home ties, habits, character, etc., all tending to show improbability of intention to leave home may raise presumption of death without regard to duration of the absence. Coe *v.* National Council K. & L. S., 96 Neb. 130, 147 N. W. Rep. 112, L. R. A. 1915, B. 744, Ann. Cas. 1916, B. 65.

[9] Lancaster *v.* Washington Life Ins. Co., 62 Mo. 121, 129.

"While a person unheard of for a time is presumed to be alive until the expiration of seven years, the absence coupled with other circumstances may be sufficient to prove death at a much earlier time." Western Grain & Sugar Products Co. *v.* Pillsbury, 173 Cal. 135, 159 Pac. Rep. 423.

"The presumption of life continues until overcome or displaced by a more potent presumption, *i. e.*, that of death; but this latter presumption has no retroactive force. To warrant the inference that death occurred earlier than presumed, there must be proof of such facts and circumstances connected with the person whose life is the subject of inquiry as, when submitted to the test of reason and experience, would force the conviction of death within a shorter period." Haddock *v.* Meagher (Iowa), 163 N. W. Rep. 417.

[10] For illustrations of this principle, see Tisdale *v.* Ins. Co., 26 Iowa, 170, again 28 Id. 16, rev'd on another point in 91 U. S. (1 Otto), 238; Stouvenel *v.* Stephens, 2 Daly, 319; Sheldon *v.* Ferris, 45 Barb. 124; Hancock *v.* Am. Ins. Co., 62 Mo. 26, s. c., 3 Centr. L. J. 595; Garden *v.* Garden, 2 Houst. 574; John Hancock Ins. Co. *v.* Moore, 16 Am. L. Reg. N. S. 214.

One who has been absent less

fact that it is strange that a man should absent himself, without communicating with his friends if living [11]—hence is is aided by whatever in his situation and habits makes it the more strange, and is impaired by whatever makes it easily credible.[12]

5. Voyages, and Other Special Perils.

It is well settled that evidence that at last accounts the absentee was exposed to great and immediate peril may, in connection with the failure of further tidings, raise a presumption of a death consequent on the peril.[13] So one who

than seven years is presumed to be living, but this presumption may be overcome by proof of facts and circumstances tending to establish death within a shorter period. Groff *v.* Groff, 36 App. D. C. 560; Alexander *v.* Alexander, 36 App. D. C. 78.

[11] Per Ld. Denman, 2 Mees. & W. 913.

"The principle upon which the presumption of death arises from absence and silence is that the absentee, if living, would probably have communicated with friends and relatives, but that presumption does not arise when absence and silence would be necessary to accomplish the purpose for which he left." N. Y. Life Ins. Co. *v.* Holck, 59 Colo. 416, 151 Pac. Rep. 916.

[12] See paragraph 9, below. Thus the mere fact that the person was absent as a mariner does not raise a presumption of death before the lapse of seven years. Eagle's Case, 3 Abb. Pr. 218, s. c., 4 Bradf. 117; and see Smith *v.* Knowlton, 11 N. H. 191, 197; Burr *v.* Sim, 4 Whart. 150, 171. Death may be proved in case of a person unheard of for a long period of time by showing facts from which a reasonable inference would lead to that conclusion; and the time of the death may be fixed with more or less certainty in the same manner. Johnson *v.* Merithew, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. Rep. 132.

The proof upon which the presumption of death is based may consist entirely of circumstantial evidence, provided it is clear and convincing. Duff *v.* Duff, 156 Mo. App. 247, 137 S. W. Rep. 909.

[13] Straub *v.* Ancient Order United Workmen, 2 App. Div. (N. Y.) 138; Eagle's Case, 3 Abb. Pr. 218; s. c., 4 Bradf. 117; Merritt *v.* Thompson, 1 Hilt. 550, 555, and cases cited.

When the circumstances surrounding the testator when last seen were such as to justify the conclusion that he died as a result of those circumstances—*e. g.*, when he was going into battle, or falling from a ship—there is no need of

has sailed in a vessel which has never been heard of, after such lapse of time as would be sufficient to allow information to be received from any part of the world to which the vessel or persons on board might be supposed to have been carried, may be presumed to be dead,[14] if on inquiry in the proper quarters it appears that no intelligence of him has been received.[15] In such a case evidence that the insurers of the ship have paid the policy as on a total loss, is deemed competent evidence of the death of one on board,[16] probably on the principle by which common repute from proper sources is received. The concurrence of a particular storm or a hurricane season, with the route of voyage, is relevant, as enhancing the probability of loss and indicating the probable time.[17]

6. Seven Years' Absence in Case of Life Estates.

The inconveniences resulting to persons entitled as reversioners upon the termination of life estates, in England, for want of proof of the death, while absent, of the persons

waiting seven years to prove his death; his absence is explainable. Matter of Miller, 67 N. Y. Misc. 660, 124 N. Y. Supp. 825.

A person who, when last heard from, was shot and carried to a hospital, will be presumed to be dead. Wells *v.* Margraves (Tex. Civ. App.), 164 S. W. Rep. 881; Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086.

The presumption of life where the absences has been for less than seven years may be met and overcome by proof of circumstances of specific peril to which the person disappearing was subjected. Continental Life Ins. Co. *v.* Searing, 240 Fed. Rep. 653, 153 C. C. A. 451.

[14] Id., and cases cited; White *v.* Mann, 26 Me. 361, 370; Merritt *v.* Thompson, 1 Hilt. 550; Gerry *v.* Post, 13 How. Pr. 118; Lancaster *v.* Washington Life Ins. Co., 62 Mo. 121, 129.

[15] See paragraphs 8 and 34, etc., below.

[16] Goods of Main, 1 Sw. & Tr. 11; In re Hutton, 1 Curteis, 595.

[17] Gibbes *v.* Vincent, 11 Rich. (S. C.) 323; Silleck *v.* Booth, 1 Younge & C. 117. The same facts which, under the law of insurance, would be competent as bearing on the presumption of loss of the vessel, will in such cases be usually relevant to the presumption of death.

upon whose life the termination depended, led in 1667 to the enactment of a statute [18] by which seven years' absence in such cases raised a legal presumption of death. This rule, in the form adopted in New York,[19] is as follows: "A person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the state or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time." [Continuing as to distribution of proceeds of sale in partition suits.] It is not necessary for the party relying on such a statute to prove either alternative specifically, but a general proof of absence, showing a case which must be within one or the other alternatives of the statute, is enough.[20]

7. Seven Years' Rule in Other Cases.

In analogy to the statute as to life estates, and another as to bigamy, the courts established the rule that in all cases, whatever presumption may be claimed of the continuance of a life from the mere fact that it was shown once to exist, ceases at the expiration of seven years from the time the person was last known to be living, and that from the mere lapse of that time arises a legal presumption that the person is no longer living. This presumption, first suggested as a proper one for the jury to draw in analogy to the statutes,[21] is now a well-recognized legal presumption, constituting, in the absence of evidence to the contrary, a *prima facie* case.[22]

[18] 19 Car. II, c. 6; 1 Chitt. Stat. 1370.

[19] N. Y. Code Civ. Pro., § 841.

[20] Osborn *v.* Allen, 26 N. J. L. (2 Dutcher), 388.

[21] Doe d. George *v.* Jesson, 6 East, 80, 85.

Evidence tending to show a motive for an absentee's disappearance is competent to rebut the presumption of death from absence for seven years. Bonslett *v.* N. Y. Life Ins. Co., 190 S. W. Rep. (Mo.) 870.

[22] Forsaith *v.* Clark, 1 Foster (N. H.), 409; King *v.* Paddock, 18 Johns. 141; Hitz *v.* Ahlgren, 170 Ill. 60, 48 N. E. Rep. 1068; Sherod *v.* Ewell, 104 Iowa, 253, 73 N. W. Rep. 493; In re Liter's Estate, 19

8. Absence and Inquiry.

To bring a case within either a statutory or judicial rule as to seven years' absence, it is not enough that no evidence of

Mont. 474, 48 Pac. Rep. 753; Northwestern Mut. Life Ins. Co. *v.* Stevens, 36 U. S. App. 401, 71 Fed. Rep. 258; Werner *v.* Fraternal Bankers' Reserve Society, 172 Iowa, 504, 154 N. W. Rep. 773; St. Martin *v.* Hendershott, 82 Ore. 58, 151 Pac. Rep. 706, 160 Pac. Rep. 373; Folk *v.* U. S., 233 Fed. Rep. 177, 147 C. C. A. 183; Lichtenhan *v.* Prudential Ins. Co., 191 Ill. App. 412.

An absentee who has not been heard of for seven years will be presumed to be dead for the purpose of administering his estate. White *v.* Emigrant Industrial Savings Bk., 146 N. Y. App. Div. 591, 131 N. Y. Supp. 311.

An absentee who has not been heard of for seven years may be presumed to be dead at the expiration of the seven years, for the purpose of distributing an estate. Matter of Sullivan, 51 Hun (N. Y.), 378, 4 N. Y. Supp. 59; Barson *v.* Mulligan, 191 N. Y. 306, 324, 84 N. E. Rep. 75, 16 L. R. A. N. S. 151.

After absence of seven years and nothing heard by those who would ordinarily hear, death will be presumed. Siyer *v.* Severs, 165 N. C. 500, 81 S. E. Rep. 685; Matter of Benjamin, 155 N. Y. App. 233, 139 N. Y. Supp. 1091; Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086.

After absence of seven years with no word to relatives or friends who would naturally receive it, together with fruitless diligent searches made during that time, death will be presumed. Stevenson *v.* Montgomery, 263 Ill. 93, 104 N. E. Rep. 1075, Ann. Cas. 1915, C. 112; Martin *v.* Modern Woodmen of America, 158 Mo. App. 468, 139 S. W. Rep. 231.

One who is absent for seven years without being heard of will be presumed to be dead and his children will be allowed to share in the distribution of his deceased brother's estate. Oziah *v.* Howard, 149 Iowa, 199, 128 N. W. Rep. 364.

By special act in Indiana for the management of estates of absentees, one who has been absent for five years without being heard of will be presumed to be dead and the date of his death is fixed as of the first day of his disappearance. But the act is limited to cases for the management and disposal of estates, and in all other cases the common-law rule of seven years with the presumption of life during that period holds. Connecticut Mutual Life Ins. Co. *v.* King, 47 Ind. App. 587, 93 N. E. Rep. 1046.

Absence from home for more than seven years without any facts or circumstances tending to explain it will raise the presumption of death. Walsh *v.* Metropolitan Life Ins. Co., 162 Mo. App. 546, 142 S. W. Rep. 815; Hancock *v.* American Life Ins. Co.,

the whereabouts of the person is adduced. There must be affirmative evidence of absence, from his established residence,[23] if he had one, and that he has not been heard of by

62 Mo. 26; Duff *v.* Duff, 156 Mo. App. 247, 137 S. W. Rep. 909; Spahr *v.* Mutual Life Ins. Co., 98 Minn. 471, 108 N. W. Rep. 4.

In Wisconsin it is not necessary to prove that diligent search and inquiry has been made as to a person absent more than seven years before a *prima facie* case of death is established. Miller *v.* Sovereign Camp Woodmen of the World, 140 Wis. 505, 28 L. R. A. N. S. 178 133 Am. St. Rep. 1095, 122 N. W. Rep. 1126.

Sections 2747, 2748, Burns' Annotated Statutes, 1908, which provide for a presumption of death after a disappearance and absence for five years, relate exclusively to the settlement of estates of absentees and do not apply to an action by a beneficiary under a life insurance policy for the proceeds of such policy. Metropolitan Life Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. Rep. 824.

Disappearance for seven years without being heard of by those most likely to hear raises a presumption of death. Matter of Smith, 77 N. Y. Misc. 76, 136 N. Y. Supp. 825.

An unexplained disappearance, followed by a lapse of eighteen years without any trace of the absentee, after inquiry in every quarter where there was any likelihood of finding a clue to his whereabouts, raised the presumption of death. Matter of Wagener, 143 N. Y. App. Div. 286, 128 N. Y. Supp. 164.

Under Article 5707, Revised Statutes, 1911, one who left his home when he was between seventeen and twenty-one years of age, and went away with a circus traveling through the country and thereafter has not been seen or heard from by his relatives for a period of fifty-eight years, will be presumed to have died seven years after his departure from home. Wells *v.* Margraves (Tex. Civ. App.), 164 S. W. Rep. 881.

There is no presumption of death because of long absence until the full period of seven years has elapsed. Murphy *v.* Metropolitan Life Ins. Co., 155 N. Y. Supp. 1062, 92 Misc. 479.

Where by the evidence the legal presumption of death is established it is error to submit the question to a jury. Page *v.* Modern Woodmen of America, 162 Wis. 259, 156 N. W. Rep. 137, L. R. A. 1916, F. 438.

[23] Doe *v.* Andrews, 15 Q. B. 760; Stinchfield *v.* Emerson, 52 Me. 465; Spurr *v.* Trimble, 1 A. K. Marsh. 278. The mere absence of a person from the place where his relatives reside, not his own residence, and the failure of his relatives to receive letters from him for a period of seven years, are not of themselves sufficient to raise a presump-

those who would be likely to have heard of him if alive.[24] For this purpose such persons should be called as witnesses, or a reasonable inquiry among them, or search for them, without success, must be shown.[25] If he had a known and

tion of death. Hitz *v.* Ahagren, 170 Ill. 60, 48 N. E. Rep. 1068.

Mere absence for seven years is not sufficient to raise the presumption of death. Donovan *v.* Twist, 105 N. Y. App. Div. 171, 93 N. Y. Supp. 990; Turner *v.* Sealock, 21 Tex. Civ. App. 594, 54 S. W. Rep. 358; Washington *v.* Filer, 127 La. 862, '54 So. Rep. 128; Francis *v.* Francis, 180 Pa. 644, 37 Atl. Rep. 120, 57 Am. St. Rep. 668; Matter of Davenport, 37 N. Y. Misc. 455, 75 N. Y. Supp. 934; Burnett *v.* Costello, 15 S. D. 89, 87 N. W. Rep. 575.

The facts upon which the presumption of death rests must be proved. Matter of Board of Education, 173 N. Y. 321, 66 N. E. Rep. 11.

[24] Doe *v.* Andrews (above); Duke of Cumberland *v.* Graves, 9 Barb. 595, 608; McCartee *v.* Camel, 1 Barb. Ch. 455.

It must be shown that the absent one has not been heard from by those who would naturally hear. Wentworth *v.* Wentworth, 71 Me. 72.

It is the duty of a husband to keep his wife advised of his whereabouts and she has a right to believe after ten years' silence on his part, that he is dead; she is not required to make any endeavor to locate him. Estate of Harrington, 140 Cal. 244, 73 Pac. Rep. 1000, 98 Am. Rep. 51; Jones *v.* Zoller, 32 Hun (N. Y.), 280.

A presumption of death is raised by the absence of a person from his domicile unheard of for seven years. Absence in this connection means that a person is not at the place of his domicile, and that his actual residence is unknown. But removal alone is not enough. The further fact that he has disappeared from his domicile and from the knowledge of those with whom he would naturally communicate is necessary in order to raise the presumption. Maley *v.* Pa. R. Co., 258 Pa. 73, 101 Atl. Rep. 911.

[25] Even producing the only surviving relative, without further inquiry, is not alone enough. Doe *v.* Andrews (above). There must be some proof of inquiry of persons and at the places where news of him, if living, would most probably be had. Posey *v.* Hanson, 10 Tucker App. D. C. 496.

In order to enforce the presumption of death of a person absent more than seven years, there must be proof of diligent search at the last known place of residence, and among the relatives, and among any others who would be expected to hear from him. Hitz *v.* Ahlgren, 170 Ill. 60, 48 N. E. Rep. 1068.

The absence of a person for thirty years with no evidence of an effort to find him will not give

fixed residence in a foreign country when last heard from, there should be some evidence of inquiries made there. If he had relatives in this country, there should be some evidence of inquiries of them, or an unsuccessful search for them at their last known place of residence: and the mere fact that letters addressed to relatives at a last known place of residence remained unanswered, is not sufficient.[26] What

rise to a presumption of death. Dworsky *v.* Arndtstein, 29 N. Y. App. Div. 274, 51 N. Y. Supp. 597.

In Kansas it is necessary to prove that the relatives and friends of the absentee have heard nothing and that diligent searches on their part have been fruitless. Caldwell *v.* Modern Woodmen of America, 89 Kan. 11, 130 Pac. Rep. 642.

Proof must be given that there was some inquiry made among those who would be likely to hear from the absentee. Posey *v.* Hanson, 10 App. D. C. 496.

In Texas it is not necessary to show that the absent one had not been heard from by his relatives. or friends for seven years, for under the statute (Art. 5707, R. S., 1911) mere proof of absence of one from his home beyond the sea or elsewhere, for seven successive years raises a presumption of death, which can be destroyed by proof of the existence of the absent one within that time. Sovereign Camp Woodmen *v.* Ruedrich (Tex. Civ. App.), 158 S. W. Rep. 170.

There must be a lack of information concerning the absentee on the part of those persons likely to hear from him; they must be looked up and interrogated, and the result of the inquiry must be given in evidence at the trial. Modern Woodmen of America *v.* Gerdom, 72 Kan. 391, 82 Pac. Rep. 1100, 2 L. R. A. N. S. 809, 7 Ann. Cas. 570, where numerous authorities are gathered in the note.

If no inquiries are made at the former home of the absentee the inference is that he is still living there, and not absent at all. Burnett *v.* Costello, 15 S. D. 89, 87 N. W. Rep. 575.

Failure to notify the authorities of an absentee's disappearance or to insert advertisements in newspapers is not conclusive evidence that diligent search was not made. Lichtenhan *v.* Prudential Ins. Co., 191 Ill. App. 412.

[26] McCartee *v.* Camel, 1 Barb. Ch. 455, 463.

Text cited in University of North Carolina *v.* Harrison, 90 N. C. 385; Sizer *v.* Severs, 165 N. C. 500, 81 S. E. Rep. 685.

The unexplained absence without any evidence that nothing had been heard from the absentee since his disappearance and without any showing that effort had been made to ascertain his whereabouts, is not sufficient to prove his death. Mackie *v.* Grand Lodge A. O. W.

is a reasonable inquiry is a mixed question of law and fact, to be determined upon the particular circumstances of the case.[27] Where a person removes from his domicile in one State to establish a home for himself in another State or country, at a place well known, this is a change of residence, and absence from the last domicile is that upon which the presumption must be built; and if alive when last heard from at his new domicile the presumption is that life continues.[28]

W. of Kansas, 100 Kan. 345, 164 Pac. Rep. 263.

[27] See Clarke *v.* Cummings, 5 Barb. 339, 353.

Under § 7302, R. C. 1905, the presumption of death arises only when the absence for seven years is unexplained. Wright *v.* Jones, 23 N. D. 191, 135 N. W. Rep. 1120.

The question of whether there was diligence in the making of searches for the absentee is for the jury. Caldwell *v.* Modern Woodmen of America, 89 Kan. 11, 130 Pac. Rep. 642.

What would be sufficient in the way of efforts to locate the missing person should be measured by the circumstances of each particular case. Subject to this rule, the law is that the search and inquiry must be diligent, and this means that degree of diligence which the definition of the world implies. N. Y. Life Ins. Co. *v.* Holck, 59 Colo. 416, 151 Pac. Rep. 916.

Proper efforts to find an absentee or to ascertain his fate should be shown but no more should be required in the way of search than could be reasonably expected from one's circumstances. Swanson *v.* Modern Brotherhood of America, 135 Minn. 304, 160 N. W. Rep. 779.

Proof of diligent search and inquiry is not required to establish the presumptive death of a person who has been absent from his home and place of residence for seven years without being heard from. Page *v.* Modern Woodmen of America, 162 Wis. 259, 156 N. W. Rep. 137, L. R. A. 1916, F. 438.

[28] Francis *v.* Francis, 180 Pa. St. 646, 647, 37 Atl. Rep. 120.

One whose case rests on the presumption of death of a person after an absence of seven years must prove that diligent effort was made to locate the absentee and every inquiry and search has been made among his relatives and friends, with the results. He must produce evidence to justify the inference that death is the probable reason why nothing is known about the absentee. Fuller *v.* New York Life Ins. Co., 199 Fed. Rep. 897, 118 C. C. A. 227.

In Missouri in order to establish a person's death by presumption these facts must be proved: (1) Residence of the person in the State; (2) Departure of that person from the State; (3) Continued absence of that person from the State for seven years. Carter *v.* Metro-

Upon the question whether a person left a certain place with a certain other person, letters written and mailed by him at that place to his family, shortly before the time when other evidence tends to show that he left the place, stating his intention to leave it with that person, are competent evidence of such intention.[29]

politan Life Ins. Co., 158 Mo. App. 368, 138 S. W. Rep. 49.

It is not necessary to prove that the absentee was exposed to danger during the seven years. Coe *v.* National Council K. & L. S., 96 Neb. 130, 147 N. W. Rep. 112, L. R. A. 1915, B. 744, Ann. Cas. 1916, B. 65.

Absence for seven years and failure to receive news of any kind on the part of relatives, are necessary to raise the presumption of death. There is no hard and fast rule which can be applied to every case, for each case must stand in a measure upon its own facts. Cerf *v.* Diener, 148 N. Y. App. Div. 150, 132 N. Y. Supp. 1026; Johnston *v.* Garvey, 139 N. Y. App. Div. 659, 124 N. Y. Supp. 278, aff'd in 201 N. Y. 548, 95 N. E. Rep. 1130.

Children, being incapable, by reason of their tender years, of absenting themselves from the State, or of concealing themselves within it, should not be subject to the same general rule applicable to adults. Modern Woodmen of America *v.* Ghromley, 41 Okla. 532, 139 Pac. Rep. 306, L. R. A. 1915, B. 728, Ann. Cas. 1915, C. 1063; Manley *v.* Pattison, 73 Miss. 417, 19 So. Rep. 236, 55 Am. St. Rep. 543.

Where one leaves his domicile with the announced intention of establishing a permanent residence in another place, and he is known to have been alive there, absence from such place unheard of for a period of seven years would become necessary in order to raise a presumption of death. Maley *v.* Pa. R. Co., 258 Pa. 73, 101 Atl. Rep. 911.

[29] Mutual Life Ins. Co. *v.* Hillmon, 145 U. S. 285. "When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive his own memory of his state of mind at a former time is no more likely to be clear and true

9. Rebutting the Presumption.

The presumption is a convenient artificial rule, defining the limit of a mere probability,[30] and is not conclusive,[31] but susceptible alike of being strengthened and impaired by any of the circumstances relevant to the natural presumption of death in case of long absence.[32] The presumption is

than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding suspicion of misrepresentation." Id. The habits and personal appearance of a person being shown, there is a presumption that they continue the same unless the contrary is proved. Marston *v.* Dingley, 88 Me. 546, 34 Atl. Rep. 414.

[30] Compare Ram on Facts (by Townshend), 110.

The presumption of death does not arise where it is improbable that there would have been any communication with home. Matter of Miller's Estate, 9 N. Y. Supp. 639.

[31] R. *v.* Harborne, 2 A. & E. 540, s. c., 4 Nev. & Man. 344. To rebut the presumption, it is not necessary to produce the testimony of persons who have seen him, or to produce letters from him. It is sufficient to produce evidence which shall satisfy the jury that he has been heard from within the seven years. Such evidence is usually and almost necessarily "hearsay." Dowd *v.* Watson, 105 N. C. 476, 18 Am. St. Rep. 920, 11 S. E. Rep. 589.

Text cited in Dowd *v.* Watson, 105 N. C. 476, 11 S. E. Rep. 589, 18 Am. Rep. 920.

The presumption of death after seven years absence is competent proof of death, which may be rebutted by the production of other competent evidence. Ancient Order United Workmen *v.* Mooney, 230 Pa. 16, 79 Atl. Rep. 233; Thomas *v.* Thomas, 124 Pa. 646, 17 Atl. Rep. 182.

[32] Thus a court of equity, having discretionary power, may require security to refund, even after the lapse of twelve years. Dowley *v.* Winfield, 14 Sim. 277. It has been held that acts of a party tending to recognize the existence of the absentee, such as reserving a fund for him on a trust accounting, or proceeding in a suit on proof of personal service of process on him, is competent as against such party. Keech *v.* Rinehart, 10 Penn. St. 244.

"The presumption of death from absence is not conclusive, but when absence is shown to have continued for seven years or more unaccompanied by circumstances reasonably accounting therefor, on a theory not involving death, it becomes sufficiently strong to cast the burden of rebutting it on the party asserting continuance of life." Rosencrans *v.* Modern Woodmen of America, 97 Neb. 568, 150 N. W. Rep. 630 (following Magness *v.*

strengthened by the fact that the person left home for temporary purposes; [33] while, on the other hand, it is weakened if he left clandestinely under circumstances indicating intention of concealment abroad,[34] or appears to have broken with friends after departure, and ceased to desire intercourse.[35] And the testimony of a witness that even others than members of the family have heard that he was living,[36]

Modern Woodmen of America, 146 Iowa, 1, 123 N. W. Rep. 169).

[33] Loring *v.* Steineman, 1 Metc. 204.

One who leaves his home temporarily and does not return or is not heard of will, after a lapse of seven years, be presumed to be dead. Johnson *v.* Merithew, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. Rep. 132.

[34] Watson *v.* England, 14 Sim. 28.

Proof that one who is absent over seven years is a fugitive from justice will be admissible to rebut the presumption of death. Mutual Ben. Life Ins. Co. *v.* Martin, 108 Ky. 11, 21 Ky. Law Rep. 1465, 55 S. W. Rep. 694.

The presumption of death, like all others of fact may be overcome by legitimate evidence opposed to it, such as proof that the absentee had a motive for his silence, as for instance that he had escaped from prison, or had other reasons for concealing his identity. Com. *v.* Powell, 256 Pa. 470, 100 Atl. 964.

To rebut the presumption of deceit after an absence of seven years, general rumor that the absentee had committed a certain crime, without stating the source of the rumor is inadmissible. Lichtenhan *v.* Prudential Ins. Co., 191 Ill. App. 412.

[35] Bowden *v.* Henderson, 2 Smale & G. 360.

A deserting husband and father is not likely to communicate his whereabouts to the persons whom he has wronged and for whose support he is liable, and his death will not be presumed after an absence of ten years. Van Buren *v.* Syracuse, 72 N. Y. Misc. 463, 131 N. Y. Supp. 345.

The fact that a divorced man is not heard from for more than seven years after the divorce by his family, relatives or friends in the place where his divorced wife resided, does not raise the presumption of death. Marquet *v.* Ætna Life Ins. Co., 128 Tenn. 213, 159 S. W. Rep. 733, L. R. A. 1915, B 749, Ann. Cas. 1915, B 677.

A husband who leaves his wife pursuant to the terms of a separation agreement will not be presumed to be dead after an absence of five years under Kirby's Dig., § 5178. Goset *v.* Goset, 112 Ark. 47, 164 S. W. Rep. 759.

[36] Flynn *v.* Coffee, 12 Allen, 133. But as to mere rumors, see Koster *v.* Reed, 6 B. & C. 19; Whiteside's Appeal, 23 Penn. St. 114, 117.

Where the real controversy be-

or that a single letter has been received from him,[37] within the seven years, wholly rebuts this presumption. While modern facilities of intercourse by mail and telegraph add significance to continued cessation of correspondence, yet, on the other hand, the presumption from absence itself is weakened by modern facilities for travel,[38] the expanse of our country, and the migratory habits of population.[39]

10. The Time of Presumed Death.

The presumption of continuance of life ends on the expiration of the seven years, but whether life is presumed to have ended on that day is another question. Where the death is presumed from circumstances naturally pointing to a particular period, it will ordinarily be a question for the jury to find the date of death,[40] either specifically or relatively to

tween the parties is whether an absentee died before his mother, and there is conflicting evidence as to whether he was heard from during the absence, a motion for nonsuit will be denied and the question will go to the jury. Sizer *v.* Severs, 165 N. C. 500, 81 S. E. Rep. 685.

[37] Smith *v.* Smith, 49 Ala. 158. The letter, if stated still to exist, should be produced, or its absence accounted for. Brown *v.* Jewett, 18 N. H. 230. Slight evidence is enough to account for absence. Am. Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507, 513.

[38] Watson *v.* England, 14 Sim. 28.

[39] Smith *v.* Smith, 49 Ala. 158.

[40] When the fact of death is conceded, and the inquiry is when did it happen, the question of presumptions arising from the fact that the vessel was never heard of, is not postponed to the latest possible period, but is a question of reasonable probability in view of the known usual and not necessarily longest time for voyages like that in question. Oppenheim *v.* Wolf, 3 Sandf. Ch. 571.

The presumption of death after seven years' disappearance does not fix the exact time of the death, which must be the subject of distinct proof. Matter of Smith, 77 N. Y. Misc. 76, 136 N. Y. Supp. 825; Johnson *v.* Sovereign Camp Woodmen of World, 163 Mo. App. 728, 147 S. W. Rep. 510; Caldwell *v.* Modern Woodmen of America, 89 Kan. 11, 130 Pac. Rep. 642; Carpenter *v.* Modern Woodmen of America, 160 Iowa, 602, 142 N. W. Rep. 411.

Where a person was afflicted with a number of disabilities which attend old age, and was last seen after an earthquake in front of his residence which was in a district that was presently swept by fire,

other events material to the cause; where a party rests on the seven years' presumption, much difference of opinion exists, and two rules contend for control.[41]

11. The English Rule.

The doctrine recently established in the English courts,[42] and followed in some American cases,[43] is that he upon whom is the burden of proof to show either death or survival, at a particular time within the seven years, must adduce distinct proof bearing on that time.[44]

the presumption of death arose when seven years had elapsed after his disappearance and the facts were sufficient to sustain a finding that he died at a certain date. Linneweber *v.* Supreme Council C. K. A., 30 Cal. App. 315, 158 Pac. Rep. 229.

[41] See paragraph 4, above.

Text cited in Barson *v.* Mulligan, 191 N. Y. 306, 84 N. E. Rep. 75, 16 L. R. A. (N. S.) 151.

The exact time of death will be fixed at seven years after the disappearance unless an earlier death is proved. Dickinson *v.* Donovan, 160 Ill. App. 195.

[42] In re Phené's Trusts, L. R. 5 Ch. 139, and cases cited; In re Lewes' Trusts, L. R. 6 Ch. 356, affi'g L. R. 11 Eq. 236.

[43] State *v.* Moore, 11 Ired. (N. C.) L. 160; Spencer *v.* Roper, 13 Ired. 333; McCartee *v.* Camel, 1 Barb. Ch. 455; see also Hancock *v.* Life Ins. Co., 62 Mo. 26.

In the absence of evidence to the contrary, there is no presumption that death occurred at any particular time but at the end of the period of seven years. Apitz *v.* Supreme Lodge, K. & L. H. 274 Ill. 196, 113 N. E. Rep. 63, L. R. A. 1917, A 183.

When the time of death is material, it cannot rest on presumption but must be established by proof. In re Bernard, 152 N. Y. Supp. 716, 89 Misc. 705.

No presumption arises as to the time of death. The burden of proof is upon the party who wishes to prove the death at any particular time within the seven years. N. Y. Life Ins. Co. *v.* Brame, 112 Miss. 828, 73 So. Rep. 806; Clement *v.* Knights of Maccabees of World, 113 Miss. 392, 74 So. Rep. 287.

[44] The grounds assigned for this rule are: (1) That to presume death upon the last day of the seven years would be to presume that which would be almost always contrary to the fact; (2) That, if life on the last day of the seven years is presumed, death on the day following is extremely improbable; and, (3) That to allow the presumption of continuance of life in a case where continuance of life is the main fact in issue, is a different thing from allowing it where the

12. The American Rule.

The rule more generally recognized in the courts of this country is that the principle which raises a presumption of the death of a person absenting himself for seven years without being heard from, furnishes a legal presumption of the *time* of the death, as well as of the *fact* of the death; for in the absence of such a presumption, the presumption would be that the person was still alive; and this presumption of the continuance of life ceases only when it is overcome by the countervailing presumption of death arising at the end of seven years; but the presumption of death so arising cannot operate retrospectively to indicate a death previous to the time it arose. In other words, the legal presumption of life is sufficient, in the absence of all other evidence, to sustain an allegation of existence at any time during the period that the presumption lasts, viz., until the lapse of the seven years.[45] And therefore the party alleging that death oc-

continuance is only incidentally involved. The English rule is supported in this country by the opinions of RUFFIN, Ch. J., NASH, J., and WALWORTH, Chan., in the cases above cited, and that of Dr. Wharton (2 Whart. Ev., § 1276), who deems it supported by the preponderance of American authority. It is assumed, also, by Mr. Bishop, 1 Bish. Mar. & D., § 456.

There is no presumption that a person was living at any particular time during his seven years' unexplained absence. Security Bank *v.* Equitable Life Assoc. Soc., 112 Va. 462, 71 S. E. Rep. 647, 35 L. R. A. N. S. 159, Ann. Cas. 1913, B 836; Evans *v.* Stewart, 81 Va. 724.

The presumption of the death of an absentee who has not been heard from for seven years is only that he is then dead, not that he died at any particular time during that period. In the absence of anything indicating an earlier death, it cannot be found that death occurred prior to the lapse of the entire period. Haddock *v.* Meagher, 163 N. W. Rep. (Iowa) 417.

The fact of death being established by the presumption from absence for seven years, a letter written by decedent at the time of his disappearance showing his intention to immediately commit suicide is competent evidence as part of the *res gestæ* to fix the date of his death. Benjamin *v.* District Grand Lodge No. 4, I. O. B. B., 171 Cal. 260, 152 Pac. Rep. 731.

[45] This doctrine is fully supported by the following decisions: Montgomery *v.* Beavans, 1 Sawyer, 653, s. c., 4 Am. L. T. U. S. Cts. 202,

curred before the expiration of that period has the burden of

Field, J.; Eagle's Case, 3 Abb. Pr. 218, s. c., 4 Bradf. 117, Bradford, Surr.; Ex'rs of Clarke *v.* Canfield, 15 N. J. Ch. (2 McCarter), 119, Green, Chan.; Whiting *v.* Nicholl, 46 Ill. 230, 241, Breese, Ch. J.; Barr *v.* Sim, 4 Whart. 150, 171, and Bradley *v.* Bradley, 4 Id. 173, Gibson, Ch. J.; Smith *v.* Knowlton, 11 N. H. 191, 196, Parker, Ch. J.; Tilly *v.* Tilly, 2 Bland (Md.) 436, 444, Bland, Chan. The same principle is also recognized, though not decisively, in Whiteside's Appeal 23 Penn. St. 114, 117, Black, Ch. J., and Stouvenel *v.* Stephens, 2 Daly, 319, Daly, Ch. J.; and Gilleland *v.* Martin, 3 McLean, 490, Leavitt, J. In the earliest English cases it seems to have been a question of the weight of testimony; and, in 1560, it was held that, on evidence of seven years' absence, without being heard of, and on proof of belief in the family, of death, death might be presumed. Thorne *v.* Rolff, Dyer, 185a, s. c., more fully, Bendloe, 86. In 1624, the question arose as to who had the burden of proof, as to whether absentees, shown once to have been in life, were still alive, and it was held that the burden was on the plaintiff asserting their death, for it having been shown that they were once in life, they should be presumed living till the contrary was shown. Throgmorton *v.* Walton, 2 Rol. R. 461. Or, in the words of Lord Ellenborough, "where the issue is upon the *life or death* of a person once shown to be living, the proof of the fact lies on the party who asserts the *death*." Wilson *v.* Hodges, 2 East, 312. See also 10 Viner's Ab. 298, Estate, R. a. 4. After the decision in Throgmorton *v.* Walton, the statute 19 Car. II, as to life estates was passed, see paragraph 6, above, directing judges to instruct the jury that seven years' absence, etc., raised a legal presumption of death. The reasons supporting the American and earlier English rule are: (1) That the old common-law presumption of continuance of life lasts until intercepted by the statutory or judicial seven years' limit, or by evidence pointing to death at a particular time. (2) Death is presumed at the end of seven years, not for the purpose of fixing on the true date, but because the true date is inscrutable. The presumptions of continuance of life, and of death after seven years, are presumptions founded on ignorance, and are not to be tested by the question whether the artificially designated day is probably the true one. Like other presumptions founded on ignorance, the object is merely certainty, because truth cannot be ascertained. (3) Because the true date is unascertainable, it becomes necessary to fix a day on which right shall be deemed to devolve, as if actual death on that day were known. (4) Without this rule, where proof of the actual date cannot be made, the property must either remain undistributed, or be distributed among the contestants,

proving it.[46] The presumption that death occurs at that not according to any settled principle, but according to the accident of possession, or as one or the other claimant happens to be the moving party in court. Apart from these considerations of theory and policy, the question resolves itself into this, viz., is the legal presumption, that a person once shown to be living continues to exist until the contrary is indicated, sufficient to stand as a *prima facie* case in favor of one who assumes the affirmative? In some other cases, the presumption of the continuance of a fact shown once to have existed is *prima facie* proof in favor of him who alleges the fact, as, for instance, in case of indebtedness, partnership, insanity, etc. It may be observed that the law constantly acts on this presumption of life, in service of process on absentees by advertisement. Where a person leaves his home and place of business for temporary purposes and is not seen, heard of, or known to be living for the term of seven years thereafter, he is presumed to be dead. But in such case the presumption of life continues and the presumption of death does not arise until the expiration of seven years from the time of disappearance, unless there is evidence that the person was, at some particular time, in contact with a specific peril as a circumstance to quicken the period of time. In re Mutual Benefit Company's Petition, 174 Penn. St. 1, 34 Atl. Rep. 283.

One whose absence is unexplained is presumed to be living until the expiration of seven years. Vreeland *v.* Vreeland, 78 N. J. Eq. 256, 79 Atl. Rep. 336, 34 L. R. A. (N. S.) 940.

If a person is presumed to be dead after seven years' absence the time of death will be fixed as at the end of that period. Baker *v.* Fidelity Title & Trust Co., 55 Pa. Super. Ct. 15.

A person is presumed to be alive until the contrary is proved. After an absence of seven years without being heard of the presumption of life ceases and the presumption of death takes its place. The time of death is fixed at the expiration of the seven-year period unless an earlier death is proved or found by the jury from the circumstances. Donovan *v.* Major, 253 Ill. 179, 97 N. E. Rep. 231.

One who has disappeared for less than seven years will be presumed to be living. Reid *v.* State, 168 Ala. 118, 53 So. Rep. 254.

One who is absent less than seven years is presumed to be alive, and the burden of proof that he is dead rests upon the beneficiary who sues for the proceeds of a life policy. Springmeyer *v.* Sovereign Camp, Woodmen of the World, 163 Mo. App. 338, 143 S. W. Rep. 872.

[46] Schaub *v.* Griffin, 84 Md. 557, 36 Atl. Rep. 443; Johnson *v.* Merithew, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. Rep. 132.

The decree of the surrogate issuing letters of administration on

time fixes the rights dependent on death, until evidence to the contrary appears. Hence an executor is chargeable with interest for not paying over to the legatee entitled by reason of the presumable death; it is not necessary that the presumption should be judicially adjusted in order to fix the rights of parties.[47]

13. Survivorship in Common Casualty.

Where death of several is caused by one catastrophe, the burden of proof is on him who claims that one survived the other, to give some evidence rendering survival probable. The law neither makes nor permits a presumption that one survived the other from the mere fact of age or sex; but if there is evidence that the prolongation of life depended on struggle or endurance, then the relative strength may be relevant, and in such case, as well as where there is even slight evidence that one was seen alive after the other may be presumed to have been dead, the question may be one for the jury.[48]

the estate of one who is presumed to be dead after an absence of seven years, is not an adjudication as to the exact time of the death. Williams *v.* Post, 158 N. Y. App. Div. 818, 143 N. Y. Supp. 1027.

[47] Whiteside's Appeal, 23 Penn. St. 114, 117.

It is not within the jurisdiction of the Surrogate's Court to presume the death of any person other than the person whose estate is being administered. Matter of Matthews, 75 N. Y. Misc. 449, 136 N. Y. Supp. 636.

[48] Moehring *v.* Mitchell, 1 Barb. Ch. 264; Ommancy *v.* Stilwell, 23 Beav. 328; Robinson *v.* Gallier, 2 Woods, 178; Kansas, etc., Ry. Co. *v.* Miller, 2 Col. T. 442, 464; Johnson *v.* Merithew, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. Rep. 132.

In the case of two or more persons dying in a common disaster there is no presumption of survivorship nor of simultaneous death. Dunn *v.* New Amsterdam Casualty Co., 141 N. Y. App. Div. 478, 126 N. Y. Supp. 229; Hildenbrandt *v.* Ames, 27 Tex. Civ. App. 377, 66 S. W. Rep. 128; United States Casualty Co. *v.* Kacer, 169 Mo. App. 301, 69 S. W. Rep. 370, 92 Am. St. Rep. 641, 58 L. R. A. 436; Johnson *v.* Merithew, 80 Me. 111, 13 A. 132, 6 Am. St. Rep. 162.

The question of survivorship in common disasters cannot be determined without some actual evidence. Matter of Herrmann, 75

13a. Presumption as to Descendants.

But the courts do not adopt a further presumption that a

N. Y. Misc. 599, 136 N. Y. Supp. 944.

One who claims survivorship must prove it. Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424.

Those whose claim depends upon the survivorship of one of two persons perishing in a common disaster must prove such survivorship. Southwell *v.* Gray, 35 N. Y. Misc. 740, 72 N. Y. Supp. 342; Fuller *v.* Linzee, 135 Mass. 468; Middeke *v.* Balder, 198 Ill. 590, 64 N. E. Rep. 1002, 92 Am. St. Rep. 284, 59 L. R. A. 653.

Where property rights are to be disposed of it will be presumed that the deaths of two or more persons who perished in a common disaster were simultaneous. St. John *v.* Andrews Institute, 191 N. Y. 254, 83 N. E. Rep. 981, 14 Ann. Cas. 708; Newell *v.* Nichols, 75 N. Y. 78, 31 Am. Rep. 424; Matter of Willbor, 20 R. I. 126, 37 A. 634, 78 Am. St. Rep. 842, 51 L. R. A. 863; Matter of Gerdes, 50 N. Y. Misc. 88, 100 N. Y. Supp. 440; Dunn *v.* New Amsterdam Casualty Co. (dissenting opinion), 141 N. Y. App. Div. 478, 483, 126 N. Y. Supp. 229; Young Women's Christian Home *v.* French, 187 U. S. 401, 23 Super. Ct. 184, 47 L. ed. 233; Supreme Council R. A. *v.* Kacer, 96 Mo. App. 93, 69 S. W. Rep. 671.

The burden of proof of survivorship is on him whose claim arises by virtue of the survivorship. Farrelly *v.* Emigrant Industrial Sav. Bank, 92 N. Y. App. Div. 529, 87 N. Y. Supp. 54, aff'd in 179 N. Y. 594, 72 N. E. Rep. 1141.

When testator and legatee perish in a common disaster the burden of proof is on those who claim under the legatee to establish that the latter survived the testator. Young Women's Christian Home *v.* French 187 U. S. 401, 23 Super. Ct. 184, 47 L. ed. 233; Matter of Willbor, 20 R. I. 126, 78 Am. St. Rep. 842, 37 Atl. Rep. 634, 51 L. R. A. 863, note.

When the intestate and the heir perish in the same disaster the burden of proof of survivorship is on those claiming through the heir. Ehle's Est., 73 Wis. 445, 41 N. W. Rep. 627.

An inebriate who was suffering from several organic diseases and whose physical condition was such that a physician certified he could not possibly live longer than one year, disappeared and was unheard of for seventeen years—*Held* by the court that he predeceased his father who died four years after the son's disappearance. Cambrelleng *v.* Purton, 125 N. Y. 610, 26 N. E. Rep. 907.

Evidence that one of two dead bodies found in the woods was still warm and limp will be sufficient to allow the court to find that it was the body of the survivor. Broome *v.* Duncan (Miss.), 29 So. Rep. 394.

There is no presumption of simultaneous death, but because

of the absence of evidence or presumption to the contrary, property rights are disposed of as if death occurred at the same time. Matter of McInnes, 119 N. Y. App. Div. 440, 104 N. Y. Supp. 147.

There is no presumption of survivorship as each case must be determined on its own facts. The burden of proof of survivorship rests upon the party asserting it. Aley *v.* Missouri Pac. R. Co., 211 Mo. App. 460, 111 S. W. Rep. 102.

Where the insured and the beneficiary under a life insurance policy die in a common disaster the burden of proof is on him who claims under the beneficiary to establish that the beneficiary survived the insured. Dunn *v.* New Amsterdam Casualty Co., 141 N. Y. App. Div. 478, 126 N. Y. Supp. 229; Hildenbrandt *v.* Ames, 27 Tex. Civ. App. 377, 66 S. W. Rep. 128; Males *v.* Sovereign Camp Woodmen of the World, 30 Tex. Civ. App. 184, 70 S. W. Rep. 108; Supreme Council R. A. *v.* Kacer, 96 Mo. App. 93, 69 S. W. Rep. 671; Middeke *v.* Balder, 198 Ill. 590, 64 N. E. Rep. 1002, 92 Am. St. Rep. 284, 59 L. R. A. 653, 69 S. W. Rep. 671; Fuller *v.* Linzee, 135 Mass. 468; Southwell *v.* Gray, 35 N. Y. Misc. 740, 72 N. Y. Supp. 342.

Contrary view, that the burden of proof is on him who claims under the insured to establish that the insured survived the beneficiary. Cowman *v.* Rogers, 73 Md. 403, 21 A. 64, 10 L. R. A. 550; United States Casualty Co. *v.* Kacer, 169 Mo. App. 301, 69 S. W. Rep. 370, 92 Am. St. Rep. 641, 58 L. R. A. 436.

The Codes of two of our States follow the rule of the civil law and provide for a presumption of survivorship. In California, subd. 40, § 1963, Code Civ. Pro., providing for a presumption of survivorship may be relied on when there is a total lack of evidence as to which of two persons who perished in a wreck died first. Matter of Louck, 160 Cal. 551, 117 Pac. Rep. 673, Ann. Cas. 1913, A 868; Grand Lodge A. O. U. W. *v.* Miller, 8 Cal. App. 25, 96 Pac. Rep. 22.

In Louisiana, under Rev. Civ. Code, Art. 936, where a mother fifty-two years old and a daughter thirty-five years old perish in a common disaster the daughter will be presumed to have survived. Langles' Succ., 105 La. 39, 29 So. Rep. 739.

Where two persons disappear and are unheard of for over seven years there is no presumption that one survived the other, even though one was heard of later than the other. Schaub *v.* Griffin, 84 Md. 557, 36 App. Div. 443.

The law is that when two or more persons perish in a common disaster there is no presumption under the common law, of survivorship; that if survivorship is claimed it must be proved, and this rule would apply whether the common disaster was a wreck or accident on land or sea or the murder of several persons at practically the same time. Wall *v.* Pfanschmidt, 265 Ill. 180, 106 N. E. Rep. 785,

man presumed to be dead left no children or descendants.[49] And even where a man leaves the State unmarried and childless, and has not been heard from for seven years, it will not be presumed that he died childless, and the party alleging such fact must prove it.[50]

L. R. A. 1915, C. 328, Ann. Cas., 1916, A. 674.

Where husband and wife perished in a common disaster, there is no presumption that the wife survived the husband. In re Fowles, 176 App. Div. 637, 163 N. Y. Supp. 873.

When two persons perish in a common disaster, there is, in the absence of all proof of the fact, no presumption of survivorship or of simultaneous death and in the absence of evidence the fact is assumed to be unascertainable. McGowin *v.* Menken, 177 App. Div. 841, 164 N. Y. Supp. 953.

[49] Posey *v.* Hanson, 10 App. D. C. 496.

It is to be presumed that a person, proved to be dead, left heirs. Modern Woodmen of America *v.* Gromley, 41 Okla. 532, 139 Pac. Rep. 306, L. R. A. 1915, B. 728, Ann. Cas. 1915, C. 1063; Harvey *v.* Thornton, 14 Ill. 217.

There is no presumption that one who has been absent for seven years without being heard of, left no children or descendants. Emerson *v.* White, 29 N. H. 482.

There is no presumption that one who has died left no descendants. Hornberger *v.* Miller, 28 N. Y. App. Div. 199, 50 N. Y. Supp. 1079, aff'd 163 N. Y. 578. 57 N. E. Rep. 1112.

[50] Still *v.* Hutto, 48 S. C. 415, 26 S. E. Rep. 713. "Haggard and his wife, it may be true, have concealed themselves and the children, but the statute, which manifestly refers only to persons having volition and the right of free locomotion, does not create the presumption of the death of children incapable, by reason of their tender age, of 'absenting' themselves from the State or of 'concealing' themselves within it. The burden of establishing the death of the children without the aid of the presumption afforded by the statute, has not been met and sustained by the plaintiffs." Manley *v.* Pattison, 73 Miss. 417, 420–421, 19 So. Rep. 236.

The facts that one who was unmarried disappeared, and thereafter was unheard of for thirty-seven years, and during that time no one appeared purporting to be his issue to make claim to lands in which he had an interest, considered by the court to raise the presumption of death without issue. Barson *v.* Mulligan, 191 N. Y. 306, 84 N. E. Rep. 75, 16 L. R. A. (N. S.) 151.

A person unmarried and childless, who disappears for seven years without being heard of will be presumed to have died unmarried and childless, unless the contrary is

II. MARRIAGE

14. Burden of Proof, and Presumptions.

Marriage is not presumable from marriageable age and lapse of time,[51] and proof that a woman was a wife during a given period does not raise a presumption of marriage at any particular earlier date;[52] but, on the other hand, the court will not, in the absence of evidence, presume that one never married. The burden of proof is on him who asserts either marriage or the contrary.[53] For the purposes of actions considered in this chapter, it may be presumed that every competent couple who live together ostensibly in the

proved. Matter of Smith, 77 N. Y. Misc. 76, 136 N. Y. Supp. 825.

One who left home when he was between seventeen and twenty-one years of age, and was unmarried at the time, and thereafter was never heard from again, will be presumed to have died seven years after his departure and to have been unmarried at the time of his death. Wells *v.* Margraves (Tex. Civ. App.), 164 S. W. Rep. 881.

[51] Erskine *v.* Davis, 25 Ill. 251, 256.

[52] Id.

"Where a marriage has been shown in evidence, the law raises a strong presumption of its legality, casting the burden of proof upon the person attacking it, and requiring him to show that it is illegal and void." In re Pusey, 173 Cal. 141, 159 Pac. Rep. 433.

[53] Doe *v.* Deakin, 3 Carr. & P. 402.

The burden of proof of a marriage rests upon the party asserting it. In re Davis, 204 Pa. 602, 54 Atl. Rep. 475.

One who claims a marriage to have been illegal has the burden of proving such claim. Senge *v.* Senge, 106 Ill. App. 140; Cash *v.* Cash, 67 Ark. 278, 54 S. W. Rep. 744; Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. Rep. 525; Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. Rep. 78; Leach *v.* Hall, 95 Iowa, 611, 64 N. W. Rep. 790.

Where one party proves that the marriage was regular, the burden shifts to the opponent to prove that it was void. Goset *v.* Goset, 112 Ark. 47, 164 S. W. Rep. 759, L. R. A. 1916, C. 707.

One who rests on the fact that a marriage was dissolved must prove it. Wilson *v.* Allen, 108 Ga. 275, 33 S. E. Rep. 975.

The burden of proof that an unmarried man, who is presumed to be dead by reason of his disappearance for seven years, was married when he died is upon the party asserting that he was married. Duff *v.* Duff, 156 Mo. App. 247, 137 S. W. Rep. 909.

way of husband and wife, are in reality such.[54] This presumption, for which considerations of public order and decency are a sufficient support, is aided by the presumption of innocence in favor of a party to the marriage claiming under it, and is greatly strengthened when the only question depending is the legitimacy of offspring. The presumptions in favor of marriage increase in strength with the prolongation of the matrimonial cohabitation.[55]

[54] 1 Bish. on Mar. & D., §§ 434, 443.

Proof that a former marriage had been solemnized in a foreign country in a church, by a person assuming the office of priest or minister, raises the presumption that the marriage was in accordance with the laws of the country and valid; and, especially where followed by cohabitation, casts upon the person attacking its validity the burden of showing that the law required some further act or fact. Lanctot *v.* State, 98 Wis. 136, 73 N. W. Rep. 575.

Where a marriage is proved it will be presumed that the parties were legally capable. Barber *v.* People, 203 Ill. 543, 68 N. E. Rep. 93.

The presumption is that a marriage once established is valid. Haile *v.* Hale, 40 Okla. 101, 135 Pac. Rep. 1143.

Although the proofs establish such cohabitation, repute, etc., as would ordinarily raise a presumption of marriage, such presumption will not, however, arise where one of the parties is under such legal disability as would prevent marriage to the other. In re Morris, 157 N. Y. Supp. 472, 92 Misc. 630.

"Every marriage is presumed to be valid, but the strength of that presumption depends on the circumstances of each particular case." Schubert *v.* Barnholt, 158 N. W . Rep. (Iowa) 662.

[55] 1 Bish. on Mar. & D., § 458, and cases cited. Rockcastle Mining, etc., Co. *v.* Baker, 167 Ky. 66, 179 S. W. Rep. 1070.

The presumption in favor of a marriage becomes stronger as time goes on. Matter of Picken, 163 Pa. 14, 29 Atl. Rep. 875, 25 L. R. A. 477; Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. Rep. 195, 89 Am. St. Rep. 193; Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. Rep. 560.

Where a person marries a second time the presumption is that it is valid and that her first husband is dead or that the former marriage was legally dissolved. Goset *v.* Goset, 112 Ark. 47, 164 S. W. Rep. 759, L. R. A. 1916, C. 707.

A marriage once established will be presumed to continue. Nelson *v.* Jones, 245 Mo. App. 579, 151 S. W. Rep. 80.

The longer parties continue to maintain the relation of man and wife, the stronger is the inference in support of a contract of marriage.

15. Direct Evidence of Marriage.

Marriage may be proved either by evidence of the contract which constitutes it (sometimes called evidence of actual marriage), or by evidence of the status, or matrimonial condition in life, of which that contract is the foundation (sometimes called *de facto* or presumptive marriage). There is, however, but one kind of marriage, and the difference is in the evidence by which the relation is proved. To prove the contract, it is sufficient to prove an unconditional agreement of marriage in the present, as distinguished from an executory agreement to marry, if intended by the parties to constitute them husband and wife,[56] though without solem-

Davidson *v.* Ream, 161 N. Y. Supp. 73, 97 Misc. 89.

Where it appears that through a long course of years a man lived and recognized a woman as his wife in every way that a man ordinarily recognizes a woman as his wife, the evidence is sufficiently presumptive to establish that somewhere and somehow the parties were legally united either by consent or ceremony as the local laws required. Miller *v.* Miller, 76 W. Va. 352, 85 S. E. Rep. 542.

Although a man and woman had maintained intimate relations for a long period of time and as a result children were born which the man had on various occasions recognized as his own, still the fact of marriage was not established in the absence of proof that the man had ever recognized the woman as his wife or had ever cohabited with her in a common dwelling. In re Fuller, 250 Pa. 78, 95 Atl. Rep. 382.

The presumption of marriage when it once arises is a strong one, but is rebuttable. In re Reinhardt, 160 N. Y. Supp. 828, 95 Misc. 413.

[56] Hill *v.* Burger, 3 Bradf. 432; Steuart *v.* Robertson, L. R., 2 Sc. App. 494, s. c., 13 Moak's Eng. 165; McClurg *v.* Terry, 21 N. J. Eq. (6 C. E. Green), 225. Whether the marriage relation exists is always a matter of evidence, and may be proved by records or by any other evidence sufficient to establish the fact; and if it be shown that the parties intending marriage have accepted each other as husband and wife the contract will be enforced. Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. Rep. 717.

"The contract of marriage is something more than a mere civil agreement between the parties, the existence of which affects only themselves. It is the basis of the family, and its dissolution as well as its formation is a matter of public policy in which the body of the community is deeply interested and it is to be governed by other considerations than those which

nization,[57] or witnesses; [58] and proof of cohabitation is not

obtain with regard to any ordinary civil contract *inter partes*." Barker *v.* Barker, 151 N. Y. Supp. 811, 88 Misc. 300. See also Levey *v.* Levey, 150 N. Y. Supp. 610, 88 Misc. 315.

"Excepted from the general rule that a marriage, valid according to the law of the state or country where it is celebrated, is valid everywhere, are marriages prohibited from motives of public policy by the public law of the state or country in which they are questioned." People *v.* Steere, 184 Mich. 556, 151 N. W. Rep. 617.

In no event can a marriage which is not absolutely void, but merely voidable, be attacked in equity by the heirs of a deceased spouse after the death of the other spouse. Henderson *v.* Ressor, 265 Mo. 718, 178 S. W. Rep. 175.

A marriage to be held invalid, though valid where celebrated, must violate some distinctive policy of the State or country of the domicile, such as laws against incest, polygamy or miscegenation. Henderson *v.* Ressor, 265 Mo. 718, 178 S. W. Rep. 175.

The rule that a marriage valid where solemnized is valid everywhere has its exceptions where unusual circumstances would render its application inequitable or contrary to a declared public policy or to good morals. Hall *v.* Industrial Commission, 165 Wis. 364, 162 N. W. Rep. 312.

Consent is necessary to the validity of the marriage contract. The minds of the parties must meet in one common intention. Mere words, without the intention corresponding therewith will not make a marriage contract; but the words and acts are evidence of such intention, and it must be shown clearly therefrom that both parties intended that they were to have effect. Dorgeloh *v.* Murtha, 156 N. Y. Supp. 181, 92 Misc. 279.

The *lex loci contractus* governs marriage contracts unless contrary to the prohibitions of natural law or the express prohibitions of a statute of a State of which the parties were citizens at the time of their marriage and in which the marriage is questioned. Davidson *v.* Ream, 161 N. Y. Supp. 73, 97 Misc. 89.

"The contract of marriage is a contract *jure gentium*, and consent, and the assumption of the marriage status are all that is required by natural or public law." Butterfield *v.* Ennis, 193 Mo. App. 638, 186 S. W. Rep. 1173.

[57] Clayton *v.* Wardell, 4. N. Y. 231; Cheney *v.* Arnold, 15 N. Y. 351, and cases cited.

Record evidence of marriage is

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[58] Van Tuyl *v.* Van Tuyl, 8 Abb. Pr. N. S. 5, s. c., 57 Barb. 235.

Under the law of Nevada it is not necessary in order to constitute a valid marriage that any ceremony should be performed by any person or be had before any per-

necessary,[59] at least if there be proof of solemnization.[60] But

not required to prove marriage relation. Smith *v.* Fuller, (Iowa,) , 108 N. W. Rep. 765; State *v.* Williams, 20 Iowa, 98.

Where immigrants upon their arrival in this country, in compliance with the law requiring the marital relations to be truly stated before their admission, represented in their declarations that they were husband and wife, and cohabitation followed, a marriage is established. In re Spondre, 162 N. Y. Supp. 943, 98 Misc. 524.

[59] Jackson *v.* Winne, 7 Wend. 47; Caujolle *v.* Ferrie, 26 Barb. 177.

"A common-law marriage may be said to be one not statutory but recognized by the common law. Such marriage may be ceremonial, in that the parties may adopt any ceremony they may elect; or all ceremony may be dispensed with. A simple consent, statement, or promise between the parties, sufficient to make a contract, is only necessary, and this whether marriage be regarded as a contract or a status. The contract completes the marriage and it is not necessary that it be followed by cohabitation to complete it." Davidson *v.* Ream, 161 N. Y. Supp. 73, 97 Misc. 89, 109.

[60] Jaques *v.* Pub. Administrator, 1 Bradf. 479.

Common-law marriages were valid in New York prior to 1901, when they were prohibited by statute. In 1907 the section prohibitory of such marriages was repealed and although no provision was made in the repealing law recognizing the validity of common-law marriages, they again became valid. Ziegler *v.* P. Cassidy's Sons, 220 N. Y. 98, 115 N. E. Rep. 471.

Where parties competent to marry went from New York to New Jersey and there had a ceremonial marriage performed which was defective for want of license and then returned to New York with no intent of not being married, and publicly assumed the relations of husband and wife, their acts constituted a common-law marriage in the State of New York, which must be presumed to have resulted equally in the State of New Jersey. Davidson *v.* Ream, 178 App. Div. 362, 164 N. Y. Supp. 1037.

"Evidence to establish a common-law marriage should be clear, consistent, and convincing. Especially is this so where the result of establishing such marriage would lay the ground for a criminal prosecution of either of the parties to the marriage for bigamy and would invalidate a subsequent

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son. The relation may be formed by words of present assent. Parker *v.* De Bernardi, 164 Pac. Rep. (Nev.) 645.

Marriage is a civil contract. Neither formal ceremony nor marriage license is essential under the laws of Missouri. Pope *v.* Missouri Pac. Ry. Co., 175 S. W. Rep. (Mo.) 955.

proof of a contract *per verba de futuro* is not enough, though followed by cohabitation.[61] The contract or its solemnization before a clergyman or magistrate may be proved by the testimony of an eye-witness, and for this purpose a party is competent;[62] and parol testimony is not excluded by the fact that the statute provides for a record.[63] It is enough

marriage wherein all of the statutory provisions had been observed." Peery *v.* Peery, 27 Colo. App. 533, 150 Pac. Rep. 329.

Every presumption should be indulged in favor of the legality of a common-law marriage in the same way and to the same extent as the law indulges in favor of a ceremonial marriage. Howard *v.* Kelly, 111 Miss. 285, 71 So. Rep. 391.

[61] Cheney *v.* Arnold, 15 N. Y. 345; Holmes *v.* Holmes, 1 Abb. U. S. C. Ct. 539; Duncan *v.* Duncan, 10 Ohio St. 181. *Contra*, 1 Bish. on Mar. & D. §§ 251–256.

To constitute a common-law marriage, the agreement though made *per verba de præsenti* must be followed by cohabitation. Herd *v.* Herd, 194 Ala. 613, 69 So. Rep. 885, L. R. A. 1916 B. 1243.

The common-law mode of marriage by consent of the parties, without ceremony or solemnization, followed by cohabitation is recognized in the State of Alabama. Id.

Also in the state of Georgia. Wynne *v.* State, 17 Ga. App. 263, 86 S. E. Rep. 823.

[62] Bissell *v.* Bissell, 7 Abb. Pr. (N. S.) 16, s. c., 55 Barb. 325.

One of the parties to a marriage contract is a competent witness. Ross *v.* Sparks, 81 N. J. Eq. 117, 88 Atl. Rep. 384, affirmed in 81 N. J. Eq. 211, 88 Atl. Rep. 385.

But the testimony of either party to a common-law marriage will not be sufficient in itself to establish the marriage. Jordan *v.* Johnson, 155 S. W. Rep. (Tex. Civ. App.) 1194.

When a marriage is proved to have been performed by a clergyman or other officer authorized to perform it, the presumption is that it is legal. State *v.* McGilvery, 20 Wash. 240, 55 Pac. Rep. 115.

Where the place was a usual one for the official solemnization of marriages it may be inferred where the official records have been destroyed by fire that the person officiating was an officer authorized to solemnize the marriage. In re Lord, 176 App. Div. 565, 163 N. Y. Supp. 177.

It is not necessary that the special or official character of the person by whom the right was solemnized should be proved by record evidence of his ordination or appointment. Jowett *v.* Wallace, 112 Maine, 389, 92 Atl. Rep. 321, Ann. Cas. 1917, A. 754.

[63] Commonwealth *v.* Norcross, 9 Mass. 492. A wife who is the complainant in the prosecution of her husband for adultery cannot testify

that the witness be able to testify that the marriage was celebrated according to the usual form, and he need not be able to state the words used.[64] From the fact of solemnization assent is presumed,[65] even though it was not expressed.[66]

to their marriage and cohabitation. People *v.* Imes, 110 Mich. 250, 68 N. W. Rep. 157. But see State *v.* Melton, 120 N. C. 591, 26 S. E. Rep. 933, where it was held that in an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgment of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence. A foreign certificate of marriage is inadmissible in a criminal case. People *v.* Imes, 110 Mich. 250, 68 N. W. Rep. 157.

Witnesses at the marriage ceremony may testify as to it. Boling *v.* State, 91 Neb. 599, 136 N. W. Rep. 1078.

[64] Fleming *v.* People, 27 N. Y. 329. In a prosecution for adultery, the testimony of the clergyman and others who participated in a marriage ceremony in a foreign country between complainant and respondent, although insufficient, in the absence of proof as to the laws of such country, to prove a valid marriage, is admissible to show that a ceremony was in fact performed, which, if followed by cohabitation, would establish the marital relation. People *v.* Imes, 110 Mich. 250, 68 N. W. Rep. 157.

Oral evidence will be sufficient to prove a marriage, without producing the marriage certificate. Watson *v.* Lawrence, 134 La, 194, 63 So. Rep. 873, L. R. A. 1915, E. 121, Ann. Cas. 1916 A. 651.

If it appears that a witness saw the parties stand up, and go through the usual ceremonies of marriage, directed by one who usually or appeared usually to marry persons, a legal marriage will be presumed until the contrary is proved. Jowett *v.* Wallace, 112 Maine, 389, 92 Atl. Rep. 321, Ann. Cas. 1917, A. 754.

[65] Id.

Making a false affidavit to secure a license does not invalidate the marriage but one doing so may be prosecuted for perjury. Switchmen's Union of North America *v.* Gillerman, 162 N. W. Rep. (Mich.) 1024.

It is not necessary to indulge in any presumptions in order to overcome the effect of misstatements as to parentage, date and place of birth contained in an application for a marriage license, where there is sufficient competent evidence in the record to show who made the application. Bellinger *v.* Devine, 269 Ill. 72, 109 N. E. Rep. 666.

[66] Harrod *v.* Harrod, 1 Kay & J. 4, 17. *Contra*, Dennison *v.* Dennison, 35 Md. 361.

When a marriage has been

Where solemnization was necessary by the law under which the marriage was contracted, if it is proved, and matrimonial cohabitation under it, the law presumes that all the necessary formalities were had, unless the contrary is shown;[67] and even then a subsequent valid marriage may be presumed from continued matrimonial cohabitation under color of the informal solemnization.[68]

solemnized according to the forms of law, every presumption will be indulged in favor of its validity. Schaffer *v.* Richardson, 125 Md. 88, 93 Atl. Rep. 391, L. R. A. 1915, E. 186.

[67] Smith *v.* Huson, 1 Phill. 287, 294, 1 Bish. Mar. & D., §§ 450, 451. It is the better opinion that, even where the law requires solemnization, it is enough to show solemnization before an officer *de facto*, that is, a person assuming to act by authority in the solemnization. 1 Bish. on Mar. & D., § 496.

Where a marriage is established it is presumed that all the preliminary formalities were gone through. Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. Rep. 84; Matter of Sloan, 50 Wash. 86, 96 Pac. Rep. 684, 17 L. R. A. (N. S.) 960.

A clergyman performing the ceremony will be presumed to have authority. People *v.* Schoonmaker, 117 Mich. 190, 75 N. W. Rep. 439, 72 Am. St. Rep. 560; Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. Rep. 78.

"There is no one absolutely necessary manner of proving a ceremonial marriage to the exclusion of all other methods. It may be proved by the testimony of persons present who saw the marriage, and the parties to an alleged marriage may be witnesses for or against it unless rendered incompetent by some statute provision. . . . The record of the marriage and marriage certificates are also competent evidence of marriage, but the register of the marriage is not *the best* evidence, at least not in the sense that it must be produced if obtainable. . . . Cohabitation, reputation, declarations and conduct of the parties, and reception among friends and neighbors are all admissible in evidence, though their probative force under the circumstances, is for the court." Rhode Island Hospital Trust Co. *v.* Thorndike, 24 R. I. 105, 52 Atl. Rep. 873.

Where it is sought so to construe a statute as to make illegal every marriage contracted or solemnized otherwise than in accordance with it, such purpose should be plain and unmistakable. The courts ought not to be asked to pronounce marriages invalid and children illegitimate under a statute unless it has plainly decreed and foretold those consequences. Ziegler *v.* P. Cassidy's Sons, 220 N. Y. 98, 115 N. E. Rep. 471.

[68] Johnson *v.* Johnson, 1 Coldw.

16. Certificate or Registry.

Marriage may be equally proved by a marriage certificate, if made evidence by statute,[69] or if so connected with the parties as to be competent as part of the *res gestæ*, or as their declaration, or if by lapse of time and family tradition it is competent as hearsay.[70] It may also be proved by an official registry kept pursuant to statute,[71] or by the registry kept by the officiating clergyman,[72] or the proper officer of a church or religious society,[73] pursuant to his duty, though without requirement of statute.[74] The registry is

(Tenn.) 626, 634; Harrod *v.* Harrod, 1 Kay & J. 4, 17; Rex *v.* Brampton, 10 East. 288; Raynham *v.* Canton, 3 Pick. 293.

"As a general rule, marriages contracted in another State pursuant to the law thereof, though not according to our law, will be recognized so as to entitle a widow to dower in this State." (W. Va.) Miller *v.* Miller, 76 W. Va. 352, 85 S. E. Rep. 542.

While a ceremonial marriage performed between a female under the age of consent and a man competent to contract marriage, may be said to be void, yet the female after reaching the age of consent may affirm the marriage, and it is thereafter binding, and no new marriage is required. Americus Gas, etc., Co. *v.* Coleman, 46 Ga. App. 17, 84 S. E. Rep. 493.

[69] Otherwise of a certificate given many years after the fact. Gaines *v.* Relf, 12 How. (U. S.) 472, 555. The original marriage license signed by the justice solemnizing the marriage is admissible to prove a marriage, though neither the justice nor the witnesses attesting the certificate as being present at the marriage are present in court. State *v.* Melton, 120 N. C. 591, 26 S. E. Rep. 933. And the record book of marriages of the county is admissible to prove a marriage. Id.

If the witnesses to a marriage certificate are out of the jurisdiction, the certificate itself will be accepted as evidence. State *v.* MacRae, 83 N. J. Eq. 796, 85 Atl. Rep. 455.

[70] See paragraph 34, below.

[71] See paragraph 43, below, and Jackson *v.* Boneham, 15 Johns. 266.

The production of the record proof of marriage from the proper public records, with proof of the identity of the parties, is sufficient, *prima facie* to show a legal marriage in fact. Jowett *v.* Wallace, 112 Maine, 389, 92 Atl. Rep. 321, Ann. Cas. 1917, A. 754.

[72] Maxwell *v.* Chapman, 8 Barb. 579, 582.

[73] Jackson *v.* King, 5 Cow. 237.

[74] Maxwell *v.* Chapman (above), Rosc. N. P. 232.

evidence both of the fact of marriage and the date of solemnization.[75]

17. Indirect Evidence of Marriage.

Evidence of cohabitation and repute—that is of status or matrimonial condition—is only indirect or presumptive evidence of a contract of marriage. This is primary not secondary evidence,[76] but its efficacy depends entirely on its justifying an inference that a contract of marriage was once made;[77] still it is not essential that such evidence point to any particular time of contract, unless time is material under the issue. One who alleges and fails to prove a formal contract of marriage is not thereby necessarily precluded from adducing indirect evidence,[78] although its value may be fatally impaired by the false allegation of a formal marriage.[79]

[75] Doe *v.* Barnes, 1 Moo. & Rob. 386.

[76] 1 Bish. Mar. & D., § 483.

The presumption of marriage, from cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law, especially so in a case involving legitimacy; and the presumption can be overcome only by the most cogent and satisfactory evidence. Hynes *v.* McDermott, 91 N. Y. 451, 43 Am. Rep. 677.

[77] Breadalbane Case, Campbell *v.* Campbell, L. R., 1 Sc. App. in H. of L. 182.

"The contract is the element needed to constitute marriage, but to establish the contract, the conduct of the parties has always been held important as evidence to prove it. A single act of consummation and a single act of recognition would be competent to support the contention that the parties consented and actually entered into a marriage contract, just as much as many acts of that character; the number of such acts going to the strength of the proof." Davidson *v.* Ream, 161 N. Y. Supp. 73, 97 Misc. 89.

[78] Tummalty *v.* Tummalty, 3 Bradf. 369.

It may, from the actions of the parties, their visible relations to each other and their representations to others, be inferred that at some time previous they had entered into a contract of marriage, and that is all the dignity of the proof of cohabitation and repute. It is circumstantial evidence tending to establish a previously existing fact, and such proof may be as satisfactory, and often more satisfactory than the much more limited direct evidence which it is ordinarily possible to produce. Matter of Hamilton, 76 Hun (N. Y.), 200, 27 N. Y. Supp. 813.

[79] The question of weight rather

Indirect evidence may be sufficient to establish a marriage, even though it may have the effect to invalidate a subsequent marriage.[80]

18. Cohabitation and Repute.

In the absence of direct proof, marriage cannot be proved by cohabitation alone, however long continued; [81] there must

than competency seems to have been passed on in Redgrave *v.* Redgrave, 38 Md. 98. Compare Blackburn *v.* Crawfords, 3 Wall. 194. Inconsistencies in testimony, due to family pride, etc., explainable. Gaines *v.* New Orleans, 6 Wall. 705. Testimony to a marriage between dissolute or unscrupulous persons to be cautiously weighed. Steuart *v.* Robertson, L. R. 2 Sc. App. 494, 520, s. c., 13 Moak's Eng. R. 165, 191. Upon the hearing of an application by the alleged widow of a decedent to revoke letters of administration granted on the decedent's estate, testimony by the petitioner to the effect that she and the decedent agreed to assume toward each other the relation of man and wife without the performance of a marriage ceremony, and that they thereafter lived together in pursuance of the agreement, is inadmissible. Matter of Brush, 25 App. Div. (N. Y.) 610.

[80] Brower *v.* Bowers, 1 Abb. Ct. App. Dec. 214. s. c., as Bowers *v.* Brower, 9 N. Y. Leg. Obs. 196; s. p., O'Gara *v.* Eisenlohr, 38 N. Y. 296.

A decree for separate maintenance is inadmissible for the purpose of establishing the marriage status against persons who were neither parties nor privies to that suit. American Woolen Co. *v.* Lesher, 2 67 Ill. 11, 107 N. E. Rep. 882.

[81] Commonwealth *v.* Stump, 53 Penn. St. 132. Marriage will sometimes be presumed from cohabitation. But such presumption may be overcome, as cohabitation may be meretricious as well as matrimonial. Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. Rep. 1071.

A marriage will not be presumed from cohabitation and reputation unless it be shown that such cohabitation was matrimonial and not meretricious. Fender *v.* Segro, 41 Okla. 318, 137 Pac. Rep. 103.

The cohabitation must be consistent with the marital relation. In re Patterson, 237 Pa. 24, 85 Atl. Rep. 75.

Slight circumstances may be sufficient to establish a change from an illicit to a legal relation, and proof of its time or place is not indispensable. Adger *v.* Ackerman, 115 Fed. Rep. 124, 52 C. C. A. 568; Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263; State *v.* Worthingham, 23 Minn. 528; Prince *v.* Edwards, 175 Ala. 532, 57 So. Rep. 714.

Where the cohabitation was illicit

be something to show that the cohabitation was matrimonial, not meretricious. The fact that the parties were reputed among friends and acquaintances to be man and wife will suffice, with evidence of cohabitation, if the reputation be a general or at least a consistent reputation. A divided repute is of no avail.[82] A mere local repute, if residence is

at the outset the presumption is that it continues to be so until the contrary is proved. Jones *v.* Jones, 4 Pa. Dist. Rep. 223.

A state of concubinage existing for a long period between two persons cannot be converted into a state of lawful matrimony without some evidence, circumstantial or otherwise, establishing an actual marriage between them. Matter of Eichler, 84 N. Y. Misc. 667, 146 N. Y. Supp. 846; Chamberlain *v.* Chamberlain, 71 N. Y. 423; Matter of Brush, 25 N. Y. App. Div. 610, 49 N. Y. Supp. 803.

[82] Cunninghams *v.* Cunninghams, 2 Dow. 482, 511; Commonwealth *v.* Stump (above). *Contra*, Lyle *v.* Ellwood, L. R. 19 Eq. C. 98, s. c., 11 Moak's Eng. 702. A witness cannot be asked if there was a divided reputation in the community as to whether the parties were married or not. Jackson *v.* Jackson, 82 Md. 17, 33 Atl. Rep. 317. "The evidence of reputation, when admitted, is an exception to general rules. It should never be allowed to stray beyond some useful or necessary purpose. In its application to cases of pedigree, it is justified by difficulties of proof, and confined generally to the family and relatives whose knowledge is assumed, and who have spoken before a controversy arisen. In its application to the fact of marriage it is more than mere hearsay. It involves and is made up of social conduct and recognition, giving character to an admitted and unconcealed cohabitation. But, in its application to a man living in appearance a single life, it adds nothing to that fact, it creates no further contradiction to an intercourse carried on elsewhere under the appearance of matrimony, and throws no additional light upon it. It amounts to bare hearsay, and the unsworn declarations of persons knowing nothing of the facts in controversy." Badger *v.* Badger, 88 N. Y. 546, 556.

Evidence as to general repute will be admitted. Farmer *v.* Towers, 106 Ark. 123, 152 S. W. Rep. 993.

Cohabitation, reputation and general surroundings that indicate the reasonable probability of the conclusion that the parties were married are recognized as being sufficient evidence to establish that fact, especially so in the case of very old people, or people coming from another country where they were married, or other instances in which it would be difficult to establish the fact. Durning *v.*

brief and frequently changed, is of little account alone, for an intended meretricious connection might be concealed by a regard for appearances. Hence there should be some degree of public recognition of the relation of husband and wife among acquaintances and friends.[83] The mere fact

Hastings, 183 Pa. St. 210, 38 Atl. Rep. 627.

A marriage solemnized before the entry of a final decree of divorce against one of the parties is absolutely void and cannot be made valid by continued living as husband and wife after the entry of the decree. Pettit *v.* Pettit, 105 N. Y. App. Div. 312, 93 N. Y. Supp. 1001.

A marriage solemnized before the entry of a final decree of divorce in favor of one of the parties will be valid if the parties to it continue to live as husband and wife after the decree is entered. Land *v.* Land, 206 Ill. 288, 68 N. E. Rep. 1109, 99 Am. St. Rep. 171.

Reputation of marriage must be unquestioned before it can operate as a part of the foundation for an inference of marriage. Pope *v.* Missouri Pac. Ry. Co., 175 S. W. Rep. (Mo.) 955.

The presumption of law, founded on cohabitation and repute, that a marriage had taken place, will not prevail over proof of a subsequent marriage in fact by one of the parties with a third person. Brown *v.* State, 16 Ga. App. 603, 85 S. E. Rep. 951.

The fact of marriage, even though legitimacy depends upon it, may be proved by common repute. Cave *v.* Cave, 101 S. C. 40, 85 S. E. 244.

Cohabitation together as man and wife and declarations by the parties concerning their relations as husband and wife, etc., do not constitute a marriage; but they are evidential facts, from which, in the absence of proof to the contrary, a strong presumption of marriage arises, because they are circumstances which usually attend that relation. Mere living together and repute do not alone constitute a valid marriage. Matter of Morris, 157 N. Y. Supp. 472, 92 Misc. 630.

[83] Hill *v.* Burger, 3 Bradf. 432, 437.

Open cohabitation as man and wife, with introduction to friends and neighbors as such, will establish the marriage. Cramsey *v.* Sterling, 111 N. Y. App. Div. 568, 97 N. Y. Supp. 1082; Gall *v.* Gall, 114 N. Y. 109, 21 N. E. Rep. 106.

Sexual relations shown to have been meretricious in their inception, are presumed to continue meretricious until they are proven to be matrimonial. Cohabitation does not create a presumption of marriage unless matrimonial association and matrimonial habits are proved. Bellinger *v.* Devine, 269 Ill. 72, 109 N. E. Rep. 666.

that the man, under particular circumstances, may have attempted to give to his mistress a different character from the meretricious one which she, in fact, sustained toward him, is not sufficient.[84]

In proving marriage by general repute, a witness may testify that the reputation at the place of residence was that the persons in question were man and wife; but he may be cross-examined as to the sources of his information, and if it appear on cross-examination that he is speaking from information given him by a particular person, either of the fact or of the general reputation, the evidence is shown to be incompetent, unless the source of information was a member of the family, of either spouse, in which case the rule as to declarations may apply.[85] The presumption of marriage arising from cohabitation is overcome by proof that at the time one of the parties has a living wife or husband, for it is not to be presumed that one of the parties was guilty of bigamy in consummating the marriage.[86]

19. Cohabitation and Declarations.

Evidence of confessions or declarations by one or both

[84] Rose *v.* Clark, 8 Paige, 574, 582. The degree of proof of cohabitation and repute must be increased when one of the parties is still living. Hill *v.* Burger, 3 Bradf. 432, 437.

It is necessary that the contract of common-law marriage should be followed by a general and full recognition by each of the other as husband or wife. State *v.* Burkrey (Mo.), 183 S. W. Rep. 328.

[85] Shedden *v.* Patrick, 30 L. J. P. M. & D. 217, 223 (1860–1861).

Since acknowledgment, cohabitation and reputation constitute presumptive evidence of marriage, evidence that a man and woman were reputed to be man and wife is admissible. Pope *v.* Missouri Pac. Ry. (Mo.), 175 S. W. Rep. 955.

[86] Henry *v.* McNealey, 24 Colo. 456, 50 Pac. Rep. 37.

Where the effect of a judgment will necessarily brand one with the crime of bigamy, strict proof is required that the alleged prior marriage was in fact a valid one according to the laws of the place of marriage and in compliance with all the formalities required by such laws. Lazarowicz *v.* Lazarowicz, 154 N. Y. Supp. 107, 91 Misc. 116.

It will be presumed that a person contracted a legitimate marriage rather than that he commited bigamy. Matter of Farley 155 N. Y. Supp. 63, 91 Misc. 185.

parties that they were married, is competent against them, and if made during cohabitation, so as to characterize it. is competent for or against third persons;[87] and so are the acts and conduct of the parties toward each other.[88] Concealment which prevented any public repute from arising, though a very strong circumstance against the presumption of marriage,[89] is not necessarily fatal to it, but may be explained;[90] and if explained, dispenses in so far with evidence of repute. Adminissions and declarations made, and a general repute originating, after the cohabitation had ceased, are not competent except as against the declarant. They must be reasonably contemporaneous with the alleged status, so as to characterize it, as facts in the nature of part of the *res gestæ*.[91]

20. Marriage after Meretricious Intercourse.

If the cohabitation is shown to have commenced as a meretricious one, the mere continuance of cohabitation, even with matrimonial repute, can never amount to evidence of marriage;[92] but the presumption in favor of marriage is

[87] See Hayes *v.* People, 25 N. Y. 396, per ALLEN, J.; 1 Bish. Mar. & D. § 497. Compare Westfield *v.* Warren, 3 Halst. 249. Declarations of parties, made while they were living together, are competent to characterize the nature of their cohabitation. Stackhouse *v.* Stotenbur, 22 App. Div. (N. Y.) 312.

[88] See Christy *v.* Clarke, 45 Barb. 529.

[89] Cunningham *v.* Burdell, 4 Bradf. 343.

The fact of secrecy may be evidence against the fact of marriage. Cave *v.* Cave, 101 S. C. 40, 85 S. E. Rep. 244.

[90] Gaines *v.* New Orleans, 6 Wall. 707.

[91] Matter of Taylor, 9 Paige, 611, 616.

[92] This seems to be the result of the present state of the authorities; but see, for a rule more favorable to the inference of marriage, 1 Bish. Mar. & D., §§ 506–509.

It is the consent of the parties, not their concubinage, which constitutes a valid marriage. Marks *v.* Marks, 108 Ill. App. 371; McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. Rep. 641.

Where the relation started meretriciously it is presumed to continue so, and there is no marriage. Pike *v.* Pike, 112 Ill. App. 243; Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263; Spencer *v.* Spencer,

so favored,[93] that the courts lay hold of any circumstances significant of actual change from an illicit to a lawful relation, even without any evidence pointing to the actual time and mode of the change. Marriage may be presumed, where cohabitation under circumstances that would have been matrimonial but for the impediment of an existing marriage of one of the parties, is continued after that impediment is removed and known to the parties to be so removed.[94] While

84 N. Y. Misc. 264, 147 N. Y. Supp. 111.

Although a relation which was meretricious at the outset is presumed to continue so, slight circumstances are sufficient to show a change in the minds of the parties respecting their connection, which will raise the presumption of marriage. Edelstein *v.* Brown, 95 S. W. Rep. (Tex. Civ. App.) 1126.

Where the relation between a man and a woman was illicit at its commencement, the presumption is that it so continued. In re Fuller, 250 Pa. 78, 95 Atl. Rep. 382.

Where it appears that a man and woman at the outstart began to live in concubinage, the presumption of fact is that they so continued until a different mode of life is proven. Cave *v.* Cave, 101 S. C. 40, 85 S. E. Rep. 244.

"The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption of more or less strength that they have been duly married. While such cohabitation does not constitute marriage, it tends to prove that a marriage contract has been entered into by the parties." In re Watson, 175 App. Div. 956, 161 N. Y. Supp. 875 (quoting Gall, *v.* Gall. 114 N. Y. 109, 21 N. E. Rep. 106).

[93] And especially where the question is on the legitimacy of issue; see Caujolle *v.* Ferrie, 23 N. Y. 90, affi'g 26 Barb. 177, 4 Bradf. 28.

An agreement to present cohabitation and a future marriage when more convenient is not enough to establish a common-law marriage. In re Maher, 204 Ill. 25, 68 N. E. Rep. 159.

Evidence of cohabitation must be supplemented with evidence of matrimonial intent, in order to prove the marriage. White *v.* White, 82 Cal. 427, 23 Pac. Rep. 276, 7 L. R. A. 799.

[94] O'Gara *v.* Eisenlohr, 38 N. Y. 296; Rose *v.* Clark, 8 Paige, 574, 581, and cases cited.

Where the relationship was meritricious in its inception it is presumed to have so continued until the cohabitation became in the eyes of the law matrimonial in its intent and character, which intent and character may be shown by direct or circumstantial proof. Howard *v.* Kelly, 111 Miss. 285, 71 So. Rep. 391.

the mere removal of the disability is not enough to purge the meretricious character, even when coupled with evidence of a prior promise to marry after its removal,[95] evidence that the parties recognized the new relation, and held themselves out as man and wife, and professed to be bound by marital ties, and thus exhibited the continuation of their cohabitation upon a new and different footing, is sufficient.[96]

21. Second Marriage During Absence.

At common law, marriage, however proved, may be disproved by evidence that one of the parties was at the time a party to a prior valid marriage.[97] The burden of proving the prior marriage is on the one who seeks by it to impeach the later:[98] but direct evidence of the prior marriage is not es-

[95] Foster *v.* Hawley, 8 Hun, 68.

A marriage illegal in its inception cannot become valid except by the establishment either directly or circumstantially of an actual contract of marriage after the removal of the impediment which rendered it illegal in the first instance; mere cohabitation as husband and wife is not enough. Hall *v.* Industrial Commission, 165 Wis. 364, 162 N. W. Rep. 312.

[96] Hyde *v.* Hyde, 3 Bradf. 509, 518.

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. Matter of Watson, 175 App. Div. 956, 161 N. Y. Supp. 875 (quoting Gall *v.* Gall, 114 N. Y. 109, 21 N. E. Rep. 106).

[97] Blossom *v.* Burritt, 37 N. Y. 434; Emerson *v.* Shaw, 1 L. & Eq. Rep. 635 (N. H., Mar., 1876).

It is not sufficient simply to prove the prior marriage and rest upon the presumption of continuance. Fagin *v.* Fagin, 151 N. Y. Supp. 809, 88 Misc. 304.

Where a marriage is assailed on the ground that a former husband or wife is still alive, the *prima facie* presumption of the continuance of life of the former husband or wife is outweighed by the presumptions of validity of the second marriage. Wilcox *v.* Wilcox, 171 Cal. 770, 155 Pac. Rep. 95.

[98] Patterson *v.* Gaines, 6 How. U. S. 550. But evidence of an admission by such party that he was guilty of bigamy in the second marriage (Gaines *v.* Relf, 12 How. U. S. 472, 534), or that his first wife was then living (1 Bish. Mar. & D., § 455), is not sufficient. When a marriage has been consummated in accordance with the

forms of law it is presumed that no legal impediments existed to the parties entering into such marriage, and the fact, if shown, that either or both of the parties have been previously married, and that such wife or husband of the first marriage is still living, does not destroy the *prima facie* legality of the last marriage. The presumption in such a case is that the former marriage has been legally dissolved and the burden that it has not rests upon the party seeking to impeach the last marriage. Wenning *v.* Teeple, 144 Ind. 189, 193, 41 N. E. Rep. 600; Boulden *v.* McIntire, 119 Ind. 574; Teter *v.* Teter, 101 Ind. 129; Yates *v.* Houston, 3 Tex. 433; Dixon *v.* People, 18 Mich. 84; Harris *v.* Harris, 8 Ill. App. 57; Town of Greensborough *v.* Town of Underhill, 12 Vt. 604; Rex *v.* Inhabitants of Twyning, 2 B. & Ald. 386; Squire *v.* State, 46 Ind. 459; Klein *v.* Ladyman, 29 Mo. 259.

The presumption is in favor of the validity of a second marriage and the burden rests upon the person asserting a prior marriage to prove it. Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. Rep. 560.

One who attacks the legality of a second marriage which is admitted, has the burden of proving a prior marriage and also that it was not dissolved. Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. Rep. 409.

There must be clear proof of a prior marriage before the second marriage will be held invalid. Hager *v.* Brandt, 111 Iowa, 746, 82 N. W. Rep. 1016.

Where a second marriage is proved the presumption is that the prior marriage was dissolved, and the burden of proof to the contrary is on the party asserting the prior marriage. Maier *v.* Brock, 222 Mo. 74, 120 S. W. Rep. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 673; Carroll *v.* Carroll, 20 Tex. 731; Howton *v.* Gilpin, 24 Ky. Law Rep. 630, 69 S. W. Rep. 766; Wenning *v.* Teeple, 144 Ind. 189, 41 N. E. Rep. 600; Alabama, etc., R. Co. *v.* Beardsley, 79 Miss. 417, 30 So. Rep. 660, 89 Am. St. Rep. 660; In re Rash, 21 Mont. 170, 53 Pac. Rep. 312, 69 Am. St. Rep. 649; Scott *v.* Scott, 25 Ky. Law Rep. 1356, 77 S. W. Rep. 1122.

If necessary to support the legality of a second marriage it will be presumed, in the absence of evidence to the contrary, that the first marriage has been legally dissolved. Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. Rep. 746, 52 Am. St. Rep. 180, 31 L. R. A. 411; Erwin *v.* English, 61 Conn. 502, 23 A. 753; Potter *v.* Clapp, 203 Ill. 592, 68 N. E. Rep. 81, 96. Am. St. Rep. 322; In re Thewlis, 217 Penn. St. 307, 66 App. Div. 519; Thomas *v.* Thomas, 53 Wash. 297, 101 Pac. Rep. 865; Matter of Meehan, 150 N. Y. App. Div. 681, 135 N. Y. Supp. 723; Coachman *v.* Sims, 36 Okla. 536, 129 Pac. Rep. 845; Ross *v.* Sparks, 79 N. J. Eq. 649, 83 Atl. Rep. 1118.

But, in a case involving property rights the presumption of validity

of a subsequent marriage will not be sufficient to overthrow the presumption of the continuing validity of the first marriage, in the absence of evidence of a divorce. Goodwin *v.* Goodwin, 113 Iowa, 319, 85 N. W. Rep. 31.

Where a man has married twice, and the first marriage has been proved by clear and uncontradicted evidence, such marriage can only be avoided by proving that he was not the person named in the record in evidence, or that his first wife is dead, or that the first marriage was legally dissolved by decree of court. Bowman *v.* Little, 101 Md. 273, 61 Atl. Rep. 223, 657, 1084.

Proof of the fact that there was a prior marriage ceremony and nothing more, is not sufficient to invalidate a subsequent marriage. There must be proof that the prior marriage was legal, that the parties to it were legally competent to contract in marriage. United States *v.* Green, 98 Fed. Rep. 63.

The presumption of the validity of a second marriage is greatly strengthened by the uninterrupted cohabitation of the parties to it for more than twenty years and until the death of one of them, the attitude of their friends, relations and acquaintances, the birth of children and the attitude of the alleged former wife. Matter of Meehan, 150 N. Y. App. Div. 681, 135 N. Y. Supp. 723.

Where there has been a second marriage with issue the court will, for the purpose of legitimatizing the issue, presume that the first marriage was legally dissolved prior to the second, in the absence of evidence to the contrary. Matter of Grande, 80 Misc. 450, 141 N. Y. Supp. 535.

The presumption in favor of a second marriage will not be overthrown by proof of the prior marriage, unattended with proof that there has been no divorce and that the partner in the prior marriage is still alive. Roxbury *v.* Bridgewater, 85 Conn. 196, 82 Atl. Rep. 193.

The burden of proof is on the party assailing a marriage on the ground that a former husband or wife is still alive, to show not only the former marriage but also that it has not been dissolved by death or judicial decree. Wilcox *v.* Wilcox, 171 Cal. 770, 155 Pac. Rep. 95.

The law is so positive in requiring the party who asserts the illegality of a marriage to take the burden of proving it that such requirement obtains even though it involves the proving of a negative, and although it is shown that one of the parties had contracted a previous marriage, and the existence of the wife or husband of the former marriage at the time of the second marriage is established by proof, it is not sufficient to overcome the presumption of the validity of the second marriage, the law presuming rather that the first marriage has been dissolved by divorce, in order to sustain the second marriage. Estes *v.* Merrill, 121 Ark. 361, 181 S. W. Rep. 136.

Whenever a previous marriage is relied upon to avoid a subsequent

sential; it may be proved by cohabitation and repute.[99] The principle of the statute of bigamy of 1604,[1] which excepted from the offense cases of second marriage contracted while the former husband or wife was beyond seas for seven years, or was absent and not known to be living for that period, was early adopted by the common-law courts, by analogy, as furnishing a presumption of death in such cases, for civil purposes, and this rule has been generally followed in this country, the time being shortened in some States by statute, as in New York to five years,[2] where, also, a further

marriage, there exists a presumption in favor of the latter; and satisfactory proof of the former marriage is required to overcome this presumption. State *v.* Collins (Del. Gen. Sess.), 99 Atl. Rep. 87.

There is a presumption and a very strong one in favor of the legality of a marriage regularly solemnized. The burden is upon the party so asserting to prove that a first marriage had not ended before the second marriage occurred. In re Hughson, 173 Cal. 448, 160 Pac. Rep. 548.

The burden is upon the person who asserts the illegality of a marriage to prove such illegality and, where a second marriage is shown as a fact a strong presumption exists in favor of its legality which is not overcome by the mere proof of a prior marriage. Jones *v.* Jones, 164 Pac. Rep. (Okl.) 463.

Proof of a subsequent marriage alone makes out a *prima facie* case as to its validity. To overcome this *prima facie* case, proof of a former marriage is required and also evidence from which it may be concluded that it has not been dissolved by death or divorce. Schaffer *v.* Richardson, 125 Md. 88, 93 Atl. Rep. 391, L. R. A., 1915, E. 186.

[99] Brower *v.* Bowers, 1 Abb. Ct. App. Dec. 214, s. c., 9 N. Y. Leg. Obs. 196.

Where a man and woman are legally married, the woman continues to be the man's wife, notwithstanding she subsequently contracts a bigamous marriage with another man during his life, and upon the death of her first husband is entitled to the widow's rights in his estate. Estes *v.* Merrill, 121 Ark. 361, 181 S. W. Rep. 136.

[1] 2 Ja. I, ch. 11 (3 Stat. at L., A. D. 1770, p. 9), § 2.

[2] Domestic Relations Law, § 6.

In California which has a statute similar to the New York statute, the second marriage remains valid until annulled by a competent court. In re Harrington, 140 Cal. 244, 294, 73 Pac. Rep. 1000, 98 Am. St. Rep. 51; Gall *v.* Gall, 114 N. Y. 109, 21 N. E. Rep. 106.

The presumption that a second marriage is legal is stronger than the presumption that the former

provision has been adopted to the effect that such a second marriage shall not be void, as formerly, if it appear that the party to both marriages contracted the second after the lapse of that period, without having meanwhile known that the absentee was living,[3] and in good faith believing him dead.[4] Under that provision the court will not adjudge it void in a

spouse of one of the parties who has not been heard of for five years was living at the time of the second marriage. Cash *v.* Cash, 67 Ark. 278, 54 S. W. Rep. 744.

[3] Domestic Relations Law, § 7; Cropsey *v.* McKinney, 30 Barb. 47, 58.

[4] Whether the presumption of innocence avails to require evidence to the contrary—compare Valleau *v.* Valleau, 6 Paige, 209; Spears *v.* Burton, 31 Miss. 555; O'Gara *v.* Eisenlohr, 38 N. Y. 296; Fleming *v.* People, 27 N. Y. 334.

A marriage by a woman after her first husband had disappeared for over seven years is valid. Gilroy *v.* Brady, 195 Mo. 205, 93 S. W. Rep. 279; Burkhardt *v.* Burkhardt, 63 N. J. Eq. 479, 52 Atl. Rep. 296.

The presumption of innocence is stronger than the presumption of the continuation of life, and rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts will indulge in a presumption of death in less than seven years. Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. Rep. 757, 31 L. R. A. 411, 52 Am. St. Rep. 180.

Where a woman marries before the expiration of seven years after the disappearance of her first husband the presumption of her innocence of the crime of bigamy will overcome the presumption of life of her first husband. Cooper *v.* Cooper, 86 Ind. 75; Lockhart *v.* White, 18 Tex. 102; Klein *v.* Laudman, 29 Mo. 259; Smith *v.* Knowlton, 11 N. H. 191; Wagoner *v.* Wagoner, 128 Mich. 635, 87 N. W. Rep. 898; Smith *v.* Fuller (Ia.), 108 N. W. Rep. 765; Murchison *v.* Green, 128 Ga. 339, 57 S. E. Rep. 709, 11 L. R. A. N. S. 702.

Where a woman marries after a period of years has elapsed since her husband disappeared, her second marriage will not be valid unless she can prove that her first husband's absence is unexplained, that she has made diligent search for him in the usual channels, and has not heard of or from him in any way and has no way of knowing what became of him. Alixanian *v.* Alixanian, 28 N. Y. Misc. 638, 59 N. Y. Supp. 1068.

Where a husband leaves his wife and goes to another jurisdiction and never communicates with her, and after five years marries again, the presumption is that at the time of his second marriage he believed his first wife to be living. In re Richards, 133 Cal. 524, 65 Pac. Rep. 1034.

collateral action involving only questions of property; [5] and after the death of one of the parties to the second marriage, that marriage is good for the purpose of succession and legitimacy; [6] and even during the life of both, it may be sustained for those purposes, by proof that the former husband or wife was absent, and not heard of for seven years, and that, after the lapse of that time, the second marriage occurred; or that previous cohabitation and repute were continued under circumstances sufficient to raise a clear presumption of marriage on grounds subsequent in point of time to the legally presumable death of the former husband or wife.[7] Upon proof that the absentee was reputed in the family, before the lapse of that period, to be dead, or other presumptive evidence, the jury may find death to have occurred before the second marriage.[8] But absence for less than seven years, without other evidence raising the presumption of death, will not suffice; for the technical presumption of innocence does not avail against facts raising a presumption of guilt on the one hand, and negativing the existence of any motive for remarriage on the other hand.[9]

22. Rebutting Evidence of Marriage.

Where the only evidence of marriage is indirect, or where evidence of actual marriage is conflicting, declarations and conduct of either or both parties inconsistent with the matrimonial character, are competent, within the limits above

[5] Cropsey *v.* McKinney (above); compare O'Gara *v.* Eisenlohr (above), and Spicer *v.* Spicer, 16 Abb. Pr. (N. S.) 112, and note.

Where a marriage is duly solemnized under the forms of law, but is void because of the fact that the man has a former wife living, the second wife is not entitled at his death to a division of the property which she herself helped to accumulate even though it was through no fault of hers that she married the husband of another. Cooper *v.* McCoy, 116 Ark. 501, 173 S. W. Rep. 412.

[6] 1 Bish. Mar. & D., § 114.

[7] Jackson *v.* Claw, 18 Johns. 346, 350.

[8] Cochrane *v.* Libby, 18 Me. (6 Shepl.) 39.

[9] O'Gara *v.* Eisenlohr, 38 N. Y. 296. *Contra*, sec 1 Bish. Mar. & D., § 453, and cases cited; and see Kelly *v.* Drew, 12 Allen, 107, 109.

stated, unless the issue is upon legitimacy. Thus declarations of either that they were not married, the fact that the woman had sued, or been sued, in her maiden name,[10] that they terminated cohabitation and separated, without further claim to matrimonial relation,[11] or that each married other persons,[12] are sufficient to go to the jury as negativing the

[10] Scudder *v.* Gori, 18 Abb. Pr. 223, s. c., less fully, 3 Robt. 661.

Where a decedent's marriage was in issue, testimony of his mother that he told her while he was still living with a woman that he was not married to her, is clearly competent and highly important both as a part of the *res gestæ* and secondly because it involves a matter of pedigree. Matter of Farley, 155 N. Y. Supp. 63, 91 Misc. 185.

[11] Jackson *v.* Claw, 18 Johns. 346. An advertisement forbidding trust, appearing in the newspaper at their domicile, immediately after separation, has been held competent, the original manuscript being lost. Jewell *v.* Jewell, 1 How. (U. S.) 219, 232; but the better opinion is that there must be evidence concerning one of the parties with it.

Proof of matrimonial cohabitation is at best only *prima facie* proof of marriage; the presumption may be rebutted. Costill *v.* Hill, 55 N. J. Eq. 479, 40 Atl. Rep. 32; Wallace's Case, 49 N. J. Eq. 530, 25 Atl. Rep. 260.

Permanent separation after cohabitation will overcome the presumption of marriage. Moore *v.* Heineke, 119 Ala. 627, 24 So. Rep. 374.

Proof that the cohabitation was not matrimonial will rebut the presumption of marriage. LeSuer *v.* LeSuer, 122 Minn. 407, 142 N. W. Rep. 593.

[12] Niles *v.* Sprague, 13 Iowa, 202.

The presumption of marriage arising from cohabitation is overcome by proof of a later formal marriage by one of the parties. Bowman *v.* Little, 101 Md. 273, 61 Atl. Rep. 223, 657, 1084.

Where there is a presumption of marriage from cohabitation and repute it will be overcome by proof of a subsequent formal marriage by either party to a third person. Norman *v.* Goode, 113 Ga. 121, 38 S. E. Rep. 317.

The presumption of marriage from cohabitation is rebutted by proof of a subsequent separation, and the marriage of one of the parties; but the question is nevertheless one for the jury. Moore *v.* Heineke, 119 Ala. 627, 24 So. Rep. 374.

Where a wife lived many years with her husband and bore him children, admissions by her that she had formerly gone through a marriage ceremony with another man with whom she never lived and from whom she had not obtained a divorce, are not sufficient to prove a valid prior marriage.

presumption from mere habit and repute. The effect even of such evidence of cohabitation and repute as, standing alone, would establish marriage, may be nullified by evidence that the parties afterward formally solemnized a marriage under circumstances showing that their motive was to legalize their connection, for this conclusively proves that, in their judgment, it was previously illicit.[13] The moral and social character of the parties themselves is relevant as bearing on the question of the matrimonial or meretricious character of the connection,[14] though incompetent against evidence of a ceremonial marriage.[15] But the opinion of a witness as to whether their character rendered such a connection improbable, is not competent.[16] Evidence of loose oral denials by the parties are of little weight against otherwise clear and satisfactory evidence of matrimonial cohabitation and repute; [17] and mere declarations that the declarant is unmarried, made without reference to a reputed relation between the particular parties, are held incompetent.[18] Denials of "marriage" are inconclusive, because they may be

Lau *v.* Lau, 154 N. Y. Supp. 107.

[13] Shedden *v.* Patrick, L. R. 1 Sc. & D. App. 470.

A subsequent ceremonial marriage is not inconsistent with a prior common-law marriage. Adger *v.* Ackerman, 115 Fed. Rep. 124, 52 C. C. A. 568.

A marriage will be presumed to have existed before it was solemnized where there is proof of matrimonial cohabitation, declarations of the parties, and reputation that they were man and wife. Betsinger *v.* Chapman, 88 N. Y. 487.

As there are various reasons, religious and otherwise, which frequently prompt men and women to solemnize their marriage more than once, the fact of a solemnization should not overcome the universally recognized presumption of legitimate marriage which existed prior to the ceremony. Shank *v.* Wilson, 33 Wash. 612, 74 Pac. Rep. 812.

[14] Hill *v.* Burger, 3 Bradf. 432, 449, s. p., Steuart *v.* Robertson, L. R. 2 Sc. App. 494, 520, s. c., 13 Moak's Eng. 165, 191.

[15] Per Bradford, Surr. Hill *v.* Burger (above).

[16] Such testimony was held to have no weight, in Gaines *v.* New Orleans, 6 Wall. 706.

[17] Tummalty *v.* Tummalty, 3 Bradf. 369.

[18] Van Tuyl *v.* Van Tuyl, 8 Abb. Pr. (N. S.) 5, s. c., 57 Barb. 235.

meant of a ceremonial marriage, while the parties were actually man and wife.[19]

23. Foreign Law.

The written law of another State, or of a foreign country, may be proved in the manner stated, c. 3, § 9 of this volume. The unwritten law may be proved by calling as a witness one practically conversant with it, either as a lawyer in that country, or as having had a course of legal duty to perform there in respect to marriage, such as to make it probable that he has made himself acquainted with the law on that subject. One who is not so qualified, and who has acquired his knowledge solely from books, is not competent.[20]

III. ISSUE OR FAILURE OF ISSUE

24. Burden of Proof.

In the absence of evidence neither birth of children, nor

[19] Where there is ample evidence of long and uninterrupted cohabitation and repute, evidence of the declaration of the man that they were not married, and his testimony that they were never married, since they may be construed as referring to a ceremonial marriage, are not enough to take the case from the jury. Richard *v.* Brehm, 73 Penn. St. 140, s. c., 13 Am. Rep. 733.

[20] A practicing lawyer of another State is competent to testify as to the requisites of a valid marriage in that State. Jackson *v.* Jackson, 82 Md. 17, 33 Atl. Rep. 317, 16 Moak's Eng. 591, n. and cases cited; Rosc. N. P. 138, 139; 1 Bish. Mar. & D. §§ 409–430, 521–536.

Where there is no evidence as to the marriage law of a foreign State, it will be presumed that the requisites to constitute marriage there will be the same as in the forum. Hynes *v.* McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Matter of Grande, 80 Misc. 450, 141 N. Y. Supp. 535; People *v.* Loomis, 106 Mich. 250, 64 N. W. Rep. 18.

A marriage performed in another State will be presumed to be in accordance with the law of that State. Dale *v.* State, 88 Ga. 552, 15 S. E. Rep. 287; Sokel *v.* People, 212 Ill. 238, 72 N. E. Rep. 382.

One who for the purpose of evading the laws of his State goes aboard a vessel and is married while at sea has the burden of proving that his marriage is valid. Norman *v.* Norman, 121 Cal. 620, 54 Pac. Rep. 143, 66 Am. St. Rep. 74, 42 L. R. A. 343.

the contrary, is presumed. But slight evidence may suffice.[21] One claiming by collateral descent must show who was last

[21] Emerson *v.* White, 29 N. H. (9 Fost.) 491, 497, and cases cited.

While an unexplained absence for seven years raise a presumption of death, it does not raise a presumption of death with issue. George *v.* Clark, 186 Mass. 426, 71 N. E. Rep. 809.

There is no presumption of law that one who has disappeared for more than seven years left a surviving wife, child or children. Nehring *v.* McMurrian, 53 S. W. Rep. (Tex. Civ. App.) 381.

One who was eighteen years of age and unmarried when last heard from, and who was not heard from for twenty years will not be presumed to have died intestate, unmarried or without children. Johnson *v.* Johnson, 170 Mo. 34, 70 S. W. Rep. 241, 59 L. R. A. 748. See also Vought *v.* Williams, 120 N. Y. 253, 24 N. E. Rep. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634.

Under Civ. Code, § 55, a legal solemnizing of a marriage is essential in order to validate a marriage from repute. In re Elliott, 165 Cal. 339, 132 Pac. Rep. 439.

A presumption of marriage will not be raised where it would involve both parties to it in the crime of bigamy. Foster *v.* Hawley, 8 Hun (N. Y.), 68.

In order to establish a common-law marriage between first cousins it must be proved that the marriage existed prior to July 4, 1909, when a law against marriage between first cousins was passed. In re Wittick, 164 Iowa, 485, 145 N. W. Rep. 913; Drummond *v.* Irish, 52 Iowa, 41, 2 N. W. Rep. 622.

As the law favors legitimacy and innocence, a second marriage will be presumed to be valid until proved otherwise. Bowman *v.* Little, 101 Md. 273, 61 Atl. Rep. 223, 657, 1084; Parsons *v.* Grand Lodge, A. O. U. W., 108 Iowa, 6, 78 N. W. Rep. 676.

In order to legitimatize issue or in the interest of order and decency, the court will in a proper case presume marriage from cohabitation and reputation alone, but in a case where to presume such marriage one party will necessarily stand convicted of bigamy, the presumption of innocence prevails over the presumption of marriage. Matter of Eichler, 84 N. Y. Misc. 667, 146 N. Y. Supp. 846.

Where there are conflicting presumptions of unequal weight, as that of the continuance of life and that of innocence of crime, the stronger will prevail. But where the dispute is whether a second or a third marriage is valid, the conflicting presumptions are equal and each involves the commission of a crime, and under these circumstances will be given to either. Palmer *v.* Palmer, 162 N. Y. 130, 56 N. E. Rep. 501.

Where two alleged marriages compete, and one of them is proven as a fact, whether by direct or circumstantial evidence, the other

entitled, and then prove his death without issue; next prove all the different links in the chain of descent which will show that he and the claimant descended from the same common ancestor, together with the extinction of all those lines of descent which could claim any preference to the claimant. He must prove the marriages, births and deaths, and the identity of persons necessary to fix title in himself, and the extinction of others who would have, if in existence, title.[28] This is done by proving the marriages, births and deaths necessary to complete his title, and showing the identity of the several parties.[29] He must prove that all the intermediate heirs between himself and the ancestor from whom he claims, are dead, without issue.[30] The non-existence of issue is a fact separate from death, in support of which some evidence must be given.[31]

25. Presumptions as to Failure of Issue.

In the absence of evidence, the presumption is that a person dying intestate, left heirs; [32] and the mere fact that the death occurred under twenty-one,[33] or that it is only presumed from the lapse of time, is not enough to raise a presumption that he left no issue,[34] except after great lapse of time, and only for the purpose of setting that branch of the family out of the case; [35] but slight evidence of death with-

cannot be left to stand upon the mere presumption founded on cohabitation and repute. Jenkins *v.* Jenkins, 83 Ga. 283; 9 S. E. Rep. 541, 20 Am. St. Rep. 316; Spencer *v.* Spencer, 84 N. Y. Misc. 264, 147 N. Y. Supp. 111; In re Maher, 204 Ill. 25, 68 N. E. Rep. 159.

The declaration of the parties while living together are admissible as they characterize the circumstance of cohabitation. Stackhouse *v.* Stotenbur, 22 N. Y. App. Div. 312, 47 N. Y. Supp. 940.

[28] Sprigg *v.* Moale, 28 Md. 497, 505, 3 Washb. R. P., 4th ed. 18 (38).

[29] Emerson *v.* White (above).

[30] Richards *v.* Richards, 15 East, 294, n.

[31] Sprigg *v.* Moale (above).

[32] Harvey *v.* Thornton, 14 Ill. 217.

[33] Clark *v.* Trinity Ch., 5 Watts & S. 266, 271.

[34] Sprigg *v.* Moale (above).

[35] Rowe *v.* Hasland, 1 W. Black. 404, Mansfield, Ch. J.

out issue, may after great lapse of time, be sufficient; [36] and unsuccessful inquiry for children, if any, at places where, if such had existed, information could be obtained, will suffice to sustain a verdict in such case.[37]

26. Escheat.

Every citizen dying is presumed to leave some one entitled to claim as his heir, however remote, unless one or other of the only two exceptions known to our law, alienage or illegitimacy, should intervene. The title of the State, by reason of defect of heirs, can be established by actual proof of the fact of alienage or of illegitimacy, or in certain cases by proof of reputation of either of those facts, provided such proof be direct and positive, founded upon inquiry, advertisements, personal family knowledge, or actual declaration of the last person seized, or of those from whom his title descended. Mere hearsay reputation of the general fact of defect of relations and heirs is not sufficient.[38]

27. Possibility of Issue Extinct.

The highest authorities in medical jurisprudence sustain the proposition that a woman beyond the age of fifty-five has no possibility of issue. Extinction of possibility may be presumed as a matter of fact at an earlier period, varying

[36] Such as proof that his family, if any, or his intimate acquaintances for many years, never heard him speak of wife, children, etc. Jackson *v.* Etz, 5 Cow. 320; Doe *v.* Griffin, 15 East, 293; McComb *v.* Wright, 5 Johns. Ch. 263. So of proof of circumstances showing that the absentee was a young man strongly likely to communicate with his family if living, and to inform them if he were ever married. In re Webb's Estate, Ir. R. 5 Eq. 235.

[37] King *v.* Fowler, 11 Pick. 302.

[38] People *v.* Fulton Fire Ins. Co., 25 Wend. 205.

In an action in ejectment brought by the State claiming title by escheat, the testimony of a niece and nephew of the decedent's wife that the decedent who owned the land had repeatedly told them that he had no brothers or sisters or other living relatives, was competent proof. People *v.* Tuthill, 176 App. Div. 631, 163 N. Y. Supp. 843.

with the evidence as to length of married life and condition of health.[39]

28. Registry of Birth or Baptism.

The fact of birth may be proved by an official registry of birth kept pursuant to statute, or by a registry of baptism shown to have been kept in the manner hereafter stated; [40] but a mere registry of baptism is not, as an official registry of birth may be, evidence of the date of birth, though stated in it,[41] further than to show that it must have been prior to the date recorded as that of baptism,—that is to say, it only proves that the child was in existence at the time of the ceremony,[42]—unless the statement of the time of birth is shown to have been made by direction of a member of the family since deceased, so as to bring it within the rule admitting declarations as to facts of pedigree.[43]

[39] In re Widdow's Trusts, L. R. 11 Eq. 408; In re Millner's Estate, L. R. 14 Eq. 245, s. c., 3 Moak's Eng. 719; and see 25 Weekly R. 901, 4 L. J. N. S. 380.

[40] Paragraph 41 (below).

The record of a board of health showing the date of a person's birth, is competent evidence on the issue of the age of such person where the law of the State in which the person was born made it the duty of such board to keep a record of births. Bucher *v.* Showalter, 44 Okla. 690, 145 Pac. Rep. 1143.

[41] Clark *v.* Trinity Church, 5 Watts & S. (Penn.) 266, 269; Blackburn *v.* Crawfords, 3 Wall. 189; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521; Matter of Greco, 154 N. Y. Supp. 306, 90 Misc. 241.

[42] Kennedy *v.* Doyle, 10 Allen (Mass.), 161; Whitcher *v.* McLaughlin, 115 Mass. 167.

[43] A statement of illegitimacy in the registry has been deemed competent, but its weight is questionable. Morris *v.* Davis, 3 Carr. & P. 215, 427; and see Caujolle *v.* Ferrie, 23 N. Y. 90.

Where there is a law requiring a public officer to gather and record information, as the federal laws which require census lists to be prepared, or State laws which require school teachers to make lists recording the name, age and sex of the pupils, those lists will be competent evidence as to the age of a person whose name is recorded. Priddy *v.* Boice, 201 Mo. 309, 99 S. W. Rep. 1055, 9 L. R. A. N. S. 718, 119 Am. St. Rep. 762, 9 Ann. Cas. 874.

Census lists are competent only to prove facts of a public nature,

29. Consorting as a Family.

The fact that persons dwelt or consorted together as members of one family in the apparent relation of parent and child, and assisted and depended on each other as such, is competent, in connection with other substantial evidence to show the existence of the relation.[44] The value of such evidence depends on much the same principles as those which admit cohabitation and repute to prove marriage.

30. Direct Testimony to Age.

Where age is a fact of pedigree within the rules below stated, it seems that the person whose age is in question, if he be a competent witness, may as properly as any other person, testify to it, under the conditions on which hearsay as to pedigree is admissible; but there seems to be no good foundation for allowing him to state it except upon such sources.[45] Inspection, however, is deemed a sufficient legal

and not the details, as the age of a particular person, which are recorded only as a basis for the general summaries affecting the public. Campbell *v.* Everhart, 139 N. C. 503, 52 S. E. Rep. 201.

A school census giving the ages of pupils cannot be offered in evidence except for school purposes. Edwards *v.* Logan, 114 Ky. 312, 70 S. W. Rep. 852, 75 S. W. Rep. 257, 24 Ky. Law 678, 1099.

Statements by a father as to the age of his child, made to a census enumerator, are admissible in evidence. Battles *v.* Tallman, 96 Ala. 403, 11 So. Rep. 247.

[44] See Kansas, etc., Rw. Co. *v.* Miller, 2 Col. T. 459; Baltimore, etc., R. R. Co. *v.* Gettle, 3 W. Va. 376, 385. The fact that one was brought up in the family of persons living together as husband and wife, as their offspring, and was recognized as their child by them and others, imposes the burden of disproving his right to inheritance upon persons attacking it and claiming to be the lawful heirs. Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. Rep. 380.

[45] Compare Dewitt *v.* Barly, 17 N. Y. 344; McCarty *v.* Deming, 4 Lans. 440; Hart *v.* Stickney, 4 L. & Eq. Rep. 120; Banks *v.* Metcalfe, 1 Wheel. Cr. Cas. 381.

The testimony of a person as to his own age is competent notwithstanding that he does not know the facts of his own personal knowledge. Stevens *v.* Elliott, 30 Okla. 41, 118 Pac. Rep. 407.

A witness may testify to his own age, subject, of course, to be tested on cross-examination as to his sources of information. Klicke *v.*

criterion to decide the question of infancy,[46] and is sufficient to put a party who may be affected by it upon inquiry; [47] but the mere opinion of a witness respecting the age of a person, from his appearance, unaccompanied by the facts on which that opinion is founded, is incompetent.[48]

31. Physician's Testimony or Account.

The testimony of the attending physician to the fact and the date [49] of birth is competent for the purpose of proving

Allegheny Steel Co., 119 Cir. Ct. App. 317, 200 Fed. Rep. 933.

A person is always a competent witness as to his own age notwithstanding that he has derived his knowledge as to it from his parents or relatives. People *v.* Ratz, 115 Cal. 132, 46 Pac. Rep. 915.

A person may testify as to his own age, which is a matter of pedigree which he is presumed to know. His testimony is primary and not secondary evidence, and it is not vitiated by his statement that his mother told him how old he is. Cherry *v.* State, 68 Ala. 29.

Age may be proven by the testimony of the person whose age is in question, and the fact that his knowledge is derived from statements of his parents or from family reputation does not render the testimony inadmissible. Landers *v.* Hayes, 196 Ala. 533, 72 So. Rep. 106.

The testimony of a witness as to his age is not incompetent as hearsay. City of Chicago *v.* Betti, 192 Ill. App. 87.

A witness may testify as to his own age from hearsay, but not as to the age of another person upon the basis of hearsay and reputation. Freeman *v.* Boynton First Nat. Bank, 44 Okla. 146, 143 Pac. Rep. 1165.

The date of a person's birth may be testified to by himself or by members of his family although the testimony is based on family tradition. Lincoln Reserve Life Ins. Co. *v.* Morgan, 126 Ark. 615, 191 S. W. Rep. 236.

[46] State *v.* Arnold, 13 Ir. L. (N. C.) 184.

It is competent to prove by witnesses that a person has the appearance of being of a certain age. Bell *v.* Bearman, 37 Okla. 645, 133 Pac. Rep. 188; State *v.* Grubb, 55 Kan. 678, 41 Pac. Rep. 951.

[47] Conroe *v.* Birdsall, 1 Johns. Cas. 127.

[48] Morse *v.* State, 6 Conn. 9, 13.

"Opinions of age deduced from appearances are the least reliable of all opinion evidence and are worthless as evidence if unaccompanied by the descriptive facts and circumstances from which the opinion is drawn." Tuite *v.* Supreme Forest Woodmen Circle, 193 Mo. App. 619, 187 S. W. Rep. 137.

[49] Beates *v.* Retallick, 11 Penn. 288.

infancy; and equally for proving existence or age for any other purpose.[50] If he does not remember the date, the charge made by him in his accounts, or any other original contemporaneous memorandum he made of the fact,[51] is competent, if introduced by his testimony that it was correctly made at the time.[52] If the physician is dead, his entry in a register of the births he attended, which he was accustomed to keep in the course of his vocation, though without requirement of statute, is evidence of the *time* of a birth entered therein, there being some independent evidence of the *fact* of birth.[53]

32. Legitimacy: Burden of Proof and Presumptions.

Legitimacy is a presumption of law in the absence of competent evidence to the contrary [54] and language in an in-

[50] As to exclusion for professional privilege, see Edington *v.* Mut. Life Ins., 67 N. Y. 185, rev'g 5 Hun, 1; Blackburn *v.* Crawfords, 3 Wall. 192, and cases cited.

[51] See Guy *v.* Mead, 22 N. Y. 462; Marcly *v.* Shults, 29 Id. 346.

[52] Heath *v.* West, 26 N. H. (6 Fost.), 191.

The account books or other books of a practicing physician or surgeon, containing entries regularly made in due course of business in connection with his attendance at the birth of a child, together with his oral evidence verifying such record, are legal and competent evidence of the date of the birth of such child. Griffith *v.* American Coal Co., 75 W. Va. 686, 84 S. E. Rep. 621, L. R. A. 1915, F. 803.

[53] Arms *v.* Middleton, 23 Barb. 571, S. P., Blackburn *v.* Crawfords, 3 Wall. 175. In Higham *v.* Ridgeway 10 East, 109, such evidence was admitted, not as an entry in the ordinary course of duty, but as an entry against pecuniary interest, because the charge was marked "paid." In Matter of Paige (62 Barb. 476), an entry in a book not kept as a journal, but with each account by itself, was held incompetent without proof of its truth. Compare generally 1 Tayl. Ev. 597–607, 1 Smith's L. C. 500, etc.

[54] Banbury Peerage Case, 1 Sim. & St. 153; Matter of Seabury, 1 App. Div. N. Y. 231. The law presumes the legitimacy of children; and this presumption applies to every case where the question is at issue, and is controlling whenever not inconsistent with the facts proved. In re Matthews, 153 N. Y. 443, 47 N. E. Rep. 901.

The children of a marriage duly solemnized under the forms of law, but void because of the father's

strument of evidence designating a person by the word "son," "daughter," "child," or the like, means *prima facie*, legitimate offspring.[55] The burden of proof is on the party denying the legitimacy of one shown to have been born from a wife,[56] and his evidence must show illegitimacy beyond a

having a former wife living, are protected by law, deemed legitimate, and entitled to inherit his estate. Cooper *v.* McCoy, 116 Ark. 501, 173 S. W. Rep. 412.

The last clause of § 1387 of the Civil Code (Cal.) providing that "the issues of all marriages null in law or dissolved by divorce, are legitimate" should be liberally construed. The section also applies to an attempted marriage contracted in good faith. In re Shipp, 168 Cal. 640, 144 Pac. Rep. 143.

If two enter into meritricious relations while either had a husband or wife living and after the removal of the impediment become by agreement lawful husband and wife, their previously born children are thereby legitimatized. Summo *v.* Snare, etc., Co., 166 App. Div. 425, 152 N. Y. Supp. 29.

A child born of parents during a period when their attempted common-law marriage was prohibited by statute, is legitimate, if after the repeal of the statute his parents contract a valid non-ceremonial marriage, recognizing him as their offspring. Matter of Biersack, 159 N. Y. Supp. 519, 96 Misc. 161.

If a child is begotten in lawful wedlock while the husband and wife are living together, its paternity and legitimacy are conclusively presumed. In re Henry, 167 Iowa, 557, 149 N. W. Rep. 605. But see Kennedy *v.* State, 117 Ark. 113, 173 S. W. Rep. 842, L. R. A. 1916, B. 1052, Ann. Cas. 1917, A. 1029.

"All that the law requires, to convert a bastard into a natural child, is that the child be acknowledged by his or her father by a declaration executed before a notary public and two witnesses, if it was not made in registering the birth or baptism of the child. Serres' Succ., 136 La. 531, 67 So. Rep. 356.

Under the statutes of Kansas illegitimates are entitled to inherit from the father whenever they have been recognized by him as his children; but such recognition must have been general and notorious or else in writing; whether an illegitimate has been so recognized by his father as to constitute a general and notorious recognition of that relation is a question of fact. Arndt *v.* Arndt (Kan.), 167 Pac. Rep. 1055.

[55] Caujolle *v.* Ferrie, 23 N. Y. 105, 107.

[56] Phillips *v.* Allen, 2 Allen, 454; Caujolle *v.* Ferrie, 26 Barb. (N. Y.) 177, s. c., 23 N. Y. 90. The English authorities (which hold to stronger rules of cogency than some American authorities on a question arising in a civil case

reasonable doubt. This presumption is additional to the presumptions indulged in favor of marriage, and of innocence of the parents, and may prevail, notwithstanding the cohabitation of the parents is shown to have been illicit in its origin, and there is no definite proof as to when or how the change from concubinage to matrimony took place.[57] A

involving crime or turpitude) require evidence "strong, distinct, satisfactory and conclusive." Hargrave *v.* Hargrave, 9 Beav. 555; People *v.* Woodson, 29 Cal. App. 531, 156 Pac. Rep. 378 (following rule in Hargrave *v.* Hargrave, 9 Beav. 552, 50 Reprint, 457); and see 23 N. Y. 109.

The law presumes legitimacy, and one who asserts illegitimacy has the burden of proof. Overlock *v.* Hall, 81 Me. 348, 17 Atl. Rep. 169.

Proof of illegitimacy must be clear and convincing. Patterson *v.* Gaines, 6 Howard, 550, 12 L. ed. 553; Mink *v.* State, 60 Wis. 583, 19 N. W. Rep. 445, 50 Am. Rep. 386; State *v.* Lavin, 80 Iowa, 555, 46 N. W. Rep. 553; Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. Rep. 498, 48 Am. St. Rep. 488; Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. Rep. 719; In re Pickens, 163 Pa. 14, 29 Atl. Rep. 875, 25 L. R. A. 477.

Where the evidence shows that the parties who contracted a marriage were under the age of consent, and that they never cohabited or consorted as husband and wife, the burden of disproving the legitimacy of a child born of a subsequent marriage of one of the parties rests upon those denying it, for the presumption of a continuance of the former marriage is not as strong as the presumption of legitimacy. Barker *v.* Barker, 172 App. Div. 244, 158 N. Y. Supp. 413.

As a child born out of lawful wedlock becomes legitimatized by the marriage of the parents, its status in that regard will not be disturbed because of the subsequent annulment of the marriage on the ground of duress. Houle *v.* Houle, 100 Misc. 28, 166 N. Y. Supp. 67.

Illegitimacy cannot be found unless the parties holding the burden of establishing it complete a chain of evidence which will not only demonstrate the fact and validity of an earlier marriage and its subsistence at the time of the latter marriage, but will aggressively exclude every suggestion which might conceivably rescue the second marriage from invalidity. Matter of Biersack, 159 N. Y. Supp. 519, 96 Misc. 161.

[57] Thus the marriage of the parents may be presumed, from the fact that the father desired to marry the mother; and that while he might have maintained an illicit relation with her without opposition from his relatives, he abandoned his home and parents in order to live with her. Caujolle

child born during the mother's coverture,[58] (even so soon after marriage that conception must have preceded marriage),[59] is presumed legitimate in the absence of competent

v. Ferrie, 23 N. Y. 90, 108, affi'g 26 Barb. 177, 4 Bradf. 28.

It is not necessary to prove the fact of illegitimacy beyond a reasonable doubt in a civil action. Cave *v.* Cave, 101 S. C. 40, 85 S. E. Rep. 244.

To rebut the presumption that a child born in lawful wedlock is the child of the husband, proof beyond a reasonable doubt is required. State *v.* Shaw, 89 Vt. 121, 94 Atl. Rep. 434, L. R. A. 1915, F. 1087.

Where the relation between man and woman was illicit at its commencement, the burden is upon the children born to them to show the actual marriage of their mother to the decedent whose estate they claim, as his heirs, or that he had publicly recognized her as his wife, or had cohabited with her in a common dwelling. In re Fuller, 250 Pa. 78, 95 Atl. Rep. 382.

Even though a marriage cannot be supported *inter partes*, there is still the presumption that the children thereof are legitimate. Matter of Biersack, 159 N. Y. Supp. 519, 96 Misc. 161.

If a child whose birth is in question was the offspring of a ceremonial union that is enough to raise the presumption of legitimacy. With equal reason and with equal force the presumption must be available to a child whose parents came together in a purpose and endeavor to contract a so-called common-law marriage. Marter of Biersack, 159 N. Y. Supp. 519, 96 Misc. 161.

[58] Cross *v.* Cross, 3 Paige, 139, Banbury Peerage Case (above). A. T. E.—8

A child born in wedlock is presumed to be legitimate, and this presumption exists even though it be born within a month or a day after marriage; but the presumption may be rebutted by the facts and circumstances which show that the husband could not have been the father because he was impotent, or could not have had access. West *v.* Redmond, 171 N. C. 742, 88 S. E. Rep. 341.

[59] Page *v.* Dennison, 5 Am. L. Reg. O. S. 469, s. c., 1 Grant, 377; Co. Litt. 244 a. But see Phillips *v.* Allen, 2 Allen, 455. But if the birth was before marriage, though the intercourse was under promise of marriage, the child is illegitimate. Cheney *v.* Arnold, 15 N. Y. 346.

A child born in lawful wedlock is presumed to be legitimate. Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. Rep. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434; Romero's Estate, 75 Cal. 379, 17 Pac. Rep. 434.

Where an antenuptial conception is shown, the presumption of legitimate birth is so far weakened that it may be overcome by a small amount of evidence. Jackson *v.* Thornton, 133 Tenn. 36, 179 S. E. Rep. 384.

evidence to the contrary, and this is a strong legal presumption, and can only be rebutted by proof that no sexual intercourse occurred [60] at any time (whether before or after marriage),[61] when the child could have been begotten; or what is equivalent, that the husband was physically incompetent, or, that under sentence of a court of competent jurisdiction, they were living separate.[62] Sexual intercourse is presumed from access.[63] Where access giving opportunity for sexual

[60] Proof negativing it beyond a reasonable doubt, for instance showing continued actual separation, with only interviews at which such intercourse was not had, may be enough. Cross *v.* Cross (above); Van Aernam *v.* Van Aernam, 1 Barb. Ch. 378.

Where a child is born so soon after marriage that it becomes certain that it was begotten before marriage, the law will presume that the child was begotten by him who became the husband. McCulloch *v.* McCulloch, 69 Tex. 682, 7 S. W. Rep. 593, 5 Am. St. Rep. 96; Wallace *v.* Wallace, 137 Iowa, 37, 114 N. W. Rep. 527, 126 Am. St. Rep. 253, 14 L. R. A. (N. S.) 544, 15 Ann. Cas. 761.

In order to bastardize a child born in wedlock or thereafter, within the period of gestation, it must be shown by those asserting illegitimacy, that, for some reason, such as non-access or impotency or the like, the husband could not possibly have been the father of the child. Vanover *v.* Steele, 173 Ky. 114, 190 S. W. Rep. 667.

[61] Page *v.* Dennison (above).

The presumption that a child born in wedlock is legitimate is not an absolute one, but is rebuttable. It is overcome by proof of impotency on the part of the husband. Drake *v.* Milton Hospital Ass'n, 266 Mo. 1, 178 S. W. Rep. 462.

[62] 1 Best's Ev. 464, Banbury Peerage Case (above).

A child born in lawful wedlock is presumed to be the child of the husband; but it is a presumption of fact which may be rebutted by proof of non-access, and where the husband and wife live apart, non-access may be shown by the facts and circumstances. State *v.* Shaw, 89 Vt. 121, 94 Atl. Rep. 434, L. R. A., 1915, F. 1087.

[63] Head *v.* Head, 1 Sim. & St. 150.

Absence of the husband for a period of years before the birth of the child is conclusive proof of illegitimacy. Pittsford *v.* Chittenden, 58 Vt. 49, 3 Atl. Rep. 323.

Proof that access was impossible during the time that the child must have been begotten is competent evidence of illegitimacy. Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. Rep. 631.

Non-access must be established by irrefragable proof, *i. e.*, so clearly and certainly as not to admit of denial, dispute or controversy. Mayer *v.* Davis, 122

intercourse is shown, such that the husband might in the usual course of nature [64] be the father, no evidence that he is not, can be received, except such as tends to negative his having had such intercourse.[65] Such evidence is competent,[66] but without it evidence of the wife's simultaneous adulterous intercourse with another man, is incompetent, for if there be a possibility of legitimacy the law will not weigh against it the doubt.[67] But it is not admissible to prove by statements of the neighbors of a person that he was illegitimate.[68] And evidence of doubts, rumors and the like among neighbors as to the paternity of a child when he appeared in a family, is inadmissible upon the question of his parentage.[69] Opin-

N. Y. App. Div. 393, 106 N. Y. Supp. 1041.

Where a child was begotten before marriage and without knowledge by the husband, he must in an action for divorce on that ground, prove non-access as clearly and convincingly as if the child had been begotten during wedlock. Wallace *v.* Wallace, 137 Iowa, 37, 114 N. W. Rep. 527, 126 Am. St. Rep. 253, 14 L. R. A. N. S. 544, 15 Ann. Cas. 761.

[64] For presumption as to period of gestation, see 1 Best Ev. 455, and standard treatises on Med. Jurisp.

Where access is not admitted, and the evidence that there was no opportunity for it greatly preponderates, the jury are not required to believe that it was impossible for the husband to have been the father of the child in order to find it to be illegitimate, but it may make such finding if the circumstances and evidence show clearly and conclusively to a reasonable mind that there was neither access nor opportunity for it at or about the time the child must have been begotten according to the laws of nature. Wilson *v.* Wilson, 174 Ky. 771, 193 S. W. Rep. 7.

[65] Banbury Peerage Case (above).

Impotency of the alleged father is competent evidence. State *v.* Broadway, 69 N. C. 411.

[66] Head *v.* Head (above).

[67] Bury *v.* Phillpot, 2 Mylne & K. 349; Cross *v.* Cross, 3 Paige, 139. Compare in favor of admission of strong circumstantial evidence that a child begotten during wedlock was the offspring of adultery, 1 Bish. Mar. & D., §§ 448, 449.

[68] Matter of Seabury, 1 App. Div. (N. Y.) 231.

The general reputation and common report of the neighborhood, as well as in the family, is admissible to show legitimacy. Lay *v.* Fuller, 178 Ala. 375, 59 So. Rep. 609.

[69] Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. Rep. 380.

The legal presumption of legitimacy is always and everywhere indulged where the possibility of

ions of witnesses as to the family resemblance between a child and the putative father are not admissble in proof of paternity.[70]

33. Parents' Testimony and Declarations as to Legitimacy.

Neither husband nor wife is competent, either *viva voce* or on deposition, to prove or disprove non-access or non-intercourse, directly or indirectly,[71] even where pregnancy

legitimacy exists; neighborhood rumor to the contrary at most does no more than create a suspicion. Vanover *v.* Steele, 173 Ky. 114, 190 S. W. Rep. 667.

To override the presumption of legitimacy of a child born in wedlock, even though antenuptial conception is shown, clear, strong and convincing testimony must be adduced. A mere preponderance is not enough. Testimony as to rumors and suspicion among neighbors touching the true paternity of the child will not avail to overcome the presumption. Jackson *v.* Thornton, 133 Tenn. 36, 179 S. W. Rep. 384.

[70] Shorten *v.* Judd, 56 Kans. 43, 42 Pac. Rep. 337. In this case it was said by the court: "While in most cases evidence of family resemblance by view and comparison of the jury is of little value in proof of parentage, yet it has often been held admissible where the child has attained an age when its features have assumed some degree of maturity and permanency. Where the child is a young infant, it has been held best not to exhibit it to the jury. Much must be left to the discretion of the trial court, however, as to the proper age. The State *v.* Danforth, 48 Iowa, 43, 47; The State *v.* Smith, 54 Iowa, 104; Gillmanton *v.* Ham, 38 N. H. 108, 112–113. And where the putative father is dead, and a photograph proven to be a good likeness of him is offered in evidence for the purpose of comparison with the child in court, we think it admissible. (2 Rice Ev., §§ 435 *et seq.;* Udderzook *v.* Commonwealth, 76 Penn. St. 340, 352, 353; People *v.* Webster, 68 Hun, 11, 17.)"

In a bastardy proceeding exhibition of the child to the jury as evidence of paternity is a matter vesting in the sound discretion of the trial court. State *v.* Browning, 96 Kan. 540, 152 Pac. Rep. 672.

[71] 1 Tayl. Ev. 837, § 868, and cases cited.

Neither husband nor wife may testify as to access or non-access, nor are their declarations admissible on this point. Wallace *v.* Wallace, 137 Iowa, 37, 114 N. W. Rep. 527, 14 L. R. A. (N. S.) 544, 126 Am. St. Rep. 253, 15 Ann. Cas. 761.

In the absence of statutory authority, a married woman is incompetent to testify to the non-

preceded marriage [72] and the fact that the other parent is dead does not alter the case.[73] Modern statutes abrogating common-law disqualifications do not affect this incompetency unless they expressly indicate it.[74] But either is a competent witness,[75] and the declarations of either are competent after his or her death, to prove legitimacy [76] or illegitimacy [77] in

access of her husband. West *v.* Redmond, 171 N. C. 742, 88 S. E. Rep. 341.

[72] Page *v.* Dennison (above), 472.

The declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. Godfrey *v.* Rowland, 17 Hawaii, 577, 7 Ann. Cas. 598; Rabeke *v.* Baer, 115 Mich. 328, 69 Am. St. Rep. 567, 73 N. W. Rep. 242.

A married woman cannot testify to the non-access of her husband. Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Div. 323; Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. Rep. 498, 48 Am. St. Rep. 488.

Public morals and decency would not permit a wife to testify to any fact tending to show her own child to be illegitimate. People *v.* Ontario County Court of Sessions, 45 Hun (N. Y.), 54.

[73] 1 Tayl. Ev. §§ 837, 868.

[74] Tioga Co. *v.* South Creek, 75 Penn. St. 436.

[75] 1 Tayl. 838, § 868.

The mother is not a competent witness to prove that her child was not begotten by the man who became her husband before its birth. Grates *v.* Garcia, 20 N. Mex. 158, 148 Pac. Rep. 493.

[76] Bull, N. P. 294, 295, Rosc. N. P. 46. Suspicions, doubts and rumors among neighbors, of the paternity of a child in a family, do not rise to the dignity of a "controversy" as to his parentage, which will exclude subsequent declarations of the father. Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. Rep. 380.

Where one claiming to be legitimate applied for partial distribution to him of the estate of a decedent who at claimant's birth stated to the physician in attendance that claimant was his child,

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[77] Blackburn *v.* Crawfords, 3 Wall. 194. Compare Cope *v.* Cope, 1 Moo. & Rob. 272; Viall *v.* Smith, 6 R. I. 422; Gaines *v.* Relf, 12 How. (U. S.) 534.

The declarations of the mother are competent to prove the relation of parent and child, without regard to whether the claim is that the child was legitimate or illegitimate. Champion *v.* McCarthy, 228 Ill. 87, 81 N. E. Rep. 808, 10 Ann. Cas. 517, 11 L. R. A. N. S. 1052.

Where it is necessary to show general recognition of legitimacy, an occasional denial by the putative father would not obviate a finding that recognition was general and notorious. To be general

any mode not involving the question of access, such as testifying to the date of birth,[78] or on the question of marriage;[79] and the wife's confession of her own adultery is competent evidence of the illegitimacy of her offspring, when the fact of non-access has been shown by independent evidence.[80] Evidence of the treatment of the child by the husband and wife, its recognition or non-recognition by them and by the family, the mention or the omission of the husband to pro-

the testimony of the physician is competent evidence of the fact. No confidential relation renders it a privileged communication. In re Baird, 173 Cal. 617, 160 Pac. Rep. 1078.

Statements by a person, since deceased, recognizing children as his own, are admissible against persons claiming as his heirs at law. Bellinger *v.* Devine, 269 Ill. 72, 109 N. E. Rep. 666.

A statute to the effect that an illegitimate child shall inherit from the person who, in writing and before a competent attesting witness shall have declared himself to be its father, contemplates something more formal than the mere writing of a letter in the presence of a third party. It contemplates a written declaration by the person making it that he is the father of the illegitimate child. The declaration must be made before a competent witness. Williams *v.* Reid, 130 Minn. 256, 153 N. W. Rep. 324, 593.

[78] Goodright *v.* Moss, Cowp. 591. But not sufficient to prove illegitimacy without other proof of non-access. Patterson *v.* Gaines, 6 How. (U. S.) 550, 589.

Where it is conceded that a man and woman were married, public policy would not after their death permit their declarations as evidence against the legitimacy of their reputed child; but where the marriage is questioned, their declarations concerning it are admissible even though legitimacy depends upon it. Cave *v.* Cave, 101 S. C. 40, 85 S. E. Rep. 244.

[79] Caujolle *v.* Ferrie, 23 N. Y. 104.

[80] Cross *v.* Cross, 3 Paige, 141, 1 Tayl. Ev. 838, § 868.

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and notorious the recognition is not required to be universal or made known to all or a majority of the community. Luce *v.* Tompkins, 177 Iowa, 168, 158 N. W. 535.

Where one is seeking to have himself adjudged to be the legitimate child of a decedent, declarations made by decedent after obtaining his divorce from claimant's mother, that he had no children, are not admissible; but if there is responsible testimony showing non-access or no opportunity for access, such statements may be admitted in corroboration of such testimony. Wilson *v.* Wilson, 174 Ky. 771, 193 S. W. Rep. 7.

vide for it in a will providing for other children, etc., is competent, within the limits of the rule as to hearsay on facts of pedigree.[81] Evidence that one since deceased admitted his own illegitimacy, is competent against those claiming under or through him.[82]

IV. HEARSAY AS TO FACTS OF FAMILY HISTORY (PEDIGREE)

34. Grounds of Receiving it; and its Weight.

For the present purpose I use the term "Facts of Family History," instead of "Pedigree," as conveniently characteristic of the American rule, which admits certain hearsay evidence of such facts, for any legitimate purpose within the scope of this chapter, whether directly involved in the issue or not,[83] and does not restrict its use, as it seems the English rule does, to cases where it is offered for a genealogical purpose, that is to make out one link in a chain of pedigree.[84] In other respects the American and English rules stand upon the same principle, viz., that upon such questions the law will receive the natural effusions of a party who knew the truth, and who spoke upon an occasion where his mind stood in an even position without any temptation to exceed or fall short of the truth.[85] The value of such evidence is enhanced

[81] 1 Tayl. Ev. 580, § 584; and see Stegall *v.* Stegall, 2 Brock. Marsh. 256. Except, perhaps, where the child is proved to have been born in wedlock, and there is no evidence of non-access. Page *v.* Dennison, 5 Am. L. Reg. O. S. 469, s. c., 1 Grant, 377.

[82] But perhaps not against others. 1 Tayl. Ev. 571, § 573.

[83] North Brookfield *v.* Warren, 16 Gray, 174, and other cases cited in next paragraphs; Primm *v.* Stewart, 7 Tex. 178. The contrary is held in settlement cases, etc., where marriage, etc., is the substantive fact. Westfield *v.* Warren, 3 Halst. 249.

[84] 1 Tayl. Ev. 575, 577, without sufficient reason. 1 Phil. Ev. C. & H. N. 252, n. 91.

[85] Whitelocke *v.* Baker, 14 Ves. 514.

Some confusion has arisen from the idea that such declarations were competent as admissions against interest. They do not derive their evidential value or competency from that consideration. They are admitted from

in proportion as it relates to long past occurrences,[86] other evidence of which is impaired or lost by lapse of time,[87]—in proportion, too, as it consists of contemporaneous declarations or records formally [88] or solemnly [89] made by persons naturally cognizant of the facts, and who would have no motive to misrepresent; and in proportion as those from whom it proceeded bore such a relation as created an interest to ascertain and perpetuate the truth; [90] and, if consisting of an oral declaration, by the naturalness of the circumstances which led to its being made; [91] and, if consisting of records,

reasons of necessity, because otherwise it would frequently be impossible to prove kinship of members of a family after those who knew the facts are dead. In re Hartman, 157 Cal. 206, 107 Pac. Rep. 105, 21 Ann. Cas. 1302, 36 L. R. A. N. S. 530.

Pedigree is the history of family descent, which is transmitted from one generation to another by both oral and written declarations, and unless proved by hearsay evidence it cannot, in most instances, be proved at all. Hence, declarations of deceased members of a family, made *ante litem motam*, are received to prove family relationship, including marriages, births and deaths, and the facts necessarily resulting from those events. Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. Rep. 135, 80 Am. St. Rep. 730; Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. Rep. 1024, 12 L. R. A. 836; Osborne *v.* Ramsay, 111 Cir. Ct. App. 594, 191 Fed. Rep. 114; Cuddy *v.* Brown, 78 Ill. 415.

Only slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy. Layton *v.* Kraft, 111 N. Y. App. Div. 842, 98 N. Y. Supp. 72, 18 N. Y. Ann. Cas. 228; Fulkerson *v.* Holmes, 117 U. S. 389, 29 L. ed. 915.

[86] In proving recent events where the fact is directly in issue, stricter proof may be reasonably required. Rosc. N. P. 49.

Hearsay testimony as to pedigree is not confined to ancient facts. Jarchow *v.* Grosse, 257 Ill. 36, 100 N. E. Rep. 290, Ann. Cas. 1914, A. 820.

[87] Stouvenel *v.* Stephens, 26 How. Pr. 244, and cases cited.

[88] Thus a formal "family record" in a Bible requires less authentication than a similar memorandum casually made elsewhere.

[89] Thus dying declarations of legitimacy are entitled to special weight. Caujolle *v.* Ferrie, 23 N. Y. 90, 94.

[90] Per Ld. Eldon, Walker *v.* Wingfield, 18 Ves. 511.

[91] Id.

in proportion as they have been public, open, and well known in the family, thus acquiring such confirmation as the tacit consent of those interested can give.[92] Without some degree of these characteristics it is not admissible. At best it is weak evidence,[93] its value often depending upon the absence of other sources, and although the weight of such evidence is for the jury, it is proper for the court to instruct them whether, upon a view of the whole, it is sufficient to sustain a finding.[94]

35. What Facts are Within the Rule.

The facts of family history which may be proved by hearsay from proper sources, are the following—birth;[95] living

[92] North Brookfield *v.* Warren, 16 Gray, 174, per BIGELOW, C. J.

[93] Morewood *v.* Wood, 14 East, 330. Hearsay is competent on questions of pedigree and heirship. Chilvers *v.* Race, 196 Ill. 71, 63 N. E. Rep. 701; Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. Rep. 380; Savage *v.* Luther, 165 Ill. App. 1.

[94] Sprigg *v.* Moale, 28 Md. 497, 509.

The question of the competency of the declarations is a question of law for the court, and should not be submitted to the jury. In re Lyle, 93 Neb. 768, 141 N. W. Rep. 1127.

Family history is nothing but the declaration of different members of a family repeated by so many persons and for such a time as to become common repute in the family. Upon the same subjects the family history and the declarations of a deceased member of a family are equally admissible; the weight to be given to each depends upon the circumstances, and is a question for the jury, not a question of admissibility. Cox *v.* Brice, 86 Cir. Ct. App. 378, 159 Fed. Rep. 378; Byers *v.* Wallace, 87 Tex. 503, 28 S. W. Rep. 1056, 29 S. W. Rep. 760.

[95] North Brookfield *v.* Warren, 16 Gray, 174; Am. Life Ins. Co. *v.* Rosemagle, 77 Penn. St. 507, 516.

Pedigree, including birth, may be proved by general repute in the family, under Civil Code, 1910, § 5764. Luke *v.* Hill, 137 Ga. 159, 73 S. E. Rep. 345, 38 L. R. A. N. S. 559.

On the question of whether the deceased was a negro, evidence that a certain negro and negress always looked after the decedent and regarded him as their son is admissible. Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. Rep. 1008.

or survival;[96] marriage;[97] issue or want of issue;[98] death;[99] the times, either definite [1] or relative,[2] of these facts; relative age or seniority;[3] name;[4] relationship generally;[5] its degree;[6] in some sense legitimacy and the contrary;[7] and the

[96] Johnson *v.* Pembroke, 11 East, 504.

When an occurrence has taken place in a family, such as a marriage, a birth, a death, or any other fact in reference to lineage or pedigree, and when members of the family afterwards speak of such facts and make declarations in reference thereto, such declarations so made are admissible after the death of the person making them, to prove such facts. Denbo *v.* Boyd, 194 Mo. App. 121, 185 S. W. Rep. 236, citing Met. Life Ins. Co. *v.* Lyons, 50 Ind. App. 534, 98 N. E. Rep. 824.

[97] Caujolle *v.* Ferrie, 23 N. Y. 90, and see paragraph 18 (above).

Where the question for determination is whether a marriage exists or not, the declaration of one of the parties to the alleged marriage who is since deceased, cannot be received in evidence against the other party if not made in his or her presence. Hubatka *v.* Maierhoffer, 81 N. J. L. 410, 79 Atl. Rep. 346; Hill *v.* Hill, 32 Pa. 511; Hulett *v.* Carey, 66 Minn. 327, 69 N. W. Rep. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419; Thompson *v.* Mims, 83 Wis. 261, 53 N. W. Rep. 502, 17 L. R. A. 847.

[98] People *v.* Fulton Fire Ins. Co., 25 Wend. 208; and see paragraph 25 and notes.

Where decedent deposited money in savings banks as trustee for fictitious sons when in fact he had no sons, hearsay evidence as to declarations by the decedent that he had no sons will be admitted. Washington *v.* Bank for Savings, 171 N. Y. 166, 63 N. E. Rep. 831, 89 Am. St. Rep. 800, affirming 65 N. Y. App. Div. 338, 72 N. Y. Supp. 752.

[99] Masons *v.* Fuller, 45 Vt. 29, 1 Tayl. Ev. 570, § 572.

[1] Roe *v.* Rawlins, 7 East, 290; Webb *v.* Richardson, 42 Vt. 465.

[2] Bridger *v.* Huett, 2 Fost. & F. 35.

[3] Johnson *v.* Pembroke, 11 East, 504.

[4] Per Ld. Brougham, Monkton *v.* Att.-Gen., 2 Russ. & M. 158.

[5] Doe *v.* Randall, 2 Moore & P. 20, 26; Vowles *v.* Young, 13 Ves. 147.

Descent, relationship, age, births, marriages and deaths may be proved by hearsay evidence of declarations of deceased blood relatives, or of husband or wife of the party whose pedigree is at issue when made *ante litem motam*. Harvick *v.* Modern Woodmen of America, 158 Ill. App. 570.

[6] Webb *v.* Richardson, 42 Vt. 465; and see Chapman *v.* Chapman, 2 Conn. 350.

[7] See paragraph 33.

Hearsay evidence may not be introduced to prove illegitimacy

place of residence, when proved for purpose of identification.[8] At this limit the rule stops. It does not admit hearsay as to a specific fact, however closely connected with these facts of family history, if one which in its nature is susceptible of being proved by witnesses speaking from their own knowledge, even although all such witnesses are dead.[9] The virtue of the evidence depends on the fact being a salient fact in a family history which concerns the declarant. A declaration as to a fact of this character is not excluded because the fact is only incidentally in issue; and on the other hand, a declaration as to an ordinary fact is not made competent by its enabling to fix the date or existence of a fact of family history.[10]

36. By Whose Declarations such Facts May be Proved.

To render the evidence competent (unless it is admissible

unless legitimacy is claimed. Flora *v.* Anderson, 75 Fed. Rep. 217.

[8] See Cuddy *v.* Brown, 78 Ill. 415; Sheilds *v.* Boucher, 1 De Gex & Sm. 40, S. P., Doe *v.* Randall, 2 Moore & P. 20; see 1 Tayl. Ev. 578, § 582.

[9] Thus hearsay as to legal status, as slave or free, is not competent. Mima Queen *v.* Hepburn, 7 Cranch, 290, 295. Nor is hearsay as to place of birth or death. Town of Union *v.* Town of Plainfield, 39 Conn. 563; Monkton *v.* Att.-Gen., 2 Russ. & M. 156, Ld. Brougham; McCarty *v.* Deming, 4 Lans. 440. But see 1 Whart. Ev., § 208. As to whether statements of a legal conclusion, such as that one was "heir," or "could get nothing by law," and the like, is competent, the authorities are in conflict. In the affirmative, see Doe *v.* Randall, 2 Moore & P. 20; Doe *v.* Davis, 10 Q. B. 314. In the negative, Chapman *v.* Chapman, 2 Conn. 350. Compare Viall *v.* Smith, 6 R. I. 417.

A son can testify to the "family tradition" as to the age of his mother when she died. Rosenthal *v.* Supreme Ruling, F. M. C., 129 Minn. 214, 152 N. W. Rep. 404.

[10] 1 Tayl. Ev. 576. The rule does not extend to declarations by servants, friends or neighbors. Flora *v.* Anderson, 75 Fed. Rep. 217.

A question of age is not necessarily one of pedigree, and declarations as to such are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not in cases in which it is only relevant to the issue. Tuite *v.* Supreme Forest Woodmen Circle, 193 Mo. App. 619, 187 S. W. Rep. 137.

as matter of general repute under the rule stated below), it must appear that the declarant, or source of the witness's information, was a deceased [11] member of the family, that is to say *legally* [12] related by blood or mar-

[11] Emerson *v.* White, 29 N. H. (9 Fost.) 491, and cases cited.

It is essential that the declarant be dead. Nehring *v.* McMurrain, 46 S. W. Rep. (Tex. Civ. App.) 369; Nolan *v.* Nolan, 35 N. Y. App. Div. 339, 54 N. Y. Supp. 975.

Pedigree declarations constitute an exception to the hearsay rule, and only those connected with the family by blood or marriage are competent declarants. And evidence of such declaration during the lifetime of the declarant is inadmissible. If living the declarant would be subject to examination as any other witness. Lemons *v.* Harris, 115 Va. 809, 80 S. E. Rep. 740.

In order to make such declarations admissible, declarant must be dead at the time. Wolf *v.* Wilhelm, 146 S. W. Rep. (Tex. Civ. App.) 216.

To admit in evidence declarations as to pedigree the prerequisites are, first, it must be proven by evidence *aliunde* the statement itself that the declarant was related to the family about which he spoke; second, that the statements were made *ante litem motam;* and, third, that the declarant is dead. Overby *v.* Johnston, 42 Tex. Civ. App. 348, 94 S. W. Rep. 131.

In cases of pedigree hearsay evidence of declarations of persons who, from their situation were likely to know, is admissible when the person making the declarations is dead. Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. Rep. 1024, 12 L. R. A. 836.

When pedigree is directly involved hearsay is permissible to establish relationship, if it is the declaration of a deceased member of the family or the husband or wife of a member of the family. Matter of Kennedy, 82 N. Y. Misc. 214, 143 N. Y. Supp. 404.

Family repute cannot be established by the testimony of a witness who did not know any member of the family and whose information is derived solely from the declarations of a person since deceased whose connection with the family is not made to appear otherwise than by his own declaration. Mobly *v.* Pierce, 144 Ga. 327, 87 S. E. Rep. 24.

To render admissible the declaration of a member of a family as to pedigree, family history or repute, it must appear that the declarant is at the time dead, insane, or permanently or indefinitely beyond the jurisdiction of the court. Perolio *v.* Doe ex dem. Woodward Iron Co. (Ala.), 73 So. Rep. 197.

[12] 1 Tayl. Ev. 569.

The declarations of persons who are shown by other evidence to be members of the family may be

riage,[13] to the family whose history the fact concerns. Therefore the witness must name the source of information,[14] and show affirmatively that it was a relative or

proven. Scheidegger *v.* Terrell, 149 Ala. 338, 43 So. Rep. 26.

From necessity, in cases of pedigree, hearsay evidence is admissible, but this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in its different branches. Northern Pac. Ry. Co. *v.* King, 181 Fed. Rep. 913, 104 C. C. A. 351.

Where a member of the family derives his knowledge from one who is not a member of the family his testimony is not admissible. Grand Lodge A. O. U. W. *v.* Bartes, 69 Neb. 631, 96 N. W. Rep. 186, 98 N. W. Rep. 715, 111 Am. St. Rep. 577.

The declarations of a deceased parent are competent evidence on a question of parentage. Chilvers *v.* Race, 196 Ill. 71, 63 N. E. Rep. 701.

[13] Doe *v.* Randall, 2 Moore & P. 20. Where the declarant's tie to the family was by marriage, the fact that it had been dissolved by death before the declaration, does not render the declaration incompetent. 1 Tayl. Ev. 571.

It is not necessary to show that the witness testifying is related to any of the parties, whose relationship is in question. Any person acquainted with a family and reputation in the family can testify as to the pedigree and relationship of members of the family, and as to common rumor in the community as to this pedigree and relationship and as to the declarations of the family as to pedigree, kinship, relationship, marriages, births, etc., McLain *v.* Woodside, 95 S. C. 152, 79 S. E. Rep. 1.

The declarations of the foster parents of an adopted illegitimate child are admissible on the question of the child's paternity. Alston *v.* Alston, 114 Iowa, 29, 86 N. W. Rep. 55.

Declarations in regard to pedigree, although hearsay, are admitted on the principle that they are the natural effusions of persons whomust know the truth and who speak on occasions when their minds stand in an even position without any temptation to exceed or fall short of the truth. The admissibility of such declarations is subject to three conditions: (1) The declarant must be deceased. (2) They must have been made *ante litem motam*, *i. e.*, at the time when there was no motive to distort the truth. (3) The declarant must be related either by blood or affinity to the family concerning which he speaks. Aalholm *v.* People, 211 N. Y. 406, 105 N. E. Rep. 647, L. R. A. 1915, D. 215, Ann. Cas. 1915, C. 1039. See also Matter of Perkins, 174 App. Div. 191, 160 N. Y. Supp. 54.

[14] Entire certainty not necessary. Scott *v.* Ratcliff, 5 Pet. 81.

An affidavit to the effect that affiant's mother who was a step-

connection,[15] (though the degree need not be stated),[16] who is since deceased.[17] It is not enough that the adversary might bring out the contrary by cross-examination.[18]

It is enough to show that the declarant was thus connected with the family, without showing him to be a connection of the person whose connection with the family is to be estab-

daughter of decedent's father, had told affiant that decedent was illegitimate, has no probative value, as neither affiant or affiant's mother was related to decedent by consanguinity or affinity. Even under the liberal rules applicable to pedigree cases such a declaration proves nothing. Matter of Leslie, 175 App. Div. 108, 161 N. Y. Supp. 790.

[15] Waldron *v.* Tuttle, 4 N. H. 371, 738; Emerson *v.* White, 29 Id. 491, S. P., Chapman *v.* Chapman, 2 Conn. 347.

The relationship of the declarant with the family must be established by evidence outside of the declaration itself. Aalholm *v.* People, 211 N. Y. 406, 105 N. E. Rep. 647, L. R. A. 1915, D. 215, Ann. Cas. 1915, C. 1039, modifying 157 N. Y. App. Div. 618, 142 N. Y. Supp. 926; Greene *v.* Almand, 111 Ga. 735, 36 S. E. Rep. 957, citing § 36 of the text.

[16] Vowles *v.* Young, 13 Ves. 146, Ld. ERSKINE.

[17] Greenleaf *v.* Dubuque, etc., R. R. Co., 30 Iowa, 301; Butler *v.* Mountgarret, 7 H. of L. Cas. 633; Emerson *v.* White (above); Waldron *v.* Tuttle (above). In the two last mentioned cases the opinion is also expressed, that it must affirmatively appear that the declarants had no interest to misrepresent; but this is not sound if intended to require affirmative evidence of want of interest. It is enough, in the first instance, to show a relationship that is entirely free from the indication of any such interest.

Hearsay evidence is always admissible to prove pedigree and this term embraces not only questions of descent and relationship, but also the particular facts of birth, marriage and death and the times when these events may have happened. Such evidence is held admissible not only from the extreme difficulty of producing any better, but is resorted to upon the ground of the interest of the declarants in all such matters of family relationship and connection. These declarations, however, whether in writing or by word of mouth, should be confined to some members of the family as distinguished from a general rumor or neighborhood reputation, and as a predicate therefor it must appear that the declarant has since died. Landers *v.* Hayes, 196 Ala. 533, 72 So. 106.

[18] Emerson *v.* White (above). *Contra*, Webb *v.* Richardson, 42 Vt. 465.

lished; [19] and, conversely, relationship of the declarant with the particular person is sufficient to admit his declarations of the relationship of that person to the family.[20] But his relationship to one or the other must be established by other evidence than the declarations themselves; [21] and this is a preliminary question for the judge,[22] and slight evidence that the declarant was connected, even without showing precise degree of relationship, seems to be enough.[23] But if the relationship is remote, the question will be whether the connection was such as to bring the declarant within the natural probability of knowledge and correctness.[24]

It is not, however, necessary that the declarant should

[19] Monkton *v.* Attorney-General, 2 Russ. & M. 156, Ld. Brougham.

The decedent's own declarations may be admitted to show kinship between him and the claimant. Young *v.* State, 36 Ore. 417, 59 Pac. Rep. 812, 47 L. R. A. 548.

[20] Id.

[21] Thus to prove a marriage, for the purpose of legitimating the issue as heirs of the alleged husband, evidence of a declaration of a relative of the woman is not competent in the first instance, because the declarant must first be shown to be connected with the family of the man. Blackburn *v.* Crawfords, 3 Wall. 187, and cases cited. But compare Jewell *v.* Jewell, 1 How. (U. S.) 219, 231, where declarations of the husband of a daughter, that his wife's mother was not married, were held competent. See also Alexander *v.* Chamberlain, 1 Supm. Ct. (T. & C.) 600, and cases cited.

Pedigree, including descent, relationship, birth, marriage, and death, may be proven by the declarations of deceased persons related by blood or marriage; but before the declarations of such deceased persons may be received in evidence, the fact of relationship must be shown by other evidence. Mobley *v.* Pierce, 144 Ga. 327, 87 S. E. Rep. 24.

[22] Even where the question is the same with that on which the jury are to pass. Doe *v.* Davies, 10 Q. B. 323. *Contra*, Dyke *v.* Williams, 2 Sw. & Tr. 491.

[23] 1 Tayl. Ev. 573, § 576.

[24] Chapman *v.* Chapman, 2 Conn. 349. The tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely from their domestic habits and connections that they are speaking the truth, and that they could not be mistaken. Whitelocke *v.* Baker, 13 Ves. 511, 514, Ld. Eldon. To render objection to the preliminary proof available as error, the proof must appear in the exceptions. Whitcher *v.* McLaughlin, 115 Mass. 167.

have had personal knowledge,[25] nor need the declarations have been contemporaneous with the event,[26] nor indicate the source of the declarant's information.[27]

37. Family Records.

Records of such facts of family history, made or preserved as such by a member of the family, are competent—for instance, entries of births, deaths and marriages, in the family Bible,[28] or other book [29] or memorandum-book; [30] a chart or

[25] Jewell *v.* Jewell, 1 How. (U. S.) 219, 231. But declarations of his own age have been held incompetent. Clark *v.* Trinity Ch., 5 Watts & S. (Penn.) 266.

[26] 1 Tayl. Ev. 572, § 575.

[27] Jewell *v.* Jewell (above). Compare 7 Scott N. R. 193, 213.

[28] Lewis *v.* Marshall, 5 Pet. 470, 476; Berkeley Peerage Case, 4 Camp. 401.

The family Bible will be admitted in evidence on a question of age. Swift & Co. *v.* Rennard, 119 Ill. App. 173; People *v.* Slater, 119 Cal. 620, 51 Pac. Rep. 957; Hall *v.* Cardell, 111 Iowa, 206, 82 N. W. Rep. 503; Union Central Life Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. Rep. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

The entries made in a family Bible are in the nature of declarations of the deceased members of the family as to matters of their family history. In re Peterson, 22 N. D. 480, 134 N. W. Rep. 751.

Entry in a family Bible is only secondary evidence of age of a person whose birth is recorded and it is only admitted when better evidence cannot be obtained. Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679.

In order that a family Bible be admitted in evidence as a family record of dates of birth it should be shown when the dates were placed in the book, by whose authority, and what information the person making the entries had. It should also be shown that the entries were made contemporaneously with the births of the children named. Supreme Council, Golden Star Fraternity *v.* Conklin, 60 N. J. Law, 565, 38 Atl. Rep. 659, 41 L. R. A. 449.

Entries as to births or pedigree made in a family Bible by members of the family, since deceased, are competent evidence as declarations made by them. People *v.* Mayne, 118 Cal. 516, 50 Pac. Rep. 654, 62 Am. St. Rep. 256; Dupoyster *v.* Gagani, 84 Ky. 403, 1 S. W. Rep. 652; McCausland *v.*

[29] A hymn book. Collins *v.* Grantham, 12 Md. 440.

[30] A memorandum book containing a record of inoculation. Clara *v.* Ewell, 2 Cranch C. Ct. 208.

genealogical table preserved as such in the family; [31] almost any document which, even though not evidence in its own character, has been preserved as a memorial by the family, such as a marriage certificate,[32] transcript of a parish register,[33] an ancient canceled will,[34] a ring worn publicly by a member of the family, stating the date of death of the person whose name is engraved upon it.[35] Except in case of a tombstone inscription, or a formal family record such as is usually kept in a Bible, there must ordinarily be evidence that the entry or document is in the handwriting of a deceased [36] mem-

Fleming, 63 Pa. St. 36; Leggett *v.* Boyd, 3 Wendell, 376.

In order to admit a family Bible in evidence as to a question of pedigree it is only necessary to show that it is the family Bible and it is not necessary to prove the handwriting of the entries or who made them. People *v.* Ratz, 115 Cal. 132, 46 Pac. Rep. 915; Contrary rule: Golden Star Fraternity *v.* Conklin, 60 N. J. Law, 565, 38 Atl. Rep. 659, 41 L. R. A. 449.

[31] North Brookfield *v.* Warren, 16 Gray, 171; Goodright *v.* Moss, Cowp. 594.

The family tree of an ancestor made by one of his descendants is admissible in evidence. Commonwealth Water Co. *v.* Brunner, 175 App. Div. 153, 161 N. Y. Supp. 794.

[32] Doe *v.* Davies, 10 Q. B. 314.

[33] Kansas, etc., Rw. Co. *v.* Miller, 2 Col. T. 460, 462.

[34] Johnson *v.* Pembroke, 11 East, 504.

[35] Rosc. N. P. 47, citing dictum in 2 Russ. & M. 158. So of the fact of the family's wearing mourning. Succession of Jones, 12 La. Ann. 397.

In addition to the declarations of deceased persons who were likely to know, unauthenticated facts and entries, made presumably with no motive to deceive, such as an entry in a family Bible, an inscription on a tombstone, a pedigree hung up in a family mansion, and recitals in deeds, are competent evidence upon that issue. Layton *v.* Kraft, 111 N. Y. App. Div. 842, 98 N. Y. Supp. 72, 18 N. Y. Ann. Cas. 228; Young *v.* Shulenberg, 165 N. Y. 388, 59 N. E. Rep. 135, 80 Am. St. Rep. 730.

[36] Or, perhaps, of one beyond seas. Collins *v.* Grantham, 12 Ind. 440. Where the member of the family who made the entry is incompetent as a witness, he may be admitted to prove the entry. Carkshadden *v.* Poorman, 10 Watts, 82. It must be shown that the person who made the entry is dead before the evidence will be admissible. People *v.* Mayne, 118 Cal. 516, 50 Pac. Rep. 654. Whether there has been a material alteration in an entry made in a family Bible is a question to be de-

ber of the family, or such evidence of its having been preserved and treated in the family as containing a family memorial, as to give it the character of a declaration by the family or some of its members.[37] In the case of a tombstone,[38] or a Bible shown to have been the family Bible,[39] this is presumed, and proof of handwriting or direction to make inscription is not required. The existence of errors in a family record, and the fact that it purports to be founded partly on hearsay, affect its credibility rather than its competency,[40] but may render it incompetent as to matters obviously stated without means of knowledge.[41] The handing down of the record in the family, may be proved by oral declarations of members of the family.[42]

38. Other Written Declarations.

Recitals or other statements in an instrument executed

termined by the court when it is offered, and before it is presented to the jury; and, where such entry is admitted, it must be assumed upon appeal that the court was satisfied that no material change had been made in the entry, in the absence of any showing to the contrary, and, its action being matter of discretion, its ruling upon the question of alteration is not open to review, unless it is made to appear that its discretion was absurd. (Id.)

[37] Hood *v.* Beauchamp, 8 Sim. 26. Preservation among the muniments of the family renders competent, especially if the document was against interest. Roe *v.* Rawlings, 7 East, 291.

[38] Rosc. N. P. 47. Inscription may be proved by a witness. 16 Gray, 171.

[39] Rosc. N. P. 47.

The admissibility of a family Bible containing a family tree or record does not depend upon authorship or authenticity of the entries, but upon the fact that it is the family Bible and record recognized as such by those with whose genealogy or pedigree it is concerned. In re Colbert, 51 Mont. 455, 153, Pac. Rep. 1022.

Mutilated portions containing family records are admissible. Id.

[40] Monkton *v.* Atty. Gen., 2 Russ. & Myl. 147. Even the testimony of a witness, that the memorial was not considered in the family as a correct one, without specifying in what respect, is held to affect not the competency but credibility only. Southern Life Ins. Co. *v.* Wilkinson, 53 Ga. 535.

[41] Davies *v.* Lowndes, 5 New Cas. 161, 6 M. & G. 471, 512, 525.

[42] Doe *v.* Davies, 10 Q. B. 324, Ld. Denman.

by a member of the family, since deceased, such as a will recognizing children;[43] or a deed in which parties are designated, and which they execute, as husband and wife;[44] or in which the woman joins for the purpose of barring her dower;[45] or which a party signs with the addition "child," or "heir," or the like,[46] although not competent on the question of title,[47] are competent as declarations within the rule. And although the original itself must ordinarily be produced,[48] yet in case of an ancient instrument the record or probate, with appropriate evidence to identify it as a family or public memorial, is competent.[49] Letters purporting to

[43] Russell *v.* Jackson, 22 Wend. 276, affi'g 4 Id. 543; Cowan *v.* Hite, 2 A. K. Marsh. (Ky.) 238; Skeene *v.* Fishback, 1 A. K. Marsh. (Ky.) 356; Shuman *v.* Shuman, 27 Penn. St. 90.

A will is competent evidence as to questions of pedigree. Russell *v.* Langford, 135 Cal. 356, 67 Pac. Rep. 331.

[44] Hicks *v.* Cochran, 4 Edw. 107.

The pleadings in an action for divorce are competent on a question of pedigree. Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. Rep. 894.

[45] Rose *v.* Clark, 8 Paige, 574, 581, and cases cited.

[46] Jackson *v.* Cooley, 8 Johns. 128; Doe *v.* Davies, 10 Q. B. 325.

[47] Skeene *v.* Fishback (above).

By executing a note and mortgage one asserts that he has capacity to do so, and the papers will be admitted in evidence as competent proof that he who executed them was of age. Bell *v.* Bearman, 37 Okla. 645, 133 Pac. Rep. 188.

[48] Doe *v.* Emerod, 1 Mov. & Rob. 466.

[49] Russell *v.* Jackson, 22 Wend. 276, affi'g 4 Id. 543. As to value and effect of ancient certificates, see Hunt *v.* Johnson, 19 N. Y. 279. Document consisting of leaf taken, after his death, from soldier's private record-book, required to be kept by soldiers in the British service, and containing the names of the soldier and his wife, and the names, ages, and places of birth of all his children, is competent to prove relationships and the ages of the children; and its removal from the book in no way derogates from its authenticity, so long as it is traced and explained. Hunt *v.* Order of Chosen Friends, 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. Rep. 576.

Recitals of heirship or pedigree in an ancient deed, where no suspicious circumstances are found, are admissible in evidence against all persons, including strangers to that title. Fielder *v.* Pemberton, 136 Tenn. 440, 189 S. W. Rep. 873.

have come from the deceased, and containing declarations as to the facts of his family history, are competent if proved to be in his handwriting by the knowledge of a witness who is acquainted with it, or by the belief of a witness who received them in due course of correspondence, and acted on them as such. The envelopes, if existing, should be produced, and the post-mark, or the witness's testimony to it if the envelope has been destroyed, is *prima facie* evidence that it was deposited at the place and time indicated by the mark.[50] Statements made in a deposition which was not taken between the parties to the action, or those under whom they claim, are not regarded as admissible as declarations, because artificially drawn forth without cross-examination, especially when made after dispute arose.[51]

39. General Family Repute.

Some facts at least of family history,—such as death, issue or failure of issue, kinship, name, and marriage,—may be proved by general reputation in the family, upon the testimony of a witness whose knowledge of that repute and of

[50] Kansas, etc., Rw. Co. *v.* Miller, 2 Col. T. 460.

A letter written by a deceased member of the family is competent on a question of family relationship. In re McClellan, 20 S. D. 498, 107 N. W. Rep. 681.

[51] Berkeley Peerage Case, 4 Campb. 401. Otherwise of an *ex parte* affidavit. Hurst *v.* Jones, Wall. Jr. 373.

The defendant father who claims that his daughter was over eighteen years of age, will be allowed to show on that issue that she had a birthday party, on which occasion there was a birthday cake, with figures thereon indicating her age. Parkhurst *v.* Krellinger, 69 Vt. 375, 38 Atl. Rep. 67.

An affidavit made by the father of a decedent as to the age of decedent, years prior to the death of the decedent, is incompetent to prove the age, although it may be competent on a question of pedigree. Bowen *v.* Preferred Accident Ins. Co., 82 N. Y. App. Div. 458, 81 N. Y. Supp. 840; Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. Rep. 1024, 12 L. R. A. 836.

A letter written by a deceased brother stating the age of the insured, is incompetent for the purpose of proving age notwithstanding that it might be admissible in case of disputed pedigree. Bowen *v.* Preferred Accident Ins. Co., 68 N. Y. App. Div. 342, 74 N. Y. Supp. 101.

the conduct of members toward each other, is that which usually exists among intimate acquaintances.[52] But the testimony of witnesses who are not connected with the family, know nothing personally of the facts to which they speak, and have not derived their information from such persons as had any connection or particular acquaintance with the family, but can only state loose hearsay from unknown sources, is not sufficient to go to the jury.[53] The rule

[52] Eaton *v.* Tallmadge, 24 Wisc. 217, 222; Bridger *v.* Huett, 2 Fost. & F. 35; Viall *v.* Smith, 6 R. I. 419; Spears *v.* Burton, 31 Miss. 547, 554; Jackson *v.* Boneham, 15 Johns. 226; Russell *v.* Jackson, 22 Wend. 276, affi'g 4 Id. 543; and see paragraphs 1, 8, and 18. To the contrary, see language of some authorities cited under paragraph 36.

A witness who derived his knowledge from an intimate acquaintance of the family will be allowed to testify. Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. Rep. 843, 116 Am. St. Rep. 358, 8 Ann. Cas. 984.

While general reputation in the family will be admitted on a question of pedigree, general reputation in the community will not be admitted. Lamar *v.* Allen, 108 Ga. 158, 33 S. E. Rep. 958.

Only the reputation in the family of the party whose pedigree is in issue will be admitted. In re Heaton, 135 Cal. 385, 67 Pac. Rep. 321.

Evidence that a man voted at a poll at which negroes could not vote is competent evidence on the question of whether his son is a negro. Gilliland *v.* Buncombe County Board of Education, 141 N. C. 482, 54 S. E. Rep. 413.

Notwithstanding that the only evidence of the witness' relationship to the decedent's family is his own testimony, he is competent to testify as to the repute in the family. Smith *v.* Kenney, 54 S. W. Rep. (Tex. Civ. App.) 801.

A husband is presumptively competent to speak on the subject of his wife's age, and may do so, though his knowledge is founded on hearsay derived from family tradition. Adler *v.* Royal Neighbors of America, 90 Neb. 56, 132 N. W. Rep. 716, Ann. Cas. 1912, D. 974; Grand Lodge A. O. U. W. *v.* Bartes, 69 Neb. 636, 96 N. W. Rep. 186, 98 N. W. Rep. 715, 111 Am. St. Rep. 577.

[53] Jackson *v.* Browner, 18 Johns. 37.

On questions of pedigree and race ancestry the declarations of deceased relatives made *ante litem motam* may be received in evidence. Such testimony is not always restricted to the expressed declarations of the parties either oral or written, but under certain circumstances may be extended to include treatment and conduct of parties towards each other, where such

is also limited to cases of legitimate relationship, and such evidence cannot be introduced to establish an unlawful relationship, *per se*, where a lawful relationship is not claimed.[54]

40. Declarations made in View of Controversy.

It is not every kind or degree or interested feeling on the part of the declarant that will exclude a declaration. The law, while it assumes, as the foundation of the rule, the existence of an interest, created by domestic ties, to know and hand down the truth, recognizes that such declarations are often accompanied with a feeling of interest which will cast suspicion on them, without rendering them incompetent; [55] and even the legal interest of a grantor, in the support of the recitals in his deed, does not exclude them.[56] But if it appears by either the declaration itself,[57] or other evidence, that at the time the declaration was made, a discussion and controversy had arisen (though merely in the family and before litigation) [58] as to the fact of family history

facts are relevant and tend naturally to establish the relationship as claimed. Hall *v.* Fleming, 93 S. E. Rep. (N. C.) 728.

[54] Flora *v.* Anderson, 75 Fed. Rep. 217.

[55] Ld. DENMAN, Doe *v.* Davies, 10 Q. B. 325.

Declarations are not admissible to prove pedigree or relationship, except when they are made by members of the family as natural or spontaneous declarations on the subject and before any dispute has arisen over the question or any claim has been made to the establishment of which the declarations would be material. In re Walden, 166 Cal. 446, 137 Pac. Rep. 35; In re Hartman, 157 Cal. 206, 107 Pac. Rep. 105, 21 Ann. Cas. 1302, 36 L. R. A. N. S. 530.

[56] Id.

[57] Butler *v.* Mountgarret, 7 H. of L. Cas. 645.

[58] It is the beginning of dispute, involving the very point in question, not that of the state of facts from which the dispute sprang, nor that of resulting litigation, which terminates the competency. Shedden *v.* Patrick, 2 Sw. & Tr. 170, 188, s. c., L. J. 30 P. M. & A. (1860–1861) 217, 232.

The declarations must have been made *ante litem motam*. Wolf *v.* Wilhelm, 146 S. W. Rep. (Tex. Civ. App.) 216.

sought to be proved,[59] the declaration is incompetent.[60] It has been said that it makes no difference that the dispute was raised for the purpose of excluding declarations, or that the existence of the dispute was unknown to the declarant.[61] Declarations made for purpose of evidence would not be competent;[62] but this must be taken in connection with the existence either of controversy or adverse interest, for one proper object of formal family records is to preserve evidence

[59] Elliott *v.* Piersol, 1 Pet. 337; Butler *v.* Mountgarret, 7 H. of L. Cas. 637.

[60] In re Hurlburt's Estate, 68 Vt. 366, 379, 35 Atl. Rep. 77. Lord BROUGHAM'S view was that it is not sufficient that the declarant was in the same situation touching the matter in contest with the party relying upon the declaration, but it is for the objector to show either that the declaration was made after controversy commenced, or under bias. Monkton *v.* Att. Gen., 2 Russ. & M. 160.

Unless declarations are made *ante litem motam* they will not be admitted. Schott *v.* Pellerim, 43 S. W. Rep. (Tex. Civ. App.) 944.

Declarations made after a controversy has arisen are inadmissible. Kirby *v.* Boaz, 41 Tex. Civ. App. 282, 91 S. W. Rep. 642.

The statement concerning which a witness may testify must have antedated the litigation and the controversy, so that it could not have been induced thereby. In re Carroll, 149 Iowa, 617, 128 N. W. Rep. 929.

The declarations must be made *ante litem motam*, and not in anticipation of litigation or contest depending upon the family relationship. Osborne *v.* Ramsay, 111 Cir. Ct. App. 594, 191 Fed. Rep. 114.

[61] Shedden *v.* Patrick (above).

[62] Chapman *v.* Chapman, 2 Conn. 347, SWIFT, Ch. J.

The declaration of a parent concerning the age of his child is admissible in evidence if made before the cause of action arose wherein the same is offered. But before such declarations are admissible it must be shown that the evidence is the best evidence of which the case is susceptible, that the declarations were made in good faith, unbiased by any issue between the parties likely to be affected thereby, and made before the litigation was commenced in which such evidence is used. Perkins *v.* Baker, 41 Okla. 288, 137 Pac. Rep. 661.

A witness cannot testify that he heard the mother of a grantor in a deed say that he was an infant at the time of its execution, unless it is first shown that the declaration was made *ante litem motam*, and that the declarant is dead. Hodges *v.* Hodges, 106 N. C. 374, 11 S. E. Rep. 364.

in case any question should arise.[63] Writings dated more than thirty years past, and coming from the proper custody, are presumed to have been made at the time of their date, as against the suggestion that they were made after controversy had arisen.[64]

41. Repute Beyond the Family—Acquaintance—Newspaper Notice—Insurance.

General repute, among one's acquaintances, that he had died, is competent, either when he left no kindred,[65] or, in connection with family repute, when he died abroad.[66] In the absence of any direct evidence, the testimony of those who naturally would be likely to hear of the absentee if living—such as one residing near the estate of a tenant for life, though not a member of the family—that he had not been heard of for years, is competent.[67] The courts, also, have taken notice of facts affecting pedigree contained in public histories, biographies and compilations like that of "Debrett's Peerage." [68] But death abroad cannot be proved

[63] See Berkeley Peerage Case, 4 Campb. 401.

[64] Davies *v.* Lowndes, 7 Scott N. R. 214, and cases cited. As to recent writings, compare Potez *v.* Glossop, 2 Exch. 191; Butler *v.* Mountgarret, 7 H. of L. Cas. 647.

[65] Ringhouse *v.* Keever, 49 Ill. 470.

[66] Ewing *v.* Savary, 3 Bibb. 235, 238.

Repute among acquaintances of a person who died abroad is admissible to prove such death. Cook *v.* Carroll, etc., Co., 39 S. W. Rep. (Tex. Civ. App.) 1006.

A general reputation among friends and acquaintances of the family that the decedent was the father of a son born out of wedlock is admissible, though hearsay. Hays *v.* Claypool, 164 Iowa, 297, 145 N. W. Rep. 874; Van Horn *v.* Van Horn, 107 Iowa, 247, 77 N. W. Rep. 846, 45 L. R. A. 93; Alston *v.* Alston, 114 Iowa, 29, 86 N. W. Rep. 55.

[67] Doe *v.* Deakin, 4 B. & Ald. 433; Flynn *v.* Coffee, 12 Allen, 133. But common repute among his acquaintances, not founded primarily on the fact of death, but on belief that his body was found and buried at a particular time and place, is not competent, unless after great lapse of time. Jackson *v.* Etz, 5 Cow. 316.

[68] Russell *v.* Jackson, 22 Wend. 276, affi'g 4 Id. 543.

Books and documents of a pub-

by a newspaper notice published here,[69] and the better opinion is that to render competent newspaper announcements of facts of family history, there must be something to connect them either with the family or a member, or with common repute properly in evidence.[70] Upon this principle of the probable truth of a general conviction among those likely to know and best qualified to judge, attested by their acting upon it, the courts have received the fact that insurers have paid a loss upon a vessel not heard from, as relevant to the presumption of death of one on board;[71] but, on the other hand, mere memoranda, though found in official record books, are not competent,[72] nor is an assumption of the right of suffrage or a submission to taxation competent evidence that the person was of age, except against himself.[73]

42. Best and Secondary Evidence.

Oral declarations are equally primary as family records or other documents of the nature of hearsay;[74] but the competency of each depends not, indeed, on entire absence of more satisfactory evidence,[75] but on the death of the declarant; and if he is alive, and present or within reach of

lic nature, such as census reports containing facts preserved for public reference and inspection, are *prima facie* evidence of their contents, as they are made by disinterested persons in the discharge of a public duty. The person making the entries has no reason to falsify them. They are *prima facie* evidence of family relationship. Matter of Kennedy, 82 N. Y. Misc. 214, 143 N. Y. Supp. 404.

[69] Fosgate *v.* Herkimer Mfg. Co., 9 Barb. 287, 295.

[70] Compare Redgrave *v.* Redgrave, 38 Md. 101; Jewell *v.* Jewell, 1 How. (U. S.) 219, 232; Ring *v.* Huntington, 1 Mill (S. C.) Const. 162; Mann *v.* Russell, 11 Ill. 586; Henkle *v.* Smith, 21 Id. 238; Sweigar *v.* Lowmaster, 14 Serg. & R. 200.

[71] See paragraph 5 (above).

[72] Ridgeley *v.* Johnson, 11 Barb. 527; See Caujolle *v.* Ferrie, 23 N. Y. 90.

[73] Clark *v.* Trinity Church, 5 Watts & S. (Penn.) 266. The declarations of the decedent as to his age are not competent.

[74] Clements *v.* Hunt, 1 Jones (N. C.) L. 400.

[75] 1 Tayl. Ev. 569, 574. Compare Fosgate *v.* Herkimer Mfg. Co., 12 Barb. 352.

process, the declaration, whether oral or written, is incompetent,[76] except as against him and those claiming under him, or by way of corroboration of testimony given by the declarant as a witness.[77] Where the original family record is proved to have been lost,[78] or in any other way properly accounted for, a copy is admissible; otherwise not.[79]

V. REGISTRY OF FACTS OF FAMILY HISTORY (PEDIGREE)

43. Registries Authorized by Law.

A registry, whether of birth, marriage, death or burial, kept pursuant to law (statutory or unwritten), is competent evidence of the main fact and its date,[80] and of any other fact which the law or statute directed the officer to ascertain and record;[81] and it is not incompetent because the statute does not expressly declare it to be evidence.[82] To prove an entry,

[76] Leggett *v.* Boyd, 3 Wend. 376; Campbell *v.* Wilson, 23 Tex. 252; Robinson *v.* Blakely, 4 Rich. L. (S. C.) 586.

[77] Wiseman *v.* Cornish, 8 Jones (N. C.) L. 218.

[78] Whitcher *v.* McLaughlin, 115 Mass. 167.

[79] Ryerson *v.* Graves, 1 N. J. L. (Coxe) 458. A recital in a deposition not enough. Greenleaf *v.* Dubuque, etc., R. R. Co., 30 Iowa, 301. It has been held that the age of a member of a family, copied by a son into the family Bible, from another book where the original entries were made by his father, is not competent without accounting for the entries of the father. Curtis *v.* Patton, 6 Serg. & R. 135. But they might be made competent by evidence establishing the family Bible as the recognized family record.

[80] See paragraphs 2, 16 and 28 (above).

[81] Bucher *v.* Showalter, 44 Okla. 690, 145 Pac. Rep. 1143; Derby *v.* Salem, 30 Vt. 722 But as to a fact not within his personal knowledge, it is, of course, slight evidence, and without the statute would not be competent. But a defective record, or the entry of facts of which the entry is not evidence, may be made competent by tracing it to information furnished by a competent family source, making it admissible as hearsay. Viall *v.* Smith, 6 R. I. 421.

[82] State *v.* Wallace, 9 N. H. 515; and see Wedgwood's Case, 8 Greenl. 75.

Where the statute made it the duty of an officer to determine before the issuance of a marriage license whether a person was over the age of twenty-one years, a

in such a register kept *within the State*, the book may be produced by the present keeper of the record, or other witness who can testify that it comes from the proper custody, with evidence either that it is the official register, and that he who was the keeper at the time of the entry, made the entry, or that the entries relied on, or at least some of them, are in his handwriting, and that the book was handed down by the present keeper's predecessors in office as the official register.[83] Instead of the book, a copy in full of the particular entries relied on may be produced,[84] authenticated (if the statute authorizes certified copies) by the certificate of the keeper of the record,[85] or authenticated by the oath of a witness, as in the case of a voluntary register stated below.

marriage license issued reciting the age, is admissible in evidence upon the question of age. It is not conclusive, but it is admissible for what it may be worth. Armstrong *v.* Modern Woodmen of America, 93 Wash. 352, 160 Pac. Rep. 946.

[83] Doe & Jaycoks *v.* Gilliam, 3 Murph. (N. C.) 47; Sumner *v.* Seebec, 3 Greenl. 223. Absence of authentication of an entry in an ancient record not fatal. Ex'rs of Booge *v.* Parsons, 2 Vt. 456.

[84] An official certified copy should be a literal exemplification of each entry relied on, but a sworn copy produced by a witness may be the tabulation of several entries if the witness swears that he extracted the details from the register. American Life Ins. & Trust Co. *v.* Rosenagle, 77 Penn. St. 507. Where the statute requires the officiating clergyman to certify his act to the county clerk for record, the proper evidence is a copy of the certificate, not merely of the memorandum of the clerk. Niles *v.* Sprague, 13 Iowa, 198. Compare Fox *v.* Lambson, 3 Halst. 275, 280. As to delay in the clergyman's return, see People *v.* Lambert, 5 Mich. 349, 1 Bish. Mar. & D., § 468.

Under §§ 11 and 12 of Chapter 89 of the Statute, a marriage is proved by the certificate at the ceremonial, or by a copy of the entry in the registry, certified to by the county clerk under the seal of the county. Ewing *v.* Cox, 158 Ill. App. 25.

[85] N. Y. Code Civ. Pro., § 928 (3 R. S., 6th ed. 150, § 17); and see Jackson *v.* People, 3 Ill. (2 Scam.) 231; Matter of Hall, 154 N. Y. Supp. 317, 90 Misc. 216; Shamlian *v.* Equitable Acc. Co., 226 Mass. 67, 115 N. E. Rep. 46.

A certified copy of a coroner's certificate of death filed with the board of health, is *prima facie* evidence in all courts of the facts recorded therein. Bromberg *v.* North American Life Ins. Co., 192

A register kept pursuant to the law of a *sister State or foreign nation*, may be proved by proving the law which authorized it,[86] and that it was made and preserved according to that law, and that the person certifying was the proper officer;[87] and by producing a copy, authenticated as such according to the mode prescribed by the law of the forum for authenticating foreign official acts,[88] or authenticated by

Mich. 143, 158 N. W. Rep. 141.

Certified copies of birth records from the state or local register are admissible in evidence. A supplemental birth certificate furnished at the instance of the state board of health, filed, preserved and found in the office of the clerk of the district court as required by the then existing law, will not be held inadmissible although irregular. Hyde *v.* Kloos, 134 Minn. 165, 158 N. W. Rep. 920.

[86] See paragraphs 9, 10; and see Morrisey *v.* Wiggins Ferry Co., 47 Mo. 521. The fact that the record was kept and preserved pursuant to foreign law may be proved by the custodian, though not a lawyer, for he is in a position to make it probable that he knows the law. Am. Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507.

The New York Code Civ. Pro., contains no provisions as to proving the records of courts of other States in this country. Provisions for these are contained in § 1, Art. IV, of the Constitution of the United States which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

U. S. Comp. Stat., § 1519, provides that the record shall be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge that the attestation is in due form. See Van Deventer *v.* Mortimer, 56 N. Y. Misc. 650, 107 N. Y. Supp. 564; Trebilcox *v.* McAlpine, 46 Hun (N. Y.), 469, 11 N. Y. St. 847; Milwaukee Gold Extraction Co. *v.* Gordon, 37 Mont. 209, 95 Pac. Rep. 995.

[87] State *v.* Horn, 43 Vt. 20; State *v.* Dooris, 40 Conn. 145. A copy of the marriage contract, the original of which was executed and deposited in the public archives of a foreign State, may be admitted, not without authentication, but by a sworn copy or a copy certified by the officers of our government when they have succeeded to the foreign authority and have custody of the original, or certified by the foreign officers who, at the time of certifying, had custody of the original, with proof that the person certifying was acting in the office, and that his signature is genuine. Chouteau *v.* Chevelier, 1 Mo. 343.

[88] N. Y. Code Civ. Pro., § 956. In Pennsylvania, *ex parte* evi-

the oath of a witness,[89] as in the case of a voluntary register stated below.

The registry being duly proved, compliance with preliminary formalities is presumed.[90]

44. Registries not Authorized by Law.

A register kept without authority of law is competent, in evidence of the main fact, whether of marriage,[91] baptism,[92] or burial,[93] and of its date, but not of other facts stated in it, such as date or place of birth or death;[94] but, to admit it,

dence of the copy has long been held admissible where the registry is beyond seas. Kingston *v.* Leslie, 10 Serg. & R. 389, and cases cited.

[89] Jackson *v.* Boneham, 15 Johns. 226.

[90] Inhabitants of Milford *v.* Inhabitants of Worcester, 7 Mass. 48, 57. "The former English rule which recognized none but registers and similar records of churches of the established religion has been abrogated, in England, by statute, so as to open the door to many other records which all churches keep, and which are as likely to be accurate as those of an established church. Such records serve a purpose equivalent to that served by family records, and in this country they are fairly to be dealt with as equivalent to corporation records, which are generally evidence of such matters as are recorded in the usual course of affairs." Hunt *v.* Order of Chosen Friends, 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. Rep. 576. But compare Supreme Assembly *v.* McDonald, 59 N. J. L. 248, 251, 35 Atl. Rep. 1061; Childress *v.* Cutler, 16 Mo. 24.

[91] Maxwell *v.* Chapman, 8 Barb. 579.

[92] Blackburn *v.* Crawfords, 3 Wall. 182, 189.

A church record of baptism is competent evidence upon a question of pedigree. Matter of Greco, 154 N. Y. Supp. 306, 90 Misc. 241.

[93] Lewis *v.* Marshall, 5 Pet. 470, 476.

[94] Except to show that the birth or death was prior to the entry. 5 Pet. 470, 476. See paragraphs 2 and 28 (above). Unless shown to have been made under direction of deceased relative or parent. Doe *v.* Bray, 8 B. & C. 817.

A record of the birth of a person, made by a mere acquaintance of the family, while not admissible as substantive evidence to prove the date of birth, may be received in corroboration of the testimony of the one who made the record that at the time she made it she had knowledge of the facts to which she testified. Hyde *v.* Kloos, 134 Minn. 165, 158 N. W. Rep. 920.

it must appear that it was kept by the proper officer,[95] or by the officiating clergyman,[96] pursuant to his duty or in the usual course of his functions,[97] and that he is since deceased;[98] but the fact that he was not a sworn officer,[99] or that he kept it not as a public record belonging to the parish, but as his private memorandum,[1] does not render it incompetent, if he was under a duty to keep it. It should also appear that the register is produced from the custody of his successor, the entry being in his own handwriting and appearing to have been made contemporaneously with the performance of the rite, and before controversy arose, with no apparent inducement to misstate nor interest adverse to his official duty; and in such case additional memoranda on the register, of fee paid, is not necessary to render the paper competent.[2] If the entries were made first in a day-book, and then transferred to the register, the day-book is not, but the register is, evidence of the act entered in the register.[3]

If the record is of a public nature, such as that of a church, an examined copy of the entries relied on, without production of the original, is admissible.[4] The proper evidence of the copy is testimony of the witness producing it, that it was taken at the proper office, the record being there produced to him by the lawful keeper;[5] and proof of the hand-

[95] Doe *v.* Andrews, 15 Q. B. 758. Compare, however, Doe *v.* Bray, 8 B. & C. 813.

[96] Blackburn *v.* Crawfords, 3 Wall. 175, 183, 189, 191.

[97] Same cases.

[98] Morrisey *v.* Wiggins Ferry Co. 47 Mo. 521, S. P., Huntly *v.* Compstock, 2 Root, 99. Compare 16 Ves. (by Sumner) 72, n. 3.

[99] Kennedy *v.* Doyle, 10 Allen, 161.

[1] Blackburn *v.* Crawfords (above).

[2] Kennedy *v.* Doyle, 10 Allen, 161.

[3] Maxwell *v.* Chapman, 8 Barb. 579.

[4] Jackson *v.* King, 5 Cow. 237; Lewis *v.* Marshall, 5 Pet. 470, 476.

[5] Gaines *v.* Relf, 12 How. U. S. 472, 522.

Where there is no proof of execution or recording of a marriage certificate it will not be admitted in evidence. The court cannot take judicial notice of the capacity and signature of the marshal whose subscription appears on the certificate. Eames *v.* Woodson, 120 La. 1031, 46 So. Rep. 13.

writing of the deceased officer may be made by the witness having inspected the signature in the various places where it occurred in the register.[6] A copy certified under the seal of the corporation, is not evidence unless made so by statute.[7] If the one who made the entry is living, the original entry is competent, on producing him as a witness to testify to accuracy.

The marriage certificate given to the parties at the time by the officiating functionary is evidence, not only when made so by statute,[8] but also if shown to be part of the *res gestæ*, on independent evidence of the act,[9] especially if given by a public officer who is since deceased; [10] or if so preserved and shown by either party as to be his or her admission or declaration,[11] or, with lapse of time, to become a family memorial, competent as hearsay.[12]

45. Best and Secondary Evidence.

Registers, even though statutory, are not conclusive evidence,[13] nor the only best evidence, so as to exclude parol,[14] unless made so by the statute. The object of the register is to facilitate the proof, not to supersede other modes.[15]

[6] Doe *v.* Davies, 10 Q. B. 325.

[7] Stoever *v.* Whiteman, 6 Binn. 416.

[8] As in N. Y. Code Civ. Pro., § 928, and in other States.

Where the witnesses to a marriage certificate are without the jurisdiction of the court, the certificate will be admitted in evidence without their testimony. State *v.* MacRae, 83 N. J. L. 796, 85 Atl. Rep. 455.

[9] See Stockbridge *v.* Quicke, 3 Car. & K. 305.

[10] Wheeler *v.* McWilliams, 2 U. C. Q. B. 77; and see 10 Allen, 161.

[11] Hill *v.* Hill, 38 Penn. St. 511. Compare Commonwealth *v.* Morris, 1 Cush. (Mass.) 391.

[12] Paragraph 37 (above).

[13] Derby *v.* Salem, 30 Vt. 722; Rice *v.* The State, 7 Humph. 14.

[14] Viall *v.* Smith, 6 R. I. 419, even to supply a defect; Northfield *v.* Plymouth, 20 Vt. 582, 589.

A certified copy of a marriage license and of the certificate of marriage is competent to corroborate other testimony that there was a marriage. Witty *v.* Barham, 147 N. C. 479, 61 S. E. Rep. 372.

[15] State *v.* Marvin, 35 N. H. 22.

The marriage certificate does not constitute the only evidence to prove the marriage. State *v.*

Where the register is proved, the witnesses who signed it need not be called.[16]

To prove that no entry was made, the book or paper of entries is the best evidence. The statement of the keeper of the record, as a witness, that no entry appeared is secondary.[17]

46. Impeaching the Registry.

The fact of a mutilation or imperfection in the register, not material to the series of entries affecting the parties; [18] or that the entry was copied from another contemporaneous or collateral register, both records being made in the course of duty; [19] or the appearance of other entries not made at the proper time or by the proper person; [20] or, if an official register, that the making of the entry was somewhat delayed,[21] or was not made on the best information,[22] and the like objections, go rather to the credibility than the competency of the entry.

VI. JUDICIAL RECORDS SHOWING FACTS OF FAMILY HISTORY (PEDIGREE)

47. Letters of Administration, etc.

Letters testamentary or of administration, though com-

Walsh, 25 S. D. 30, 125 N. W. Rep. 295.

Record evidence of marriage is not necessary, and it may be proved by any kind of evidence, whether direct or circumstantial. Casley *v.* Mitchell, 121 Iowa, 96, 96 N. W. Rep. 725.

It is not necessary to introduce the return of the officiating minister or other officer, to prove the date of a marriage. Bronnenburg *v.* Charman, 80 Ind. 475.

[16] Birt *v.* Barlow, 1 Dougl. 172.

[17] Blackburn *v.* Crawfords, 3 Wall. 183. But compare to the contrary, Smith *v.* Richards, (above).

[18] Walker *v.* Wingfield, 18 Ves. 445, Ld. Eldon; and see Doe & Jaycoks *v.* Gilliam, 3 Murph. N. C. 47; Sumner *v.* Seebec, 3 Greenl. 223.

As to mutilated portions of a Bible containing a family record, —see In re Colbert, 51 Mont. 455, 153 Pac. Rep. 1022.

[19] Doe *v.* Andrews, 15 Q. B. 756.

[20] Maxwell *v.* Chapman, 8 Barb. 579.

[21] Derby *v.* Salem, 30 Vt. 727.

[22] Doe *v.* Andrews, 15 Q. B. 759.

petent and sufficient in favor of or against the representative to prove his capacity to sue and be sued,[23] are not competent against any other party, to prove the death as a substantive part of a cause of action or defense,[24] unless by lapse of time they have become competent as hearsay.[25] This exclusion is an apparent exception to general principles, and rests on the imperfect judicial character of the proceedings. The statutes regulating the probate court may of course be such as to make the adjudication competent; but as death is the jurisdictional fact, the determination would not be conclusive even between the parties to the proceeding. On other questions directly, not merely incidentally,[26] in issue, and actually determined by the probate court, such as legitimacy or illegitimacy, and kinship, a decree of the surrogate's court is competent evidence between the parties and those in privity with them,[27] and if the matter was exclusively within the probate jurisdiction and intelligently decided, is conclusive [28] both as to personalty [29] and

[23] See paragraph 1. So they have been admitted after lapse of time, where the question of death did not affect the liability of the objector, but only the question as who was the proper plaintiff. French *v.* French, 1 Dick. 268.

[24] Carroll *v.* Carroll, 60 N. Y. 123, rev'g 2 Hun, 609. Nor to prove the time of death, either relatively or absolutely. English *v.* Murray, 13 Tex. 366; Ins. Co. *v.* Tisdale, 91 U. S. (1 Otto) 238.

The granting of letters of administration affords *prima facie* evidence of death. Aultman *v.* Limm, 93 Ind. 158.

Neither a recital in the application for letters of administration to the effect that the decedent left surviving him a wife, nor a reference to her in the report of the appraisers of the estate, nor the statement made by the alleged wife in an affidavit to the effect that she was the wife of the decedent is competent evidence on the question of whether or not the relation of husband and wife existed. Berger *v.* Kirby, 135 S. W. Rep. (Tex. Civ. App.) 1122.

[25] Munro *v.* Merchant, 26 Barb. 383. See U. S. *v.* Wright, 11 Wall. 648; Johnson *v.* Towsley, 13 Id. 72, 83, 86, and cases cited.

[26] Anson *v.* Stein, 6 Iowa (Clarke), 150.

[27] Lalonette *v.* Lipscomb, 52 Ala. 570.

[28] Doglioni *v.* Crispin, L. R. 1 H. L. 301; and see Broderick's Will, 21 Wall. 503.

[29] Caujolle *v.* Ferrie, 13 Wall. 469.

realty;[30] but as to a third person not strictly claiming under either party, it is, at the most, only *prima facie* evidence in his favor, and is not competent against him.[31]

48. Judgments and Verdicts.

Personal judgments, and judgments affecting particular property only, are not competent evidence of facts of heirship or the like, recited in them, except as against a party to the action in which they were recovered, or a person claiming under him,[32] or as to the particular property adjudicated on,[33] unless by lapse of time the rule as to hearsay makes them competent.

Where the circumstances are such that the fact might be established by general reputation, any judgment or decree, or even a verdict,[34] of a court of competent jurisdiction, expressly or by necessary implication determining the fact, is *prima facie* evidence, even against third persons.

A judgment in an action for divorce, being in the nature of an action *in rem*, determines the question of personal status as against all the world, and is therefore competent for or against strangers. Such a judgment, whether foreign or domestic, is to be proved by the production of the record, or a duly authenticated copy, which should include the pleadings, orders, reports, etc., as well as the adjudication.[35]

[30] Blackburn *v.* Crawfords, 3 Wall. 190.

[31] Spencer *v.* Williams, L. R. 2 P. & D. 230, 237, and cases cited. Thus a decree of the probate court, determining a question of legitimacy of a child, by determining that the parents were never married, is not competent as against other children who were not parties to the proceedings. Kearney *v.* Denn, 15 Wall. 57. So proceedings before the surrogate for admeasurement of dower, are not evidence of title. Clarke *v.* Randall, 5 Cow. 168.

[32] Lovell *v.* Arnold, 2 Munf. 167; Archer *v.* Bacon, 13 Mo. 149; Wardlaw *v.* Hammond, 9 Rich. (S. C.) L. 464.

[33] Whitman *v.* Henneberg, 73 Ill. 109.

[34] Pile *v.* McBratney, 15 Ill. 314, 319; Patterson *v.* Gaines, 6 How. (U. S.) 599.

[35] Lawrence's Will Case, 18 Abb. Pr. 347.

VII. IDENTITY

49. Necessity of Proof.

Where a given name [36] appears with the surname, in a document or testimony, identity of the name with that appearing in other evidence, is sufficient to make a *prima facie* case of identity of person, if there be a reasonable coincidence in whatever circumstances of time, place, age, legal character or capacity, etc., appear in the case, and nothing affirmative to cast doubt on the identity.[37] Under

[36] Fanning *v.* Lent, 3 E. D. Smith, 206.

Where the given name is written the middle name or letter may be disregarded in identifying an individual. Riley *v.* Litchfield, 168 Iowa, 187, 150 N. W. Rep. 81, Ann. Cas. 1917, B. 172.

Custom gives the wife the surname of her husband but not his given or Christian name. In re Taminosian, 9 Neb. 514, 150 N. W. Rep. 824, Ann. Cas. 1917, A. 435.

Letters of the alphabet, consonants as well as vowels, are sufficient to distinguish different persons having the same surname. State *v.* Wasilenskis, 114 Me. 91, 95 Atl. Rep. 415.

[37] As, for instance, where the name is very common, or where the name of a signer and of an attesting witness is the same. Jackson *v.* Christman, 4 Wend. 277; Richmond Cedar Works *v.* Stringfellow, 236 Fed. Rep. 264.

To prove identity of person, identity of name is usually, in the first instance, sufficient. Morris *v.* McClary, 43 Minn. 346, 46 N. W. Rep. 238, citing text.

Identity of person is presumed from identity of name under Code Civ. Pro. (Cal.), § 1963. People *v.* Rolfe, 61 Cal. 540.

Identity of name is presumptive of identity of person, where there are not two or more persons in the same community or vicinity bearing the same name. Garrett *v.* State, 76 Ala. 18.

The rule that identity of name is *prima facie* identity of person does not apply where the transaction is remote. It would work great injustice if rights of property, after a great length of time, were allowed to depend upon mere identity of name. Sailor *v.* Hertzogg, 2 Pa. 182; Sitler *v.* Gehr, 105 Pa. St. 577, 51 Am. Rep. 207.

The identity of a person named in a deed may be shown by parol evidence. Laclede Land, etc., Co. *v.* Murphy, 264 Mo. 523, 175 S. W. Rep. 183.

In an action on a record identity of name is *prima facie* identity of person. Barlow *v.* Marrone, 88 N. J. L. 187, 95 Atl. 985.

Identity of a person may be presumed from identity of name, but

such circumstances, proof of identity of the person named in a record, whether a register of baptism, marriage,[38] etc., or a judgment,[39] is unnecessary in the first instance. The practice in this State is to leave it to the adverse party to give some evidence against identity. This is a principle recognized in civil cases generally.[40]

the presumption will be rebutted by even very slight evidence to the contrary. Keyes *v.* Munroe, 266 Mo. 114, 180 S. W. Rep. 863.

If a person is described by a wrong name in a deed this is at most only a misnomer which can be explained by parol evidence. Troy, etc., Gold Mining Co. *v.* Snow Lumber Co., 170 N. C. 273, 87 S. E. Rep. 40.

[38] Jackson *v.* King, 5 Cow. 241 (disapproving 1 Campb. 196, 4 Id. 34). Entries in a church register, showing that W. A. had a son baptized as S., that years after S. A. had a daughter baptized as M., and that years after M. A. was married to P., is sufficient evidence to go to the jury that P. married a granddaughter of W. A., if nothing appears to show that there ever were other persons of those names. It may be presumed that the persons named in the register were the ancestors of the claimant, where all bore the appropriate names, the dates of the several baptisims and marriages being at such distance of time from each other as to be consistent with the claim. Id. This appears also to be the modern English rule. Hubbard *v.* Lees, L. R. 1 Ex. 255. *Contra*, Middleton *v.* Sandford, 4 Campb. 34; Mooers *v.* Bunker, 29 N. H. 420; Morrisey *v.* Wiggins Ferry Co., 47 Mo. 525, 1 Whart. Ev. 623, § 655.

The Christian or given name may consist of letters only, and there is no presumption that letters stand for other names and are not themselves the Christian name of the party. Riley *v.* Litchfield, 168 Iowa, 187, 150 N. W. Rep. 87, Ann. Cas. 1917, B. 373.

A photograph identified by a person as a picture of himself is admissible. Wong Back Sue *v.* Connell, 233 Fed. Rep. 659, 147 C. C. A. 467.

[39] Hatcher *v.* Rocheleau, 18 N. Y. 86; Yucker *v.* Morris, 86 N. J. Eq. 181, 98 Atl. 259 (rev'g 85 N. J. Eq. 476, 97 Atl. Rep. 42).

A judgment expressed to be merely for or against the "plaintiff" or the "defendant" will be sufficient if the names of the parties thus designated can be ascertained without ambiguity from other parts of the record. Siekmann *v.* Kern, 136 La. 1068, 68 So. Rep. 128, Ann. Cas. 1916, D. 1228 (citing Black on Judgments Vol. 1, § 116).

[40] Bogue *v.* Bigelow, 29 Vt. 183, 2 Phil. Ev. 508, and note, 1 Greenl. Ev., § 38, note. Otherwise in

50. Mode of Proof.

Identity of person may be proved by the direct testimony of a witness having means of knowledge; [41] and photographs as well as other miniatures, shown to be good likenesses, are competent, in connection with testimony, to identify the person.[42] Evidence showing correspondence of age, per-

criminal cases. Wedgwood's Case, 8 Greenl. 75.

Identity of names is *prima facie* identity of persons; the burden of proof is upon those who dispute the identity to establish the contrary. Lee *v.* Murphy, 119 Cal. 364, 51 Pac. Rep. 549, 955.

The presumption of identity arising from evidence of sameness of name, is not conclusive, nor will it arise where different persons have the same names except as to their middle name or initial. Gray *v.* Missouri Lumber & Mining Co. (Mo.), 177 S. W. Rep. 595.

Where, in a policy of insurance, a loss, if any is made payable to a person of the same name as the plaintiff with the added words "as trustee," the identity of the person will be assumed from the identity of the names. Boskowitg *v.* Continental Ins. Co., 175 App. Div. 18, 161 N. Y. Supp. 680.

[41] The testimony of a grandmother that she verily believed the person produced in court to be the one baptized as a child as proved by the register is sufficient evidence of identity, for the jury. Queen *v.* Weaver, L. R. 2 C. C. Res. 85, s. c., 7 Moak's Eng. 323. So evidence that the woman was formerly known by the maiden name mentioned in the marriage register, and that the parties cohabited as husband and wife, is proof of identity. State *v.* Wallace, 8 N. H. 515, 517.

If a person calls himself Smith it is some evidence that he is Smith; evidence of conversations with him by witnesses will be admitted. Reynolds *v.* Staines, 2 C. & K. 745, 62 E. C. L. 745.

Ex necessitate rei, and as a matter of common sense, the declarations of a decedent as to who he was and where he came from should always be received in evidence. They are of the same nature as declarations against interest. If such be not the rule of law, it would be impossible legally to establish the identity of very many travelers and strangers who die among strangers in distant lands, although in point of fact there may not be in any man's mind the slightest doubt as to who they are. Wise *v.* Wynn, 59 Miss. 588, 42 Am. St. Rep. 381.

[42] Ruloff's Case, 11 Abb. Pr. (N. S.) 245, s. c., 45 N. Y. 213; Luke *v.* Calhoun, 52 Ala. 115; Udderzook *v.* Commonwealth, 76 Penn. St. 340; R. *v.* Folsom, 4 F. & F. 103.

sonal appearance, dialect, habits, manners, calling, places of resort, etc., is also competent.[43]

VIII. NATIONAL CHARACTER, AND DOMICILE

51. Citizenship and Alienage.

Citizenship may be proved by proving birth, at any place, from a father, a citizen of the United States, whether he was native born or not; [44] or birth in this country since the war of the Revolution, without reference to the alienage or citizenship of the parents.[45] Alienage may be proved by prov-

[43] See Jackson *v.* Etz, 5 Cow. 316; Lindsay *v.* People, 63 N. Y. 143; Cunningham *v.* Burdell, 4 Bradf. 343.

On the question of identity it is admissible to show the name which the person bore, his personal appearance and conversation, and the account he gave of himself, his family connections, and associations. Mullery *v.* Hamilton, 71 Ga. 720, 51 Am. St. Rep. 288; Nehring *v.* McMurrain, 45 S. W. Rep. (Tex. Civ. App.) 1032; Cuddy *v.* Brown, 78 Ill. 415; Young *v.* State, 36 Ore. 417, 59 Pac. Rep. 812, 60 Pac. Rep. 711, 47 L. R. A. 548.

[44] Young *v.* Peck, 21 Wend. 389; U. S. R. S., § 1993. (U. S. Comp. Stats., § 3947.)

A child born in a foreign country, but whose father is a citizen of the United States at the time, is also a citizen of the United States. Buckley *v.* McDonald, 33 Mont. 483, 84 Pac. Rep. 1114.

When the husband of an alien woman becomes a naturalized citizen, she, as well as her infant son, dwelling in this country, become citizens of the United States as fully as if they has become such in the special mode prescribed by the naturalization laws. United States *v.* Rodgers, 144 Fed. Rep. 711.

Citizenship as between the various States depends upon domicile. In re Sedgwick, 223 Fed. Rep. 655.

"One may be a citizen of the United States, and yet not be a citizen of any State." Hough *v.* Société Electrique Westinghouse de Russia, 231 Fed. Rep. 341.

[45] McKay *v.* Campbell, 2 Sawyer, 118, s. c., 5 Am. L. T. 407; Lynch *v.* Clarke, 1 Sandf. 583, 638. Compare as to expatriation, Ludlam *v.* Ludlam, 26 N. Y. 363, affi'g 31 Barb. 486, 14 Op. U. S. Att.-Gen. 295; Op. N. Y. Att.-Gen. 380; Juando *v.* Taylor, 2 Paine, 652.

Children born in this country and under its jurisdiction, become at once, by virtue of such birth, American citizens. Ehrlick *v.* Weber, 114 Tenn. 711, 88 S. W. Rep. 188.

ing birth in a foreign country, from a father not a citizen of this country, or who never resided in this country;[46] or birth in this country prior to the declaration of independence, and withdrawal or removal from this country without ever having adhered to our government.[47] Marriage to an American, of an alien woman who might

A person born in this country, though of alien parents who had never been naturalized, and who are not engaged in diplomatic service, who continues to reside here, is deemed a citizen of the United States. Stadtler *v.* School Dist. No. 40, 71 Minn. 311, 73 N. W. Rep. 956.

A child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." United States *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890, affi'd 71 Fed. Rep. 382; Sing Tuck *v.* United States, 63 Cir. Ct. App. 199, 128 Fed. Rep. 592, rev'g 126 Fed. Rep. 386.

Notwithstanding the Chinese Exclusion Acts, a child born in this country of Chinese parents who although subjects of China, had a permanent domicile and residence, and carried on business here, is a citizen of the United States. Ng You Nuey *v.* U. S., 224 Fed. Rep. 340, 140 C. C. A. 26; U. S. *v.* Chin Hing, 225 Fed. Rep. 794.

[46] See Shanks *v.* Dupont, 3 Pet. 247; U. S. R. S., § 1993; U. S. Comp. Stats., § 3947; U. S. *v.* Gordon, 5 Blatchf. 18; Young *v.* Peck, 21 Wend. 389.

A native of Porto Rico who resided there prior to April 11, 1899, and came to New York in 1902 is not an alien immigrant and cannot be deported. Gonzales *v.* Williams, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. ed. 317.

[47] See Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99; Hollingsworth *v.* Duane, Wall. C. Ct. 51.

One who was born in Massachusetts in 1771, and lived there until 1807 when he moved to Canada, though born a British subject, by his continued residence in this country after the Declaration of Independence, giving allegiance to the new government, established his American citizenship. State *v.* Jackson, 79 Vt. 504, 65 Atl. Rep. 657, 8 L. R. A. N. S. 1245.

lawfully be naturalized, makes her a citizen;[48] in other cases marriage does not alter the woman's citizenship.[49] Evidence that one deceased was reputed to be of a specified foreign nationality, and had the appearance and dialect thereof, is

[48] U. S. Comp. Stats., § 3948.

An alien woman who comes to this country and who, while proceedings for her deportation are pending, marries an American citizen, must be discharged from custody on the ground that her husband's domicile is her domicile. Hopkins *v.* Fachant, 65 Cir. Ct. App. 1, 130 Fed. Rep. 839.

Under § 1994, U. S. Rev. Stat., any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

This applies to women of African blood who under the Act of July 14, 1870, are eligible to become naturalized. Broadis *v.* Broadis, 86 Fed. Rep. 951; Dorsey *v.* Brigham, 177 Ill. 250, 52 N. E. Rep. 303, 42 L. R. A. 809, 69 Am. St. Rep. 228.

Where an alien woman marries in this country her status as an alien is unchanged unless it is shown that the man whom she married was a citizen. Lehigh Valley Coal Co. *v.* Washko, 231 Fed. Rep. 42, 145 C. C. A. 230.

When an alien woman marries a citizen of this country her infant child, by a former marriage, dwelling in this country, as well as she herself, becomes a citizen of the United States. In re Cimorelli, 155 N. Y. Supp. 509, 91 Misc. 604.

[49] Beck *v.* McGillis, 9 Barb. 35, 49; Shanks *v.* Dupont, 3 Pet. 242. Compare Citizenship, 14 Op. U. S. Att.-Gen., 402.

A woman, a citizen of the United States, does not lose that citizenship by marriage to an alien, so long as she continued to reside in the United States. Wallenburg *v.* Missouri Pac. Ry. Co., 159 Fed. Rep. 217.

The political status of an American woman who marries a citizen of France follows that of her husband, with the modification that there must be a withdrawal from her native country, or an equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage. Ruckgaber *v.* Moore, 104 Fed. Rep. 947, 31 N. Y. Civ. Proc. 310, aff'd in 52 Cir. Ct. App. 587, 114 Fed. Rep. 1020.

The Act of Congress March 2, 1907, 34 Stats. 1228, ch. 2534, section 3, provides: "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American within one year with a consul of the United States, or if residing in the United States at the termination of the marital relation, by continuing to reside therein."

presumptive evidence of alienage.[50] Residence, if material on a question of national character, may be proved as in case of domicile.

52. Naturalization.

A record of the judgment of a competent court, admitting an alien to become a citizen, and reciting the facts which entitled the alien thereto, is conclusive, and is complete evidence of its own validity; it cannot be impeached in collateral proceedings, by proof contradicting these facts.[51]

[50] Jackson *v.* Etz, 5 Cow. 314.

A man lived at the time of his death in this country and left surviving him a widow and children, all of whom were dependent upon him for support, but were resident in a foreign country. In the absence of a record showing the country of his birth, it must be presumed that he was a citizen of the foreign country in which his family resided, and this presumption will continue until a change of citizenship is proved. Hamilton *v.* Erie R. R. Co., 219 N. Y. 343, 114 N. E. Rep. 399.

[51] McCarthy *v.* Marsh, 5 N. Y. (1 Seld.) 263, and cases cited. Compare Case of Stern, 13 Op. U. S. Att.-Gen., 376.

Proceedings in a court of record under U. S. Rev. Stat., §§ 1993, 2165, 2171 and 2172, being the naturalization laws, are judicial, and result in a judgment which can be impeached only as other judicial judgments may be. Mutual Ben. L. Insurance Co. *v.* Tisdale, 91 U. S. 238, 23 L. ed. 314; Boyd *v.* Nebraska, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. ed. 103.

No inquiry can be made in any controversy to attack the sufficiency of the final admission to citizenship by showing a want of conformity to the previous requirements of the statutes. Andres *v.* Ottawa Cir. Judge, 77 Mich. 85, 43 N. W. Rep. 857, 6 L. R. A. 238.

An order made by a court of competent jurisdiction, admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction. Spratt *v.* Spratt, 4 Pet. (U. S.) 393, 7 L. ed. 897; United States *v.* Norsch, 42 Fed. Rep. 417; Tinn *v.* U. S. Dist. Atty., 148 Cal. 773, 84 Pac. Rep. 152, 113 Am. St. Rep. 354.

A judgment of a court showing on its face that it has admitted a Japanese to citizenship of the United States is void under § 2169, U. S. Rev. Stat., under which Japanese are not eligible to citizenship, and may be attacked at any time and in any proceeding, and the same may be disregarded. In re Takuji Yamashita, 30 Wash. 234, 70 Pac. Rep. 482, 59 L. R. A. 671, 94 Am. St. Rep. 860.

A decree of naturalization may be set aside if obtained by fraud

A certified copy of a record of naturalization in another State, certified according to the act of Congress to allow it to be admissible in evidence, is admissible, without further proof that it has been in the custody of the clerk, etc., and without extraneous proof of any of the preliminaries of naturalization.[52] If the local law requires any further declaration or oath as a condition of holding lands, there must be evidence tending to show that the condition was complied with.[53]

or perjury. The wrong is to the nation and to the State, and therefore some public authority, and not a private citizen, may impugn the action of the court. McCarren *v.* Cooper, 16 N. Y. App. Div. 311, 44 N. Y. Supp. 695, aff'd 162 N. Y. 654, 57 N. E. Rep. 1116.

A certificate of naturalization issued by a court having jurisdiction cannot be vacated or annulled solely on the ground that it was procured by perjured testimony. United States *v.* Gleeson, 33 Cir. Ct. App. 272, 90 Fed. Rep. 778, affi'g 78 Fed. Rep. 396; United States *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; Marshall *v.* Holmes, 141 U. S. 598, 12 Sup. Ct. 62, 35 L. ed. 870; Bailey *v.* Sundberg, 1 Cir. Ct. App. 387, 49 Fed. Rep. 583.

The admission to citizenship of aliens is not a right, but a privilege. Congress may prescribe the conditions upon which these high privileges may be enjoyed, and may commit to any official or tribunal the determination of any questions of fact upon which the privilege may depend. When an applicant has met all the requirements of the law, the privilege accorded him ripens into a right. U. S. *v.* Shanahan, 232 Fed. Rep. 169.

Aliens are admitted to citizenship upon their solicitation, and not as of right, and where the court is deceived by the evidence as to the applicant's good moral character, the certificate issued may be cancelled. U. S. *v.* Raverat, 222 Fed. Rep. 1018.

The Circuit Court of Appeals has no jurisdiction to review a decree admitting an alien to citizenship. U. S. *v.* Neugebauer, 221 Fed. Rep. 938, 137 C. C. A. 508.

The federal courts have no power to change the name of a naturalized citizen except at the time and as a part of the process of naturalization. In re Holland, 237 Fed. Rep. 735.

A declaration of intention, being a record of the court, may be amended by the court in which the petition is filed. U. S. *v.* Viaropulos, 221 Fed. Rep. 485.

[52] People *v.* Snyder, 41 N. Y. 397, affi'g 51 Barb. 589.

[53] Blight *v.* Rochester, 7 Wheat. 535.

53. Nature of the Question of Domicile.

Amid the conflict of opinion and decision on questions of domicile, an important guide is to bear in mind that for purposes of succession the object of the inquiry is, to ascertain what jurisdiction, what law, this person's aggregate of legal rights and liabilities was under. For other purposes,[54] a

[54] Such as taxation, voting, settlement, etc.

In the decision of a question of domicile, it is hardly possible that a decision in one case can be of much value in the decision of another, for the question is always one of fact, depending upon all the facts in evidence, and but slight difference in any two cases will justify and may demand contrary conclusions. Ashland *v.* City of Catlettsburg, 172 Ky. 365, 189 S. W. Rep. 454.

The law recognizes a distinction between residence and domicile. Domicile is of more extensive signification than residence, and includes beyond mere physical presence at a particular locality, an intention to constitute it a permanent abiding place. One cannot have two domiciles at the same time, but is always deemed to have one. In re Davis, 217 Fed. Rep. 113.

In many instances there is a difference between the legal intendment of the terms "residence" and "domicile," but in the matter of succession and transfer taxes the theory of the taxing power renders the terms synomymous. Matter of Martin, 173 App. Div. 1, 158 N. Y. Supp. 915.

The terms "domicile" and "inhabitancy" are synonymous. Ex parte White, 228 Fed. Rep. 88.

"Residence" and "domicile" as the latter word is employed under the law of succession, are not synonymous and convertible terms. A man may have two residences but only one place of domicile. There must be a concurrence of actual residence, and the intention to remain in order to acquire a domicile. Worsham *v.* Ligon, 144 Ga. 707, 87 S. E. Rep. 1025.

The presumption is that where a person lives, there is his domicile, especially where he has no family elsewhere, and while no particular length of residence is necessary to fix a person's domicile, yet in the absence of any avowed intention and of acts which indicate the contrary intention, a long continued residence is regarded as a controlling circumstance in determining the question of domicile. Reed *v.* Reed, 59 Pa. Super. 178.

The law will, from the facts and circumstances, fix a legal residence for a person, unless he voluntarily fixes it himself, and, when his legal residence is once fixed, it requires both fact and intention to change it. Denny *v.* Sumner County, 134 Tenn. 468, 184 S. W. Rep. 14.

person may belong to several places, in the legal sense, and the law looks at his interests distributively to ascertain the locality for each purpose. But for purposes of succession the inquiry is not as to the locality of any one class of interests, nor even of his chief interests nor political allegiance, but we are to look at the aggregate of his civil interests as an entirety,—the *universitas juris*, of the Roman law,—and ask where in legal society was this entirety centered; in what jurisdiction did this aggregation, considered as a whole, subsist?

54. Presumptions and Material Facts.

The domicile of a person *sui juris* is proved by showing a residence at a particular place, or at least within a particular jurisdiction, accompanied with either direct or presumptive evidence of an intention to remain there for a time not limited.[55] If nothing appears indicating that the person ever

[55] Mitchell *v.* U. S., 15 Wall. 350; Guier *v.* O'Daniel, 1 Binn. 349, n.

The domicile of a man is the place where he has his true, fixed, permanent home, and to which he intends to return whenever he he is away from it. Plant *v.* Harrison, 36 N. Y. Misc. 649, 74 N. Y. Supp. 411; Dupuy *v.* Wurtz, 53 N. Y. 556.

The term "residence" used by the Constitution in fixing the qualifications of voters, does not mean domicile. Estopinal *v.* Michel, 121 La. 879, 46 So. Rep. 907, 19 L. R. A. (N. S.) 759.

Residence, as contradistinguished from a temporary place of existence, is the place of abode, dwelling or habitation for some continuous time. Griffin *v.* Woolford, 100 Va. 473, 41 S. E. Rep. 949.

Residence necessarily involves the idea of a local habitation or place of abode. Whitbeck *v.* Marshall-Wells Hardware Co., 188 Ill. 154, 58 N. E. Rep. 929, affi'g 88 Ill. App. 101.

As domicile and residence are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to

had a different origin or residence, proof of the mere fact of his being at a place, without more, is sufficient *prima facie* evidence that he was then domiciled there, to put upon the adverse party the burden of rebutting the evidence,[56] which may be done by showing that his presence there was either for a temporary purpose,[57] or by constraint; [58] but the place where one is, for however short a time, may, if he never had any other domicile, be deemed to be his domicile, at least for the purpose of defining his capacities while there. Usually, however, there is evidence of an abode; and the place where the person "lives" is taken to be his domicile until facts adduced establish the contrary.[59] Thus an immigrant having abandoned his domicile abroad, and come with his family to this country with intent to seek a home here, acquires a domicile at the port where he comes within our jurisdiction, which continues until his movement and intent manifest the adoption of another.[60] Showing long continued residence within a jurisdiction other than that of the domicile of origin,

make it one's domicile. Matter of Newcomb, 192 N. Y. 238, 84 N. E. Rep. 950, affi'g 122 App. Div. 920, 107 N. Y. Supp. 1139.

The words "inhabitant," "citizen" and "resident" mean substantially the same thing, and one is an inhabitant, resident or citizen of the place where he has his domicile or home. State *v.* Banta, 71 Mo. App. 32.

The residence of an orphan child is the place in which its foster parent provides it with a home and gives it parental care. People *v.* Hendrickson, 54 Misc. Rep. 337, 104 N. Y. Supp. 122.

Where one has had an actual domicile, and departs from it temporarily, intending to return, it will remain his legal domicile for all purposes. Erwin *v.* Benton, 120 Ky. 536, 27 Ky. Law Rep. 909, 87 S. W. Rep. 291, 9 Ann. Cas. 264.

[56] Bruce *v.* Bruce, 2 Bos. & P. 230, n., Ld. Thurlow; Bempde *v.* Johnstone, 3 Ves. 201; Mann *v.* Clark, 33 Vt. 55, 60.

[57] Bruce *v.* Bruce (above).

A man's domicile is determined by his actual residence coupled with his intention to remain, irrespective of the residence of his family. McCord *v.* Rosene, 39 Wash. 1, 80 Pac. Rep. 793.

[58] Bempde *v.* Johnstone (above).

[59] Bruce *v.* Bruce, 2 Bos. & P. 229, n.; Bempde *v.* Johnstone, 3 Ves. 201; Stanley *v.* Bernes, 3 Hagg. Eccl. 374, 437, Best on Pres. 235.

[60] Kennedy *v.* Ryall, 67 N. Y. 386, affi'g 40 Super. Ct. (J. & S.) 347; Whart. Notes on Dom. 3 So. L. Rev. 416, 417.

in the absence of anything indicating intent to preserve or return to that original domicile, is enough to throw on the other party the burden of disproving intent to remain.[61] If the person was moving to and fro, the question where he had his home,[62] where he had established his family, if he had one,[63] or where his strongest domestic ties were fixed,[64] may determine in which of the several places he "lived," within the meaning of the rule,[65] even though he declared himself a resident of his place of business.[66] It is the residence which indicates the domicile, though but little of his time was spent there, rather than the place of business, though much was spent there.[67] If he maintained two domestic establishments at once, the relative length of time spent in them is of little or no weight;[68] but any circumstances, such as health, climate, etc., indicating that he probably regarded one rather than the other as likely to be his ultimate abode, will control;[69] if, however, the case is equally balanced in

[61] Ennis *v.* Smith (Kosciusko's Case), 14 How. (U. S.) 400, 423.

[62] Story's Confl. of L., § 41.

[63] Chaine *v.* Wilson, 8 Abb. Pr. 78, s. c., 1 Bosw. 673.

The presumption that a married man's domicile is with his wife and family, may be overcome by evidence showing the fact to be otherwise. Nolley *v.* Nolley, 122 Ark. 440, 183 S. W. Rep. 954.

[64] See Catlin *v.* Gladding, 4 Mass. C. C. 308.

[65] See other cases in 2 Abb. N. Y. Dig., 2d ed., tit. Dom.

While a man may have many residences, he can have only one domicile. So, where there is any doubt as to a domicile, the domicile of origin always reverts,—not so of residence. In re Norton, 159 N. Y. Supp. 619, 96 Misc. 152.

[66] Wade *v.* Matheson, 4 Lans. 158.

Under Civ. Code 1895 (Ga.), § 1825, a person who has no fixed place of abode within a county, and is engaged in a business which causes a frequent change of residence therein, may be deemed temporarily domiciled in that county. Ginn *v.* Cannon, 119 Ga. 475, 46 S. E. Rep. 631.

[67] Chaine *v.* Wilson (above).

The question of residence is one of fact, and there is no positive rule that regulates the determination. Necessarily, the conclusion must be drawn from a consideration of all of the circumstances. Webster *v.* Kellogg Co., 168 App. Div. 443, 153 N. Y. Supp. 800.

[68] Greene *v.* Greene, 11 Pick. 410, 415.

[69] Forbes *v.* Forbes, Kay, 341. Compare Isham *v.* Gibbons, 1 Bradf. 69.

respect to intent, the one first adopted as an abode will maintain its character as his domicile. Slight circumstances may fix domicile, if not controlled by stronger evidence; and as the question is usually between two places, each indicated by some circumstances, it often occurs that the evidence of facts pointing to one place would be entirely conclusive were it not for circumstances of a still more decisive character which fix it beyond question in the other.[70] In such cases the intention of the person to consider the one or the other to be his residence or domicile will usually control.[71] Foreign domicile may be proved by evidence of foreign national character, and of residence within the foreign jurisdiction, although the particular place may not be satisfactorily ascertained.[72]

For the purpose of actions treated in this chapter, *a wife's* domicile is proved by proving that of her husband, if *sui juris*,[73] unless they were separated by the decree of a com-

[70] Thorndike *v.* City of Boston, 1 Metc. 246; Mann *v.* Clark, 33 Vt. 60.

[71] Opinion of the judges, 5 Metc. 589. Source of income (if not parental) is not material. Id. 591.

Actual residence is not indispensable to retain a domicile after it is once acquired. Hayes *v.* Hayes, 74 Ill. 312; Jenks *v.* Rounds, 87 Ill. App. 284.

The fact that letters of administration are issued in one State is no adjudication that such State was the decedent's last domicile. Thormann *v.* Frame, 176 U. S. 350, 20 Super. Ct. 446, 44 L. ed. 500, affi'g 102 Wis. 653, 79 N. W. Rep. 39.

Citizenship depends upon domicile, and as domicile and residence are two different things, citizenship is never determined by residence. Collins *v.* Ashland, 112 Fed. Rep. 175.

The question of domicile is a mixed question of law and fact; in so far as it is a question of fact it is solely for the jury. Forlaw *v.* Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. Rep. 898.

In determining the issue of domicile, the party's own expressed intention cannot have a controlling effect. Where there is a conflict between his intention as expressed and as exhibited by his conduct, the latter will usually control. Ashland *v.* Catlettsburg, 172 Ky. 365, 189 S. W. Rep. 454.

[72] See Matter of Fitzgerald, 2 Cai. 318.

[73] Whart. Confl. of L., § 44.

The domicile of the husband is presumptively that of the wife.

petent court.[74] The domicile of a legitimate *minor* is proved by proving the domicile of the father,[75] while he was living; after his death, that of the mother; but it does not follow any change in her domicile resulting on her remarriage.[76] That of an illegitimate minor is proved by proving the domicile for the time being of its mother.[77] That of a foundling, by showing where it was discovered, or the place of education or adoption to which it was removed.[78] In case of a continued *absentee, under constraint,* like a soldier or sailor, the residence of his wife at the place where he established her is *prima facie* evidence of his domcile;[79] or, if single, the place

Barber *v.* Barber, 151 N. Y. Supp. 1064, 89 Misc. 519.

The domicile of the husband is presumed to be the domicile of the wife. He may choose any reasonable place or mode of living and the wife must conform thereto. State *v.* Flower, 27 Idaho, 223, 147 Pac. Rep. 786.

[74] Id.; Greene, 10 Pick. 415; and see Yelverton *v.* Yelverton, 1 Sw. & Tr. 574, 585; Parsons *v.* City of Bangor, 61 Me. 461, APPLETON, J.

Where the domicile of matrimony is in a certain place, and the husband abandons the wife, the domicile of the latter continues in that place until a new domicile has been acquired by her elsewhere. Hibbert *v.* Hibbert, 72 N. J. Eq. 778, 65 Atl. Rep. 1028.

A minor who lives with his father until he reaches his majority, and thereafter wanders without a fixed abode, will be regarded as domiciled at his father's residence in the absence of change or intention to change. Rexroth *v.* Schein, 206 Ill. 80, 69 N. E. Rep. 240.

The general rule is that in the absence of a decree of separation or divorce, the legal domicile of a wife follows that of her husband. The mere fact of their living apart does not affect the question. Whiting *v.* Shipley, 127 Md. 113, 96 Atl. Rep. 285.

[75] Ludlam *v.* Ludlam, 26 N. Y. 356, 371; Guier *v.* O'Donnell, 1 Binn. 352, n.; Forbes *v.* Forbes, Kay, 353.

The domicile of the father establishes the domicile of his minor children. Upon the death of the father, the domicile of the mother fixes that of the children. In re McCoun, 96 Kan. 314, 150 Pac. Rep. 516.

[76] Brown *v.* Lynch, 2 Bradf. 214; and see Ryall *v.* Kennedy, 40 N. Y. Super. Ct. (J. & S.) 347 (aff'd in 67 N. Y. 386), and cases cited.

[77] Whart. Confl. of L., § 37.

[78] Id., § 39.

[79] Brewer *v.* Linnæus, 36 Me. 428. But compare Ford *v.* Hart, L. R. 9 C. P. 273, s. c., 9 Moak's Eng. 400; Yelverton *v.* Yelverton, 1 Sw. & Tr. 574.

A soldier who marries while en-

where he most usually resorted for board in the intervals of his return.[80]

55. Change of Domicile.

Domicile once shown, whether it be the original or an acquired one,[81] is presumed by the law to have continued

listed and maintains an apartment for himself and wife near the post where he is stationed, does not thereby acquire a domicile. Ex parte White, 228 Fed. Rep. 88.

[80] So held of the residence of a fisherman living in his boat at sea. Boothbay *v.* Wiscasset, 3 Greenl. (Me.) 354.

Where the statute undertakes to fix a residence at all, it makes the criterion where the party sleeps, and not where he takes his meals. Paul *v.* State, 49 Tex. Cr. 20, 90 S. W. Rep. 171.

[81] Opinion of the judges, 9 Metc. 587, 589.

A domicile once gained remains until a new one is acquired. A man cannot have two domiciles at the same time. In re Titterington, 130 Iowa, 356, 106 N. W. Rep. 761.

A domicile once established will continue until both residence in a new locality and intent to make the latter the domicile concur. Green *v.* Simon, 17 Ind. App. 360, 46 N. E. Rep. 693; Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. Rep. 805; McCollem *v.* White, 23 Ind. 43; Borland *v.* Boston, 132 Mass. 89, 42 Am. St. Rep. 424; Viles *v.* Waltham, 157 Mass. 542, 32 N. E. Rep. 901, 34 Am. St. Rep. 311; People *v.* Moir, 207 Ill. 180, 69 N. E. Rep. 905, 99 Am. St. Rep. 205; Price *v.* Price, 156 Pa. 617, 27 Atl. Rep. 291; Plant *v.* Harrison, 36 N. Y. Misc. 649, 74 N. Y. Supp. 411; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Desmare *v.* United States, 93 U. S. 605, 23 L. ed. 959.

Mere intention to change one's domicile without proof of other facts, such as residence in the new place, with which such intention can be connected, is not enough. Palmer *v.* Hampden, 182 Mass. 511, 65 N. E. Rep. 817.

On a change of domicile from one State to another, citizenship may depend upon the intention of the individual, but this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject. Collins *v.* Ashland, 112 Fed. Rep. 175.

A once established domicile, either of origin or of choice, is presumed to be permanent, in the absence of proofs to the contrary. Matter of Morgan, 159 N. Y. Supp. 105, 95 Misc. 451.

Domicile once acquired is not forfeited by absence on business of the State or of the United States. Stevens *v.* Allen, 139 La. 658, 71 So. Rep. 936, L. R. A. 1916, E. 1115.

The law does not recognize the

until a new domicile is shown to be acquired. Merely abandoning the old abode, though without intent to return, does not divest the domicile.[82] The burden is on him who alleges a change of domicile to prove the change.[83] To constitute the new domicile two things are indispensable: 1, residence in the new locality;[84] and, 2, the intention to remain

possibility of a man's being without a domicile. Having once had a domicile, unless he has gained a new one elsewhere, he retains the domicile of origin. Matter of Rooney, 172 App. Div. 274, 159 N. Y. Supp. 132.

[82] Somerville *v.* Sommerville, 5 Ves. 756, 787; Jennison *v.* Hapgood, 10 Pick. 77; First Nat'l Bank *v.* Balcom, 35 Conn. 537; Mitchell *v.* U. S., 21 Wall. 350. Unless it be in a foreign jurisdiction; The Venus, 8 Cranch, 253; or the intent be to resume domicile of birth. Reed's Appeal, 71 Penn. St. 381, 383. The better opinion is that the principle that original domicile easily reverts, is practically confined to cases where the national character and the original domicile are the same, and does not apply where both domiciles are under one national sovereignty. First Nat. Bank *v.* Balcom, 35 Conn. 357. Compare Mann *v.* Clark, 33 Vt. 55, 61. The intention to abandon, though formed after leaving, effects abandonment. Hampden *v.* Levant, 59 Me. 559, APPLETON, J.

Before the law will artificially establish the place of birth as a domicile, based upon the abandonment of the last domicile without the intentional adoption of a new one, the evidence should clearly establish the facts on which the unusual presumption is based. Hibbert *v.* Hibbert, 72 N. J. Eq. 778, 65 Atl. 1028.

[83] Crookenden *v.* Fuller, 1 Sw. & Tr. 441; Hodgson *v.* De Buchesne, 12 Moore's P. C. 288; Mitchell *v.* U. S. (above); Desmare *v.* U. S., 93 U. S. (3 Otto) 605; People *v.* Winston, 25 Misc. (N. Y.) 676.

The burden of proof is upon the party who asserts the change. Caldwell *v.* Pollak, 91 Ala. 353, 8 So. Rep. 546; Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. R. 511; Pickering *v.* Winch, 48 Ore. 500, 87 Pac. Rep. 763, 9 L. R. A. N. S. 1159; Eisele *v.* Oddie, 128 Fed. Rep. 941.

A residence once acquired is presumed to continue until another one is acquired, and the burden of proof is upon the person who has made the change to show it and the acquisition of the new residence. Cover *v.* Hatten, 136 Iowa, 63, 113 N. W. Rep. 470.

[84] There are, however, cases where the establishment of a home or wife at a place, with intent to go and abide there permanently, have been held to fix the domicile there before actual residence commenced. Bangs *v.* Brewster, 111 Mass. 382; and see Peterson *v.*

there, either permanently or for an indefinite time.[85] The change cannot be made except *facto et animo*. Both are alike

Chemical Bk., 32 N. Y. 21, 23, affi'g 2 Robt. 605. Being *in itinere* to the intended new domicile may be enough. Forbes *v.* Forbes, Kay, 341. But mere intention to change is not enough. Guier *v.* O'Donnell, 1 Binn. 352, note. If it sufficiently appears that the necessary intent to remain existed, the right of domicile is acquired by ever so brief a residence. The Venus, 8 Cranch, 253, 279. But the force of residence as evidence of domicile is increased by the length of time during which it has continued. Stanley *v.* Bernes, 2 Hagg. Ecc. 437. Under what circumstances "locating" with intent to return for family, effects a change before they are brought, compare Burnham *v.* Rangeley, 1 Woodb. & M. 7; State *v.* Hallett, 8 Ala. 159; Smith *v.* Croom, 7 Fla. 81, 158.

The mere intention to acquire a new domicile, unaccompanied by an actual removal, avails nothing; neither does the fact of removal, without the intention, avail. The *factum et animus* must both exist together. Smith *v.* Croom, 7 Fla. 81; Beekman *v.* Beekman, 53 Fla. 858, 43 So. 923.

To constitute a change of domicile three things are essential: (1) actual residence in the other or new place; (2) an intention to abandon the old domicile; and (3) an intention of acquiring a new one at the other place. Denny *v.* Sumner County, 134 Tenn. 468, 184 S. W. Rep. 14, L. R. A. 1917 A. 285.

[85] Jennison *v.* Hapgood, 10 Pick. 77. As to intent to return in the indefinite future, see Bruce, 2 Bos. & P. 230, n.; Ross *v.* Ross, 103 Mass. 575.

A change in the domicile of a person cannot be effected by an intention in the mind to make this change, unless it is accompanied by an actual change in the place of abode. Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. Rep. 827; Foss *v.* Foss, 58 N. H. 283; Murphy *v.* Hunt, 75 Ala. 438. A change of domicile is consummated when one leaves the State where he has hitherto resided, avowing his intention not to return, and enters another State intending to settle there permanently. Pyle *v.* Brenneman, 122 Fed. Rep. 788, 60 Cir. Ct. App. 409; Bradley *v.* Lowry, 17 S. C. Eq. 1, 39 Am. Dec. 142; Stevens *v.* Larwill, 110 Mo. App. 140, 84 S. W. Rep. 113.

Whether a change of residence was effected in any case depends upon the intention with which the removal from the former domicile was made. Hall *v.* Schoenecke, 128 Mo. 661, 31 S. W. Rep. 97.

There must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile, in order to effect a change of domicile. Dupuy *v.* Wurtz, 53 N. Y. 556.

Going into another State to

necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. But the fact of fixing a residence in an-

transact some business with the intention to return does not change one's domicile. Horne *v.* McRae, 53 S. C. 51, 30 S. E. Rep. 701.

A change of domicile is accomplished by a change of residence to a new place, combined with the *animus manendi*. Marks *v.* Germania Savings Bk., 110 La. 659, 34 So. Rep. 725.

A farmer who moves his family and party of his household to a new locality in order that his children may have the advantage of the schools there, but retains his old home and continues to work the farm, and intends to bring his family back after they are through schooling, does not change his domicile. Montgomery *v.* City of Lebanon, 111 Ky. 646, 64 S. W. Rep. 509, 23 Ky. Law Rep. 891, 54 L. R. A. 914.

Fact and intent must concur in order that one may gain a residence or domicile in another jurisdiction from that of his original domicile. Shirk *v.* Monmouth Township Board, 137 Iowa, 230, 114 N. W. Rep. 884.

One who goes to another place for the temporary purpose of getting medical care and treatment and not with the intention of making the new place his permanent future residence, does not change his domicile. People *v.* Moirs, 207 Ill. 180, 69 N. E. Rep. 905, 99 Am. St. Rep. 205.

A change of domicile is consummated when one leaves the State where he has hitherto resided, avowing his intention not to return, and enters another State intending to permanently settle there. Pyle *v.* Brenneman, 122 Fed. Rep. 788, 60 Cir. Ct. App. 409; Bradley *v.* Lowry, 17 S. C. Eq. 1, 39 Am. Dec. 142; Stevens *v.* Larwill, 110 Mo. App. 140, 84 S. W. Rep. 113.

If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile notwithstanding he may entertain a floating intention to return at some future period. Gilbert *v.* David, 235 U. S. 561, 35 S. C. 164, 59 L. ed. 360 (quoting Story on Conflict of Laws, 7th ed., § 46, page 41). See also Baker *v.* Baker, 162 Ky. 683, 173 S. E. Rep. 109, L. R. A. 1917 C. 171; Saunders *v.* City of Flemingsburg, 163 Ky. 680, 174 S. W. Rep. 51.

To enable one to change his domicile or acquire a new one, there must be (1) freedom of choice; (2) bodily presence in the chosen locality; (3) an intention to remain there permanently. But an insane person is incapable of exercising either choice or intention and cannot legally change his domicile. He will retain the domicile he possessed before he became insane. Sumrall *v.* Com., 162 Ky. 658, 172 S. W. Rep. 1057.

other place, from motives of health or business of a permanent nature, may raise a legal presumption of intent to make the change.[86] On the other hand, the intent to change will not be presumed if it would have been illegal.[87]

The domicile of *a minor* cannot be changed by its own act;[88] but an actual change of residence by the guardian with the ward, made in good faith, may have the effect to change the ward's domicile.[89] If a minor, on coming of age, leaves

[86] Elbers *v.* U. S. Ins. Co., 16 Johns. 128.

Where a person leaves his domicile and definitely abandons the hope or expectation of returning to it as his home, and continues a wanderer with no new domicile adopted by him either in fact or intent, then his domicile of origin—his birthplace—might become his legal domicile. Hibbert *v.* Hibbert, 72 N. J. Eq. 778, 65 Atl. Rep. 1028.

The fact that an invalid is not able to return to his place of residence for a long time does not *per se* negative an established domicile of origin and choice. Matter of Kane, 156 N. Y. Supp. 1004, 93 Misc. 406.

Although a party may abandon his domicile, it will still remain his legal residence until he takes up an actual residence elsewhere. In determining whether or not a new domicile has been acquired both the fact and the intent must be present. A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time does not constitute a change. Saunders *v.* Flemingsberg, 163 Ky. 680, 174 S. W. Rep. 51.

[87] Mitchell *v.* U. S. (above).

[88] Forbes *v.* Forbes, Kay, 353. *It seems* not even after emancipation. Trammell *v.* Trammell, 20 Tex. 406, 417.

The last domicile of the deceased father fixes that place as the domicile of the son until he reaches his majority, unless it can be shown that the mother lives elsewhere since the death of the father, in which case the son's domicile follows that of the mother. Young *v.* Hiner, 72 Ark. 299, 79 S. W. Rep. 1062.

Under the laws of Florida, the domicile of the father is the domicile of his minor children, male and female, until they become twenty-one years of age, and such minors are incapable of making a domicile in Florida unless the father makes Florida his domicile.

When a female under the age of twenty-one, whose father is domiciled in Ohio, marries a man domiciled in Florida, she becomes a resident of Florida as soon as she is married. Beekman *v.* Beekman, 53 Fla. 858, 43 So. Rep. 923.

[89] Wheeler *v.* Hollis, 19 Tex. 522, and cases cited; and see Brown *v.* Lynch, 2 Bradf. 214. Otherwise, if made fraudulently for the guard-

the parental domicile, he may acquire a domicile, as any other person, by taking up a residence,[90] without intent to return otherwise than on visits. But if he retains family ties, and resorts to the old home in vacation, he does not lose his domicile there by his absence and residence at college.[91] A *wife* after divorce, either absolute or by way of separation, may change her domicile by her own act.[92] A

ian's benefit. Trammell *v.* Trammell, 20 Tex. 406. The domicile of a person *non compos* may be changed, where it does not affect succession, by the committee or guardian. Holyoke *v.* Haskins, 5 Pick. (Mass.) 20.

The domicile of an infant follows that of the father, notwithstanding the separation of the parents and promises by the father to return the infant to the mother at her request. Lanning *v.* Gregory (Tex. Civ. App.), 101 S. W. Rep. 484, 100 Tex. 310, 99 S. W. Rep. 542, 123 Am. St. Rep. 809, 10 L. R. A. (N. S.) 690.

The domicile of an infant follows that of the father, and after the latter's death, it generally follows that of the mother. Lamar *v.* Micou, 112 U. S. 452, 5 Sup. Ct. 857, 28 L. ed. 751; Modern Woodmen of America *v.* Hester, 66 Kan. 129, 71 Pac. Rep. 297; Boyle *v.* Griffin, 84 Miss. 41, 36 So. Rep. 141; In re Russell, 64 N. J. Eq. 313, 53 Atl. Rep. 169.

After a decree of divorce giving the mother the exclusive custody of the infant, the domicile of the latter follows that of the mother. Fox *v.* Hicks, 81 Minn. 197, 83 N. W. Rep. 538, 50 L. R. A. 663.

The domicile of a child of divorced parents, who has been placed in the custody of the mother, follows that of the mother. Toledo Traction Co. *v.* Cameron, 69 C. C. A. 28, 137 Fed. Rep. 48.

[90] Hart *v.* Lindsey, 17 N. H. 235.

[91] Granby *v.* Amherst, 7 Mass. 1, 5. And see Putnam *v.* Johnson, 10 Mass. 488. An intent to change domicile is not so readily presumed from residence at a public institution for purposes of education, as from a like removal for ordinary purposes. Opin. of the Judges, 5 Metc. 590.

A man must have a habitation or domicile somewhere and he can have only one at a time. In order to lose one he must acquire another, but the mere attendance at an institution of learning for the sole purpose of acquiring an education is not of itself sufficient to establish such a status. Seibold *v.* Wahl, 164 Wis. 82, 159 N. W. Rep. 546, Ann. Cas. 1917, C. 400.

[92] Barber *v.* Barber, 21 How. (U. S.) 582.

The domicile of a child whose parents have been divorced follows that of the parent in whose custody the court has placed it. Toledo Traction Co. *v.* Cameron, 69 C. C. A. 28, 137 Fed. Rep. 48.

Where parents are living separ-

soldier or sailor does not lose his domicile by absence in actual service.[93] Naturalization is very strong, but perhaps not conclusive evidence of change of domicile.[94] Where the domiciles of original selection are both domestic, the presumption of revival of intention to return to the domicile of origin does not apply.[95]

rately under a decree of separation, the court may order the children to be kept within the State or brought within it, even after they have been placed in the custody of the mother, and she has changed her domicile to another State, and taken the children with her. Dixon *v.* Dixon, 72 N. J. Eq. 588, 66 Atl. Rep. 597.

A husband and wife may have separate domiciles. Hewitt *v.* Weatherby, 57 Mo. 276; Exchange Bank *v.* Cooper, 40 Mo. 169.

A wife who has been deserted by her husband may establish her own independent domicile. Ditson *v.* Ditson, 4 R. I. 87; Atherton *v.* Atherton, 181 U. S. 155, 21 Sup. Ct. Rep. 544, 45 L. ed. 794.

A married woman residing in a sister State may for cause acquire a domicile apart from her husband by removing to this State with the intention of permanently making this her home and actually residing here. And thereafter she may obtain a divorce from him. Shute *v.* Sargent, 67 N. H. 305, 36 Atl. Rep. 282.

Where the husband is guilty of misconduct, the wife must, to avoid condonation, establish a separate domicile of her own. Ditson *v.* Ditson, 4 R. I. 87.

[93] Brewer *v.* Linnæus, 36 Me. 428, s. p., per SHAW, Ch. J., Sears *v.* City of Boston, 1 Metc. (Mass.) 250, 252.

Where one whose domicile is in a particular State, enters the United States Army and remains in it until his retirement after many years of continuous service, he retains the domicile of origin and his wife whom he marries in another State has no other domicile than his, and save for just cause can acquire no other. Stevens *v.* Allen, 139 La. 658, 71 So. Rep. 936, L. R. A. 1916, E. 1115.

[94] See Moore *v.* Darrall, 4 Hagg. 53.

A naturalized citizen who continuously resides abroad may not be a citizen of or have a domicile in any State. Stein *v.* Fleischmann Co., 237 Fed. Rep. 679.

[95] Succession of Steers, 47 La. Ann. 1551, 18 So. Rep. 503.

The letters of a decedent referring to his birthplace as his domicile and expressing his intention to return there and make it his home, and his returning there shortly before his death, and dying there, all go to prove that it was his domicile. Thorn *v.* Thorn, 28 App. D. C. 120.

56. The Intent.

Usually the intent to which the evidence is to be directed is not intent to secure domicile, as a legal result, but to take up continuous residence, as a matter of fact. In some cases, however, especially where two residences are shown, there may have been an intent that one should be made the domicile to the exclusion of the other. Intent of either kind is competent evidence. On the one hand it is enough to show the residence as a fact, and the intent to abide, without showing that the person had any intention or even knowledge as to the legal consequence in fixing domicile;[96] on the other hand, the intelligent intention to retain the existing domicile as the legal habitat, while making a change of residence which it was apprehended might be permanent, may

[96] This is the American rule. The English courts seem not agreed. In Moorhouse *v.* Lord, 10 Ho. of L. 282, 285, 292, it was held (in case of a national change) that the intent must be intent to change the domicile as distinguished from the residence. In Douglas *v.* Douglas, 41 L. J. Eq. 74, 88, this was said not to be the English law, and the rule was laid down that the evidence of intention may be either express, or such as to lead to the inference that, if the question had been formally submitted to the party whose domicile is in dispute, he would have expressed his wish in favor of a change; that such an intention must be either shown to have actually existed in the mind, or it must appear that it was reasonably certain it would have been formed or expressed if the question had arisen in a form requiring a deliberate and solemn determination. Id. 89.

The mere intention to acquire a new domicile without the fact of an actual removal avails nothing; neither does the fact of an actual removal without such intention. This intent is as essential as the fact of actual residence. A mere change in the place of abode, though more than temporary, is not sufficient unless the intent concur. Denny *v.* Sumner County, 134 Tenn. 468, 184 S. W. Rep. 14, L. R. A. 1917, A. 285.

Domicile is more than a mere matter of intention. It is a man's permanent home as distinguished from transitory residences. A person cannot, simply by chosing and intending in good faith to make a certain place his domicile, effect that result. The intent to change domicile is ineffective unless supported by adequate facts. In re Sedgwick, 223 Fed. Rep. 655.

be effectual to prevent a change of domicile.[97] But where the facts show all the preponderating indicia of domicile

[97] Dupuy *v.* Wurtz, 53 N. Y. 556, affi'g 64 Barb. 156.

The place where one has established his home, and where he is habitually present, and to which, when he departs, he intends to return, is his domicile. State *v.* Superior School Dist., 55 Neb. 317, 75 N. W. Rep. 855.

A domicile, once acquired, remains until a new one is acquired, *facto et animo.* Simmons' Succ., 109 La. 1095, 34 So. Rep. 101; McLean *v.* Janin, 45 La. Ann. 664, 12 So. Rep. 747; Ballard *v.* Pulesston, 113 La. 235, 36 So. Rep. 951; Erwin *v.* Benton, 120 Ky. 536, 87 S. W. Rep. 291, 27 Ky. Law Rep. 909, 9 Ann. Cas. 264.

Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude, or to a subject governed by choice. A person may select and make his own domicile and no one may let or hinder. He may elect between his winter and summer residence and make a domicile of either. The right to choose implies the right to declare one's choice, formally or informally, as he prefers, and even for the sole purpose of making evidence to prove what his choice was. Such declarations are not self-serving in an improper sense, unless they are made with intent to deceive. If they are false and made for a sinister purpose, they will meet the fate that falsehood always meets in courts of justice when discovered by the triers of fact. In re Newcomb, 192 N. Y. 238, 84 N. E. Rep. 950, aff'd, 122 App. Div. 920, 107 N. Y. Supp. 1139.

Temporary absence from the State of one domiciled there will not change the residence, unless to the factum of residence elsewhere be added the *animus manendi.* Watkinson *v.* Watkinson, 68 N. J. Eq. 632, 60 Atl. Rep. 931, 69 L. R. A. 397, 6 Ann. Cas. 326, rev'd 67 N. J. Eq. 142, 58 Atl. Rep. 384.

Without an intention to change, one who goes to another State to do business and establishes a permanent business office there does not change his domicile. State *v.* Snyder, 182 Mo. 462, 82 S. W. Rep. 12.

One who changes his residence solely for the purpose of fulfilling a business contract, with no intention of remaining permanently in the new place, does not change his domicile. Knight *v.* Bond, 112 Ga. 828, 38 S. E. Rep. 206.

A man who moves his family to rented quarters in another county in order that his children may attend school does not change his domicile. Peacock *v.* Collins, 110 Ga. 281, 34 S. E. Rep. 611.

The fact that a person lived at various hotels in a city instead of at a private dwelling house or an apartment, did not preclude him from regarding that city as his home, and where he became the owner of a house in another State

in one of two residences, the mere election of the person to have the other considered as the domicile cannot suffice.[98]

57. Evidence of Residence and of Intent.

A witness may testify to the fact of a person's residence; and even negatively, by showing that the witness had adequate acquaintance with the place, and that the person could not, in his opinion, have lived there without the witness' knowing it.[99] A person, whether a party to the suit or

and went there on several occasions, afterwards stating that he intended to make it his home, but never subsequently visiting it, he did not acquire a domicile in such State. Matter of Rutherford, 88 Misc. 414, 150 N. Y. Supp. 734.

[98] Gilman *v.* Gilman, 52 Me. 165; Holmes *v.* Greene, 7 Gray, 299, 301; Butler *v.* Farnsworth, 4 Wash. C. Ct. 101.

Although the plaintiff had not made up her mind definitely one way or the other as to her future abode, she came from Connecticut to New York, because she thought she might earn a better living in New York, and also because she wanted to bring this suit in New York. She came to New York with the intention of staying in New York, and it would have been error to dismiss the complaint on the ground of non-residence. Bump *v.* N. Y., New Haven, etc., R. R. Co., 38 N. Y. App. Div. 60, 55 N. Y. Supp. 962, aff'd in 165 N. Y. 636, 59 N. E. Rep. 1119.

A man cannot have two legal residences at the same time, and, for the purpose of voting, he cannot have a domiciliary residence separate and apart from the home which he provides for his family and which he habitually uses as his own habitation with no intention of departing therefrom except for temporary purposes. He cannot actually live in one locality for the sake of the comfort, convenience and social standing of his family and maintain a wholly distinct political residence in another place. Matter of Rooney, 172 App. Div. 274, 159 N. Y. Supp. 132.

[99] Cavendish *v.* Troy, 41 Vt. 108. It was also held that to prove his presence, ancient documents of other persons, showing his business and litigation there, were competent.

The testimony of the plaintiff that the defendant owed her money for board and lodging, that at the time he left her house, taking all his clothes, and saying that he expected to leave town and accept a position on a railroad in the West, and that she has not seen him since, is sufficient to support a finding that the defendant is a non-resident. Kelson *v.* Detroit, etc., Ry. Co., 146 Mich. 563, 109 N. W. Rep. 1057, 10 Ann. Cas. 500.

not, may testify what was his own intent in taking up his residence or removing,[1] but against his testimony all material circumstances may be weighed.[2]

Evidence of *declarations* manifesting intent, made by the person before suit, and accompanying the residence or the acts of change, is competent, whether the person is living [3]

[1] Fisk *v.* Chester, 8 Gray (Mass.), 50; Hulett *v.* Hulett, 37 Vt. 581, 586; Cushing *v.* Friendship, 89 Me. 525, 530, 36 Atl. Rep. 1001.

Intention may be proved by one's own declarations. In re Newman, 124 Cal. 688, 57 Pac. Rep. 686, 45 L. R. A. 780.

The testimony of the person whose domicile is in question will be controlling, unless negatived by his acts or declarations proven in the case. Collins *v.* Ashland, 112 Fed. Rep. 175.

The declarations of witnesses as to a certain town being their home are not proper evidence to prove their residence. Griffin *v.* Wall, 32 Ala. 149; Ham *v.* State, 156 Ala. 645, 47 So. Rep. 126.

[2] Wilson *v.* Wilson, L. R. 2 P. & D. 435, 444, s. c., 4 Moak's Eng. 663, 671.

One does not lose his status as an actual *bona fide* resident of a place, either because he finds it necessary to establish his family elsewhere, or does not in the absence of his family maintain a domestic establishment in such place. The question is one largely of intention, and the intention of a person, in that respect, is determined by his expressions thereof, at times not suspicious, and his testimony considered in connection with his conduct and the circumstances of his life. Caufield *v.* Cravens, 138 La. 283, 70 So. Rep. 226.

A person's own testimony or declared intention as to domicile cannot have a controlling effect. Where there is a conflict between a person's intention and his conduct, his conduct will control. Saunders *v.* Flemingsburg, 163 Ky. 680, 174 S. W. Rep. 51.

[3] Kilburn *v.* Bennett, 3 Metc. (Mass.) 199; Burgess *v.* Clark, 3 Ind. 250.

The question of a person's place of residence depends upon his intention, as evidenced by his acts and declarations. Barfield *v.* Coker, 73 S. C. 181, 53 S. E. Rep. 170.

Declarations of intention not made in connection with the doing of any act, may be received in evidence on the question of domicile, on the ground that intention as to residence is an independent fact, in itself material to the issue and provable as such. If not treated as a part of the *res gestæ* of an existing status, the admission of such declaration is justified. Wilbur *v.* Town of Calais, 90 Vt. 335, 98 Atl. Rep. 913.

or not [4] at the time of trial, if the intent related to the present or future,[5] but declarations of the intent of a former residence or removal are not competent.[6]

A written declaration, although more reliable than mere words in point of preservation, may or may not be more significant of intent in proportion as it is spontaneous and deliberate.[7] Thus, an averment in pleading,[8] or a description in a will,[9] deed or contract,[10] being formal acts drawn usually

[4] Brodie *v.* Brodie, 2 Sw. & Tr. 259, 262; Ennis *v.* Smith, 14 How. (U. S.) 400, 421.

To constitute domicile, two things must concur—residence and intention to make it the home of the party. The declarations of a deceased in respect to his home and his intention to return to it outweigh the fact of voting in a primary, or being candidate for an office, as indicating his real purpose. Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. Rep. 423, 89 Am. St. Rep. 952.

[5] A letter written a year after leaving, and expressing intent never to return, with business instructions based on it, is competent on the question of previous change. Thorndike *v.* City of Boston, 1 Metc. 242, 247.

[6] Salem *v.* Lynn, 13 Metc. 544. But this limit is not to be too strictly applied. In depends perhaps on the existence of interest. See also Crookenden *v.* Fuller, 1 Sw. & Tr. 450. Declarations of a person accompanying a change of his abiding place are competent to explain the change as part of the *res gestæ*. They are also often admissible as evidence on the broader ground that they tend to show his intention to make the change. If they indicate the state of mind of the declarant, they have a legitimate tendency to show his intention. Viles *v.* City of Waltham, 157 Mass. 542, 34 Am. St. Rep. 311, 32 N. E. Rep. 901.

[7] See Dupuy *v.* Wurtz, 53 N. Y. 556, 561, affi'g 64 Barb. 156.

[8] Hegeman *v.* Fox, 31 Barb. 475, 478.

[9] Gilman *v.* Gilman, 52 Me. 165. Compare Ennis *v.* Smith, 14 How. (U. S.) 400, 421.

Where a man born in a certain place had resided there continuously for eighty-five years and, when his condition was apparently impaired both physically and mentally, had married and gone to his wife's home in another State where he afterwards made a will in which he was described as of the latter place, it was held that he had not then that degree of mental strength and capacity to form and carry out a purpose to change his domicile. Matter of Horton, 175 App. Div. 447, 161 N. Y. Supp. 1071.

[10] Lougee *v.* Washburn, 16 N. H. 134. A declaration of residence, in a conveyance, is not conclusive, unless the domicile is one of the

by another; or an entry in a hotel register,[11] being usually a careless act,—though each competent, are entitled to little weight.

Acts are usually more cogent evidence of intent than declarations.[12] The law, in the absence of direct evidence of in-

causes of the contract. Tillman *v.* Mosely, 14 La. Ann. Rep. 721.

[11] Gilman *v.* Gilman (above).

Where one, who travels a great deal for several years, repeatedly registers his name at hotels as of New York it is impossible to avoid the conclusion that his fixed intention was to make New York his domicile. Marks *v.* Germania Savings Bk., 110 La. 659, 34 So. Rep. 725.

Evidence that a person signed his name in an hotel register as being from a certain city, is admissible on the question of his domicile. Matter of Rutherford, 88 Misc. 414, 150 N. Y. Supp. 734.

[12] Dupuy *v.* Wurtz (above). The "intent is manifested by what he does, and by what he says when doing, and sometimes as significantly by what he omits to do or to say." THOMAS, J., in Cole *v.* Cheshire, 1 Gray, 444. Ashland *v.* Catlettsburg, 172 Ky. 265, 189 S. W. Rep. 454.

To constitute a domicile, only two elements are necessary—one of the act, and the other of the intention. Tiller *v.* Abernathy, 37 Mo. 196; Stevens *v.* Larwill, 110 Mo. App. 140, 84 S. W. Rep. 113.

Intention may be determined by the general acts and conduct and expressions of intention, but such expressions alone will not control the ultimate fact in issue if they are inconsistent with the acts and general conduct of the person making them. Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. Rep. 805.

One's own declarations as to his intent, particularly when made after he has become appreciative of the consequences of a change of domicile, are not controlling. His intentions are to be deduced from his acts and from a consideration of the circumstances under which he acted. Canadian Pacific Ry. Co. *v.* Wenham, 146 Fed. Rep. 207.

Declarations of the intention with which an act is done may illustrate the character of the act as a part of the *res gestæ* (Wright *v.* Boston, 126 Mass. 161) but are entitled to but little, if any, consideration when made either as the narration of a past act, or as indicating the purpose which with an act is to be done in the future. The residence of a person will not be affected by such declaration until the intention is carried into effect by the completed act. Sheehan *v.* Scott, 145 Cal. 684, 79 Pac. Rep. 350.

The place of legal residence is fixed both by intention and acts, and where both these concur, there is little trouble in determining the residence; but in other

tent, presumes that a man did not intend to abandon his family; hence the act of leaving one's family at the pre-existing domicile, or of breaking up the establishment and removing the family to the new abode, and leaving them there while returning, raises a strong presumption of intent to retain, in the first case the old,[13] in the second case the new residence.[14] Evidence that the person voted,[15] or at-

cases it is difficult to reconcile the intention with the acts, and when such a situation arises, the law will from the facts and circumstances, fix the legal residence of the party. Baker *v.* Baker, 162 Ky. 683, 173 S. W. Rep. 109, L. R. A. 1917, C. 171.

[13] Jennison *v.* Hapgood, 10 Pick. 99.

A man's residence is not necessarily controlled by the residence of his family. McCord *v.* Rosene, 39 Wash. 1, 80 Pac. Rep. 793; Cochrane *v.* Boston, 4 Allen, 177; Schlawig *v.* De Peyster, 83 Iowa, 323, 49 N. W. Rep. 843, 13 L. R. A. 785, 32 Am. St. Rep. 308; Thompson *v.* State, 28 Ala. 12; Exchange Bank *v.* Cooper, 40 Mo. 169.

A man can make his residence in a hotel, separate and apart from his family. McCord *v.* Rosene, 39 Wash. 1, 80 Pac. Rep. 793.

One who was born and who lived in New Jersey for forty-five years and then for the last ten years of his life came to New York every winter, living at a boarding house for a few months, returning each time to his home in New Jersey and having no property in New York, nor reserving any quarters there, was domiciled in New Jersey. Matter of White, 116 App. Div. 183, 101 N. Y. Supp. 551.

To gain a residence in a place, a person must not only go there, but must go with the intention of making it his home for a more or less definite time, and where one after declaring such place his residence neither moved his family there, nor made any preparations to do so, he did not acquire a legal residence. Bartlett *v.* New Boston, 77 N. H. 476, 93 Atl. Rep. 796, Ann. Cas. 1917, B. 777.

[14] Greene *v.* Greene, 11 Pick. 410.

The issuing of letters of administration is no adjudication that the deceased was domiciled within the jurisdiction of the court issuing the letters. He may have had property there. Thormann *v.* Frame, 176 U. S. 350, 20 Super. Ct. 446, 44 L. ed. 500, aff'g 102 Wis. 653, 79 N. W. Rep. 39.

[15] Smith *v.* Croom, 7 Fla. 81, 158; Caufield *v.* Cravens, 138 La. 283, 70 So. Rep. 226; Hurst *v.* Flemingsburg, 172 Ky. 127, 188 S. W. Rep. 1085.

If a married man has different places of residence at different times of the year, that will be deemed his domicile which he himself selects or describes or deems

tempted to vote,[16] or that he refrained from voting,[17] or that he voted elsewhere,[18] or that he paid [19] or did not pay [20] taxes as a resident, to the State or local treasury where he was, or that he paid such taxes elsewhere,[21] though not direct evidence of domicile, is competent on the question of residence, which is one of the elements in proof of domicile. But such facts are slight evidence, taken into consideration because of the want of direct or decisive proof; and their competency depends on their manifesting his own intent or opinion as to his residence, not that of the officers of taxation or election.[22]

to be his home, or which appears to be the center of his affairs, or where he votes or exercises the right and duties of a citizen. Northern *v.* McCaw, 189 Mo. App. 362, 175 S. W. Rep. 317.

The acts of town authorities in registering a person as a voter and assessing a poll tax against him, are not judicial determinations establishing his status. They are evidence of his domicile but are not conclusive. In re Sedgwick, 223 Fed. Rep. 655.

[16] Guier *v.* O'Donnell, 1 Binn. 354 n.

[17] Hitt *v.* Crosby, 26 How. Pr. 413.

Declarations as to one's domicile, the exercise of political rights, payment of personal taxes, a place of residence or of business, are the indicia ordinarily resorted to to prove domicile. Tuttle *v.* Wood, 115 Iowa, 507, 88 N. W. Rep. 1056.

[18] Lincoln *v.* Hapgood, 11 Mass. 350.

[19] See Mann *v.* Clark, 33 Vt. 61. Merely owning property in another State and paying taxes on it, and declaring from time to time the intention of going there to make a home, will not change one's domicile. In re Dalrymple, 215 Pa. 367, 64 Atl. Rep. 554.

[20] Hitt *v.* Crosby, 26 How. Pr. 413.

[21] If the law of the foreign State does not, like the law of the *forum*, impose taxes on personalty merely upon residence, it is for the adverse party to show the law in order to render evidence of having paid taxes in the other State incompetent. Hulett *v.* Hulett, 37 Vt. 581, 587.

[22] Thus, if the registering officers have no authority to register a voter except on his application, their testimony, that they decided him to be an inhabitant and registered him, is incompetent without evidence that he requested it. Fisk *v.* Chester, 8 Gray (Mass.), 506.

Neither voting nor registration as a voter is conclusive on the question of domicile. Easterly *v.* Goodwin, 35 Conn. 279, 95 Am. Dec.

Evidence of acts is not confined to acts contemporaneous with the alleged change. After proof of actual removal or of declarations of intent to remove, it is competent to prove the character of the sojourn at either place.[23]

It is said that intent must be proved by very satisfactory evidence,[24] especially when the change is to a foreign country,[25] but this requirement varies according to the transitory or settled habits of the person.

237; Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. Rep. 818; East Livermore *v.* Farmington, 74 Me. 154; Quinn *v.* Nevills, 7 Cal. App. 231, 93 Pac. Rep. 1055.

Where respective owners were required to list their personalty for taxation purposes, the fact that a person's property was not so listed, is inadmissible on the question of residence. Worsham *v.* Ligon, 144 Ga. 707, 87 S. E. Rep. 1025.

[23] See Wilson *v.* Terry, 11 Allen (Mass.), 206; Crawford *v.* Wilson, 4 Barb. 523. So, to show that a removal before suit brought was with intent to take up a domicile, evidence is competent that it was continued after so brought, and down to the time of trial; for these facts, although occurring pending the action, are competent as throwing light upon the character of the previous fact. Hulett *v.* Hulett, 37 Vt. 581, 585.

The place of residence being one of intention, an expression of such an intention can only be overcome by strong circumstances to the contrary. Northern *v.* McCaw, 189 Mo. App. 362, 175 S. W. Rep. 317.

[24] Donaldson *v.* McClure, 20 Scotch Sess. Cas., 2d ser. 307, 321, aff'd in 3 McQ. 852. The circumstances of residence, the establishment of a business place, the acquisition of a house for a residence, and the declaration of the party and the exercise of political rights, are usually relied upon to establish the *animus manendi*. Succession of Steers, 47 La. Ann. 1551, 18 So. Rep. 503.

In the absence of proof that a person otherwise qualified has acquired a residence elsewhere, he must be considered to be a resident of the parish where his work requires him to stay, where he was born, and where he has lived and voted; and it makes no difference that he has never had in said parish any other home than a boarding house, while he had had in another parish a home where he has kept his wife and children, whom he visited as often as he could. Estopinal *v.* Michel, 121 La. 879, 46 So. Rep. 907, 19 L. R. A. N. S. 759.

[25] Moorhouse *v.* Lord, 10 H. of L. 283.

IX. WILLS

58. Presumptions, and Burden of Proof as to Intestacy.

The law never presumes a will [26] in the absence of all evidence; and in trying the title of an heir, it is not necessary for him to show that his ancestor died intestate. The intestacy is presumed until the contrary appears.[27] And mere existence of a will being shown, the law does not presume that it was a will of real as well as of personal property.[28]

59. Domestic Will Proved by Producing Probate.

A will is put in evidence by showing it to have been duly proved [29] in the probate or other competent court within the

[26] Duke of Cumberland *v.* Graves, 9 Barb. 595, 606.

The right to dispose of property by will is not a natural right. It is one conferred and regulated by statute. Peace *v.* Edwards, 170 N. C. 64, 86 S. E. Rep. 807; Irwin *v.* Rogers, 91 Wash. 284, 157 Pac. Rep. 690, L. R. A. 1916, E. 1130; Alexander *v.* Johnston, 171 N. C. 468, 88 S. E. Rep. 785.

The will, in contemplation of law, is in effect at the instant of the death of the testator and is to be considered as if it bore date then. Dickinson *v.* Belden, 268 Ill. 105, 108 N. E. Rep. 1011.

[27] 3 Washb. R. P. 18 (37). Because it is the negative (Lyon *v.* Kain, 36 Ill. 368); and because the law entitles heirs to rest on the right of inheritance until a will is proved. Delafield *v.* Parish, 26 N. Y. 9.

The law favors that construction of a will which will prevent partial intestacy; but only when a contrary intention is not expressed. Nolan *v.* Nolan, 169 App. Div. 372, 151 N. Y. Supp. 355.

The presumption that a testator did not intend to die intestate as to any of his property, may be rebutted by the provisions of the will, or evidence to the contrary. Edwards *v.* Mudge, 186 Mich. 71, 152 N. W. Rep. 902.

[28] Duke of Cumberland *v.* Graves (above). The contrary held after probate, in Stevenson *v.* Huddleson, 13 B. Monr. (Ky.) 299.

[29] A copy of the decree of probate, not the mere certificate of the clerk that the will has been proved, is the proper evidence. Creasy *v.* Alverson, 43 Mo. 13. At common law, the will itself is the primary evidence as to lands; the probate the primary and exclusive evidence as to personalty.

A joint will contained in a single instrument is the will of each of the makers, and at the death of one may be probated as his will, and be again admitted to probate at the death of the other, as the

State; and the mode of due probate depends on the statutes of the State, which should be carefully consulted. This is now usually the primary and exclusive mode of proving a domestic will, or a devise of lands within the State. Under a statute which allows the record, or an exemplification of the record, to be received in evidence the same as the original,[30] the whole record must be presented or exemplified,—that is, the record of the proofs,[31] as well as of the will itself.[32] The original record of the surrogate is equally competent; [33] and, independent of statute, would be so on proof that the original will was lost.[34] If from the record, including the sworn petition for probate, if one was presented, jurisdiction appears on the face of the proceedings, the authority for record is *prima facie* established, and the will and record are admissible in evidence without further proof *aliunde*.[35] If it affirmatively appear by them that the will was not duly proved,—as, for instance, where it was admitted on the oath of one of the subscribing witness, without accounting for the others,—the probate is not evidence.[36] The proofs are,

will of the latter. Campbell *v.* Dunkelberger, 172 Iowa, 385, 153 N. W. Rep. 56.

Where there is no contest on the probate of a will, the only question is as to the sufficiency of the proof to establish it. Matter of Hall, 154 N. Y. Supp. 317, 90 Misc. 216.

[30] See N. Y. Code Civ. Pro., § 2623. In Pennsylvania, probate without the proofs is held *prima facie* evidence. Kenyon *v.* Stewart, 44 Penn. St. 188.

[31] Including the sworn petition, if any. Bolton *v.* Jacks, 6 Robt. 166.

Where a will is duly proved and admitted to probate in one State, it may be proved in any other State by producing a certified copy of the probate. Gemmell *v.* Wilson, 40 Kan. 764, 20 Pac. Rep. 458.

[32] Morris *v.* Keyes, 1 Hill, 540; Caw *v.* Robertson, 5 N. Y., 125; Ackley *v.* Dygert, 33 Barb. 176; Marr *v.* Gilliam, 1 Coldw. 488, 512; Bright *v.* White, 8 Mo. 422, 427.

[33] Elden *v.* Keddell, 8 East, 187.

[34] Jackson *v.* Lucett, 2 Cai. 363.

[35] Bolton *v.* Jacks, 6 Robt. 166. As to presumptions in favor of due notice, etc., see Marcy *v.* Marcy, 6 Metc. (Mass.) 360; Bolton *v.* Brewster, 32 Barb. 389.

[36] Staring *v.* Bowen, 6 Barb. 109. And see Thompson *v.* Thompson, 9 Penn. St. 234. *Contra*, Telford *v.* Barney, 1 Greene (Iowa), 575; Stevenson *v.* Huddleson, 13 B. Monr. (Ky.) 299.

however, required only for authentication; they do not become evidence in the cause for other purposes.[37] Without the probate, the will itself as a title to property, or as giving a right to the executor or administrator to sue, cannot be received in evidence.[38]

60. Decree of Probate Court, How Far Conclusive.

The decree of a surrogate having jurisdiction of the subject, declaring a will of *personalty* duly executed, is conclusive evidence thereof, against all the world, in a collateral action, as to personalty.[39] But as to *real property* the probate of a will containing a devise was not, at common law, any evidence whatever of its execution; and the American statutes making it competent evidence do not, without express language or necessary implication, have the effect to make it conclusive, but only *prima facie* evidence. The effect of the probate, whether conclusive (as it always is as to personalty, and under some statutes is as to realty), or *prima facie* (as usually in respect to realty), extends to all points peculiar to the testamentary act, and which were necessarily determined, including the capacity of the testator, in respect of

[37] Nichols *v.* Romaine, 3 Abb. Pr. 122.

[38] Graham *v.* Whitely, 26 N. J. Law 254; Thorn *v.* Shiel, 15 Abb. Pr. N. S. 81; 1 Whart. Ev. 78, § 66, and cases cited. And see Broderick's Will, 21 Wall. 503.

[39] Vanderpoel *v.* Van Valkenburgh, 6 N. Y. (2 Seld.) 190; Matter of Kellum, 50 Id. 298; Colton *v.* Ross, 2 Paige, 396; Muir *v.* Trustees of Leake & Watts Orphan House, 3 Barb. Ch. 477. See also Clark *v.* Bogardus, 4 Paige, 623. This is so at common law, and also by express statutes usual in the American States.

The judgments of the courts in admitting wills to probate, where the courts had jurisdiction of the subject-matter, are conclusive until set aside upon appeal. Kemmerer *v.* Kemmerer, 233 Ill. 327, 84 N. E. Rep. 256, 122 Am. St. Rep. 169.

The decree admitting a will to probate cannot be attacked collaterally in the absence of fraud. Bolton *v.* Schriever, 135 N. Y. 65, 31 N. E. Rep. 1001, 18 L. R. A. 242; Caulfield *v.* Sullivan, 85 N. Y. 153.

age,[40] coverture or non-coverture,[41] soundness of mind,[42] the form and mode of execution,[43] the competency of witnesses,[44] and the weight of the evidence upon these points.[45] It is also evidence conclusive or *prima facie*, as the case may be, in respect to the contents of the will, except that for the purposes of construction or interpretation, so far as that may appear from the grammmatical skill or the accuracy of the writer in punctuation, parenthetical clauses, mode of writing, and the like, which are never perfectly reproduced in a copy, the court may, even when the probate is conclusive, examine the original,[46] and for this purpose production of the original

[40] Howard *v.* Moot, 64 N. Y. 262, affi'g 2 Hun, 475. Otherwise where the age for devising real property was not necessarily determined. Dickenson *v.* Hayes, 31 Conn. 417.

[41] Cassels *v.* Vernon, 5 Mas. 332, and see Picquet *v.* Swan, 4 Mas. 443.

[42] Poplin *v.* Hawke, 8 N. H. 124; Osgood *v.* Breed, 12 Mass. 531.

An *ex parte* probate is not evidence of testamentary capacity. Bradley *v.* Onstott, 180 Ind. 687, 103 N. E. Rep. 798.

[43] Vanderpoel *v.* Van Valkenburgh (above).

The probate decree is presumptive evidence of the facts as to proper execution, as to the competency of the testator and that he was not under restraint. Drake *v.* Cunningham, 127 App. Div. 79, 111 N. Y. Supp. 199.

In an action to contest a will, the probate thereof is *prima facie* evidence of the due attestation, execution and validity of the will. Scott *v.* Thrall, 77 Kan. 688, 95 Pac. Rep. 563, 127 Am. St. Rep. 449, 17 L. R. A. N. S. 184.

The probate of a will is presumptive evidence that it was duly executed and that it is valid as a will of real property as against the parties duly cited and against persons claiming through or under such parties. Drake *v.* Pechin, 58 Misc. 449, 109 N. Y. Supp. 474.

[44] Fortune *v.* Buck, 23 Conn. 1.

[45] Holliday *v.* Ward, 19 Penn. St. 490; Holman *v.* Riddle, 8 Ohio St. 384; Jourden *v.* Meier, 31 Mo. 40; Taylor *v.* Burnsides, 1 Gratt. (Va.) 165. *Contra*, Ferguson *v.* Hunter, 7 Ill. (2 Gilm.) 657; Hale *v.* Monroe, 28 Md. 98. See also, as to probate by less than the statutory number of witnesses, paragraph 59, note 3.

Where a probate court has jurisdiction in admitting a will to probate, all presumptions are in favor of the regularity of its proceedings, and in a collateral attack upon such probate the court will not inquire into the degree of proof required by the probate court. Kolterman *v.* Chilvers, 82 Nebr. 216, 117 N. W. Rep. 405.

[46] 1 Wms. Ex'r, 6th Am. ed. 637,

may be compelled by subpœna *duces tecum*.[47] The probate, however, does not determine the legality of the dispositions of the will. In those States where the probate is only *prima facie* evidence as to realty, it may be impeached by evidence to the contrary as to capacity or execution, or on the weight of evidence,[48] even by parties who were parties to the probate proceedings.[49] Where probate would not be conclusive in favor of a will, a decree of the probate court rejecting the will is not conclusive against it.[50] Where probate would be conclusive in its favor, rejection is conclusive against it.[51] In any case, the jurisdiction, over the subject, of the surrogate whose decree is produced may be impeached, and in a case of personal property where this is done, as well as in all cases of real property, the validity of the will may be questioned.[52]

61. Formalities of Execution.

When proof of execution is necessary, it must appear,

n., citing Manning *v.* Purcell, 24 L. J. Ch. 523, n., 3 Redf. on W. 62 (8) and n.

The legal effect of a will or of its various provisions, its construction and operation, cannot be passed upon on an application to admit the will to probate. Greenwood *v.* Murray, 26 Minn. 259, 2 N. W. Rep. 945.

[47] See Kenyon *v.* Stewart, 44 Penn. St. 179, unless deposited in the probate court, pursuant to law. Randall *v.* Hodges, 3 Bland (Md.), 477.

[48] See Staring *v.* Bowen, 6 Barb. 109; Rowland *v.* Evans, 6 Penn. St. 435; Holliday *v.* Ward, 19 Id. 490; Kenyon *v.* Stewart, 44 Id. 179. The opposing party may even show statements made out of court by one of the subscribing witnesses, in order to contradict the statements of such witness in the record of the proofs before the surrogate, as to the due execution of the will. Otterson *v.* Hofford, 36 N. J. (7 Vroom) 129, s. c., 13 Am. R. 429. See note 8 (below).

Where by statute the probate of any will is made "conclusive as to its due execution" it is not conclusive as to construction of the provisions of the will. Jones *v.* Roberts, 84 Wis. 465, 54 N. W. Rep. 917.

[49] Bogardus *v.* Clark, 4 Paige, 623.

[50] Smith *v.* Bonsall, 5 Rawle (Penn.), 80.

[51] Picquet *v.* Swan, 4 Mass. 461.

[52] Redf. Surr. Pr. 119, Code of 1877, § 2473.

1. That the will was subscribed by the testator, at the end; that is to say, after, and in reasonable proximity to the last clause; 2. That it was subscribed by the testator in the presence of each of at least two witnesses, or that it was acknowledged by him to have been made, to each of such attesting witnesses, or to such of them as were not present at the making of the subscription; 3. That at the time of making such subscription, or at the time of acknowledging the same,—or both, if subscribed in presence of one and acknowledged after subscription to the other,—he declared in the presence of both witnesses, or in the presence of each, that the instrument was his will; 4. That each of at least two such witnesses signed his name as a witness at the end of the will, at the testator's request. Any of the acts thus required of the testator may be done by another, in his presence and by his direction or manifested approval; and the order in which they are to be done is not material, except that the testator must subscribe before the witnesses do.[53] On a trial in an

[53] These rules, which state the requisites under the New York statute, are from Redf. Surr. Pr. 75. The statutes in the various States vary more or less.

Under a statute requiring that a will be signed, it is sufficient if the name of the testator appears in his handwriting in the body of the instrument. Peace *v.* Edwards, 170 N. C. 64, 86 S. E. Rep. 807.

In the absence of a statute providing that a will must be dated, a will without a date is valid. Peace *v.* Edwards, 170 N. C. 64, 86 S. E. Rep. 807.

A testator should sign his name at the physical end of the instrument but there is no law which requires a will or an attestation clause to be dated. Matter of Talbot, 154 N. Y. Supp. 1083, 91 Misc. 382.

A superscription on a sealed envelope in a decedent's handwriting indicating that the enclosed is his will, does not constitute a valid signature to an unsigned holographic will found within the envelope, inasmuch as a will must be signed at the end thereof. In re Poland, 137 La. 219, 68 So. Rep. 415.

When the testator signs by making his mark, he signs and executes the will himself, although his name may have been subscribed by another at his request. Wilson *v.* Craig, 86 Wash. 465, 150 Pac. Rep. 1179, Ann. Cas. 1917, B. 871.

One who in the presence of and by the express request of a testator signs the name of the testator to

action at law, the execution may be proved by one witness, if he is able to prove perfect execution; [54] but if he can only prove his own signature, the other witnesses, if living, must be produced, or, if they are dead, their handwriting and that of the testator must be proved; and it is then a question of fact, whether, under all the circumstances, all the requisites of the statute are to be deemed complied with.[55] The testimony of the subscribing witnesses, whether in support of or against the will, is not conclusive, but is liable to be rebutted by other evidence, either direct or circumstantial.[56]

his will, is competent as an attesting and subscribing witness thereto. Steele *v.* Marble, 221 Mass. 485, 109 N. E. Rep. 357.

Where it was shown by the testimony of the attesting witnesses that they had known the testatrix for several years; that they had seen her sign the paper and at her request had signed as witnesses; that the paper had not been read to them and that the testatrix did not say in so many words that it was her will but that they understood it was a will, it was held that this was sufficient proof of execution. Padgett *v.* Pence (Mo. App.), 178 S. W. Rep. 205.

[54] Cornwall *v.* Wooley, 1 Abb. Ct. App. Dec. 441. Otherwise, perhaps, in an action in equity to establish the will. Thornton *v.* Thornton, 39 Vt. 122, s. c., 6 Am. L. Reg. N. S. 341. In a statutory contest of a will, it is proper for the proponents for probate to take the affirmative to show its due execution. Morton *v.* Heidorn, 135 Mo. 608, 37 S. W. Rep. 504.

A will is duly executed and published, though the witnesses neither saw the testator's signature, nor were made acquainted with the instrument they attested, provided they were requested by the testator to subscribe the memoradum of attestation. Shewmake *v.* Shewmake, 144 Ga. 801, 87 S. E. Rep. 1046.

A full and complete attestation clause properly signed is *prima facie* evidence of the due execution of the will, and has the effect of shifting the burden of proof to those who deny the proper execution of the will. Shewmake *v.* Shewmake, 144 Ga. 801, 87 S. E. Rep. 1046.

[55] Jackson *v.* Le Grange, 19 Johns. 386; Jackson *v.* Vickory, 1 Wend. 406.

A bequest for charitable uses which is void because the will was not executed at a time nor in the manner prescribed by law, does not prevent the probate of the will but affects only the question of distribution. In re Galli, 250 Pa. 120, 95 Atl. Rep. 422.

[56] Orser *v.* Orser, 24 N. Y. 51; Theological Seminary of Auburn *v.* Calhoun, 25 N. Y. 422, rev'g 38

But the rebutting proof should be clear.[57] The signature of a deceased witness to a full attestation clause is not alone enough, against the positive testimony of a surviving witness.[58] But a full attestation clause may after the lapse of time be enough as against the entire forgetfulness of the witnesses.[59] The subscribing witnesses are subject to same rules as to contradiction and impeachment as other witnesses.[60] The conduct and declarations of the testator at the

Barb. 148, s. p., Peck *v.* Cary, 27 N. Y. 9, affi'g 38 Barb. 77, and see 25 N. Y. 425, note, and cases cited. The witnesses to a will are not the only persons competent to prove its due execution or the sanity of the testator. Those facts may be proved by other witnesses. Morton *v.* Heidorn, 135 Mo. 608, 37 S. W. Rep. 504.

Where there is no contest, the testimony of the two subscribing witnesses is sufficient for the probate of the will. Matter of Hermann, 83 N. Y. Misc. 283, 145 N. Y. Supp. 291.

Where the testimony of the subscribing witnesses is uncontradicted the will will be deemed to have been properly executed. Matter of Smart, 84 N. Y. Misc. 336, 145 N. Y. Supp. 838.

[57] Redf. Surr. Pr. 98.

Where it appears the signature to the will produced is the genuine signature of the testator and that the two subscribing witnesses signed in his presence, a *prima facie* case is made in favor of the due execution of the will, and this *prima facie* case is not overcome by the mere fact that the subscribing witnesses testify they failed to notice whether the will was signed. Thompson *v.* Karme, 268 Ill. 168, 108 N. E. Rep. 1001.

[58] Orser *v.* Orser (above).

[59] Nelson *v.* McGiffert, 3 Barb. Ch. 158.

Where there is a full attestation clause signed by the attesting witnesses the presumption is that the will was duly executed. Matter of Smart, 84 N. Y. Misc. 336, 145 N. Y. Supp. 838.

The testimony of the attesting witnesses that the statute was not complied with may be too positive to be overcome by presumption from the very full certificate of attestation contradicting the attesting witnesses. In re Solomon, 145 N. Y. Supp. 528.

A presumption of due execution arises where a codicil bears the signature of the testator, a complete attestation clause, and the signatures thereto of two subscribing witnesses. In re Gahagan, 82 N. J. L. 601, 89 Atl. Rep. 771.

If there is no attestation clause the burden of proof that the will was executed in accordance with the statute is on the proponent. In re Van Handlyn, 83 N. J. L. 290, 89 Atl. Rep. 1010.

[60] Peebles *v.* Case, 2 Bradf. 226; Losee *v.* Losee, 2 Hill, 609. And

time of the execution are competent upon the question of execution, and its intelligence and freedom, because a part

as to weight of testimony, see Thornton *v.* Thornton, 39 Vt. 122, s. c., 6 Am. L. Reg. (N. S.) 341; Stevens *v.* Van Cleve, 4 Wash. C. Ct. 262; Turner *v.* Cheeseman, 15 N. J. Eq. 243. But evidence of the bad character of a deceased subscribing witness is not admissible. Boylan ads. Meeker, 4 Dutcher, 275. Whether his declarations of opinion as to the insanity of testator are admissible, compare Scribner *v.* Crane, 2 Paige, 147; Baxter *v.* Abbott, 7 Gray (Mass.), 71; Beaubien *v.* Cicotte, 12 Mich. 459. The party calling the subscribing witness to support the will may impeach his testimony unfavorable to the will, by proof of his declarations of fact in its favor, though not by declarations of contrary opinion, nor by attacking his veracity generally. Thornton *v.* Thornton (above). Compare Fulton Bank *v.* Stafford, 2 Wend. 483, and, as to contrary opinions, Schell *v.* Plumb, 55 N. Y. 592, affi'g 16 Abb. Pr. N. S. 19. It is compentent to show by cross-examination of a subscribing witness to a will that he has received or been promised a reward for giving testimony, and if this is denied by the witness, admissions or declarations to that effect, made by the witness out of court, may be proved. In re Will of Snelling, 136 N. Y. 515, 32 N. E. Rep. 1006. "Some question has been made by the respondent as to the competency of the declaration of a subscribing witness to impeach the execution of a will; but the case of Losee *v.* Losee (2 Hill, 612), seems to be an authority for the admissibility of such evidence. It is there said that 'proof of the signature of a deceased subscribing witness is presumptive evidence of the truth of everything appearing upon the face of the instrument relating to its execution, as it is presumed the witness would not have subscribed his name in attestation of that which did not take place. But this presumption may be rebutted, and hence, the propriety and even necessity of permitting him to be impeached in the usual mode, as if he were living and had testified at the trial to what his signature imports.' The reason for admitting such evidence in a case like the present was stated by Bugley, J., in Doe *v.* Ridgway (4 Barn. & Ald. 52), thus: He (the attesting witness to a bond) must have been called, if he had been alive, and it would then have been competent to prove by cross-examination his declarations as to the forgery of the bond. Now the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence." In re Will of Hesdra, 119 N. Y. 615–616, 23 N. E. Rep. 555.

The subscribing witnesses may be shown to be unworthy of belief. Magruder's Succ., 135 La. 147, 65 So. Rep. 14.

If the circumstances surround-

of the *res gestæ;* but his previous or subsequent conduct and declarations are not competent upon this question,[61] except within the limits below stated as to mental capacity and undue influence.[62] Proof of due execution raises a sufficient presumption of knowledge of the contents, unless circumstances of suspicion exist,—for instance, where the will was drawn up by a devisee. In such case he must give affirmative evidence that the testator knew its contents, and that it expressed his real intentions. Any evidence is sufficient which shows that he had full knowledge of the contents, and executed it freely and without undue influence.[63] So

ing the execution of a paper show that it was executed as a last will and testament, it may be admitted to probate against the testimony of all the subscribing witnesses, or on the testimony of one contrary to the testimony of the other. Matter of Bassett, 84 Misc. 656, 146 N. Y. Supp. 842; In re Cottrell, 95 N. Y. 329; Matter of Marley, 140 N. Y. App. Div. 823, 125 N. Y. Supp. 886.

[61] Waterman *v.* Whitney, 11 N. Y. 172; Boylan ads. Mecker (above). Compare Sugden *v.* Ld. St. Leonards, L. R. 1 Prob. Div. 154, 227.

"A competent witness is one who at the time of attesting a will would be legally competent to testify in a court of justice to the facts which he attests by subscribing his name to the will." In re Wiese, 98 Neb. 463, 153 N. W. Rep. 556, L. R. A. 1915, E. 832.

[62] Paragraphs 63 and 70. And except, perhaps, if part of the *res gestæ* of his custody of the will (see paragraph 75, note 9, below), or to rebut evidence impeaching the genuineness of the signature [Taylor Will Case, 10 Abb. Pr. N. S. 300], or where the declarations are offered to support or rebut evidence of his ignorance of its contents (Davies *v.* Rogers, 1 Houst. 44, Redf. on Wills, 567).

Neither the fact that testator made his wishes known partly by pantomine and partly in answer to questions, nor the circumstance that the mechanical work of affixing his name to the will was performed by another, serves to invalidate the instrument. In re Clark, 170 Cal. 418, 149 Pac. Rep. 828.

[63] Lake *v.* Ranney, 33 Barb. 49, and cases cited; see Harrison *v.* Rowan, 3 Wash. C. Ct. 580; Comstock *v.* Hadlyme, 8 Conn. 254.

Where a will is executed according to legal formalities, it will be presumed, in the absence of evidence to the contrary, that it was read by the testator, or that he otherwise became acquainted with its provisions. Bailey *v.* Bee, 73 W. Va. 286, 80 S. E. Rep. 454.

where the testator is shown to be unable to read, there should be some evidence that he knew its contents. The will cannot be shown to be void by parol proof that dispositions which the testator directed to be inserted were omitted by the mistake of the scrivener. For the purpose of determining the genuineness of the will, the circumstances attending its production, the history of its custody, and the declarations of its custodian made during the custody, are competent.[64] The genuineness of signatures may be proved by the opinion of any witness who has at any time seen the person write, or who has received documents purporting to be written by the person, in answer to documents written by himself, or under his authority, and addressed to the person, or to whom, in the ordinary course of business, documents purporting to be written by the person have been habitually submitted.[65] But it cannot be proved by the opinion of an expert, unless he is acquainted with the handwriting, nor can his opinion be received on a comparison of handwritings, unless the signature produced is attached to papers otherwise in evidence, and material to the issue, or admitted to be genuine.[66] Photographic copies of a signature are not admissible to aid the expert.[67]

[64] Boylan ads. Meeker, 4 Dutcher, 275, s. p., Nexsen *v.* Nexsen, 3 Abb. Ct. App. Dec. 360. Subject, however, to the professional privilege, if any exist. Taylor Will Case, 10 Abb. Pr. N. S. 300. See N. Y. Code Civ. Pro., §§ 833–836; 3 Wall. 176, 192, Redf. Surr. Pr. 101.

[65] See ch. 21 Paragraphs 6–15.

Where an attesting witness is unable to identify his handwriting on a will, because his eyesight has failed, it is competent for other witnesses to identify the will as the one signed by the attesting witness and to prove that he attested it. Reynolds *v.* Sevier, 165 Ky. 158, 176 S. W. Rep. 961, L. R. A. 1915, E. 593.

[66] This is the rule in the Federal courts, except where those courts follow the State statute. Stokes *v.* United States, 157 U. S. 187. For the New York rule see N. Y. Code Civ. Pro., § 961, d.

Documents otherwise irrelevant to a probate cause may be introduced in evidence for the purpose of comparison of handwriting. Matter of Smart, 84 N. Y. Misc. 336, 145 N. Y. Supp. 838.

[67] Taylor Will Case, 10 Abb. Pr. N. S. 300.

62. Testamentary Capacity.[68]

The burden of proving to the satisfaction of the court that the paper in question does declare the will of the deceased, and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory,[69] is on the party undertaking to establish the will; and this burden is not shifted during the progress of the trial, and is not removed by proof of the formal execution of the will and the testamentary competency, by the attesting witnesses, but remains with the party setting up the will.[70] The ordinary

[68] As to age, see paragraphs 27–30.

[69] For the test in case of delusion, see Banks *v.* Goodfellow, L. R. 5 Q. B. 549; Van Guysling *v.* Van Keuren, 35 N. Y. 70; Clapp *v.* Fullerton, 34 Id. 190; Bonard Will Case, 16 Abb. Pr. N. S. 128; Dunham's Appeal, 27 Conn. 192; Boughton *v.* Knight, L. R. Prob. & D. 64, 68; Duffield *v.* Morris, 2 Harr. (Del.) 375; Stackhouse *v.* Horton, 15 N. J. Eq. 202; Redf. Am. Cas. on L. of Wills, 384. For the test in case of imbecility or mental weakness, see Delafield *v.* Parish, 25 N. Y. 9, 27, 29, overruling Stewart *v.* Lispenard, 26 Wend. 225. Whether it be deemed that a will requires greater capacity than a contract (as said in Boughton *v.* Knight, above, which is usually sound as to mere question of mental capacity), or that a contract requires greater capacity than a will (as said in Harrison *v.* Rowan, 3 Wash. C. Ct. 586; Kinne *v.* Kinne, 9 Conn. 102; Converse *v.* Converse, 21 Vt. 168, which may be true on a question of weakness in case of undue influence), the question whether testator had capacity for contracts or other transactions, civil or criminal, is not relevant, except so far as the facts adduced show testamentary incapacity or susceptibility to undue influence. See Dew *v.* Clark, 1 Hagg. Ec. 311.

The testator must be possessed of a sound and disposing mind and memory. The question is not so much what was the degree of memory possessed by the testator, as had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the object of his bounty? Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed his will? In re Craft, 85 N. J. Eq. 125, 94 Atl. Rep. 606.

[70] Delafield *v.* Parish (above); Redf. Am. Cas. on L. of Wills, 4. *Contra*, Id. 28, and Higgins *v.* Carlton, 28 Md. 115, and cases

presumption of sanity does not alone suffice to dispense with all evidence on the point. Slight evidence, however, is sufficient to go to the jury.[71] After the formal and usually

cited below. As to the right to open and close, see Brooks *v.* Barrett, 7 Pick. 94; Comstock *v.* Hadlyme, 8 Conn. 254; Taylor Will Case, 10 Abb. Pr. N. S. 300. One who challenges the mental capacity of a testator, or donor, has the burden of establishing the acsence of that particular capacity in issue. Teegarden *v.* Lewis, 145 Ind. 98, 40 N. E. Rep. 1047, 44 N. E. Rep. 9. Upon proving the formal execution of a will, including the legal attestation and subscription by the witness, presumption of testamentary capacity arises. Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. Rep. 16. Where the making and executing of an alleged will are not denied, testamentary capacity and the absence of undue influence will be presumed, and such presumption will stand until overcome by the weight of testimony. Messner *v.* Elliott, 184 Pa. St. 41, 39 Atl. Rep. 46. The law presumes that every person possesses a sound and disposing mind, and the burden is upon the contestant to establish by a preponderance of evidence that the testator did not at the time of making the will possess a mind sufficiently clear and strong to be able to know and understand the nature of the testamentary act, to know and remember the character and extent of the property disposed of, and the manner in which and the persons to whom it is desired to distribute it. In re Wilson, 117 Cal. 262, 49 Pac. Rep. 172, 711. Where, in the trial of an issue of *devisavit vel non*, the sanity of the testator is impeached, the burden of proof is upon the caveators. In re Burns' Will, 121 N. C. 336, 28 S. E. Rep. 519. "The meaning of the complaint charging unsoundness of mind being a charge of testamentary incapacity under the statute, and the burden of that charge being on the plaintiff, it follows as an unavoidable conclusion that the plaintiff cannot stop short of proof of the testamentary incapacity he has alleged, and demand a verdict. The failure of the defendant to go forward and disprove the allegations of the complaint left unproven by the plaintiff cannot entitle the plaintiff to a verdict unless testamentary incapacity is presumed, and that, we have seen, is not presumed, but the direct contrary is presumed." Blough *v.* Parry, 144 Ind. 463, 491, 40 N. E. Rep. 70, 43 N. E. Rep. 560.

The proponent of a will must prove by a preponderance of evidence that the testator was of sound mind. Turner *v.* Butler, 253 Mo. 202, 161 S. W. Rep. 745.

[71] Id.; and 1 Wms. on Ex'rs, 6th Am. ed. 24–30, and notes reviewing conflicting cases.

There is a presumption that the testator possessed testamentary capacity and the burden of proof is on him who alleges insufficiency

slight evidence of mental capacity has been given, if evidence to the contrary is adduced by those resisting the will, it is in the discretion of the court, if not a matter of right, that the party alleging the will may give cumulative evidence of capacity, etc., in rebuttal.[72] Evidence that incapacity of a continuing nature previously existed (within reasonable limit of time), is sufficient to raise a presumption of its existence at the time of execution, which must be rebutted by affirmative evidence.[73] Evidence of the existence of such incapacity, at a time subsequent to the execution of the will, is competent in case of idiocy, and is competent in other cases if sufficiently near in point of time to raise a presumption (in connection with other evidence, and when the nature of the defect is considered) that it existed at the time of execution; but is not competent except on that ground.[74]

of mental capacity. Philpott *v.* Jones, 164 Iowa, 730, 146 N. W. Rep. 859.

The legal presumption is that a testator was sane when he executed his will. In re Craft, 85 N. J. L. 125, 94 Atl. Rep. 606. In re Martin, 170 Cal. 657, 151 Pac. Rep. 138.

[72] Taylor Will Case, 10 Abb. Pr. N. S. 300; and see Redf. Am. Cas. on L. of Wills, 32.

All insane delusions do not render one incapable of making a will. Merely showing that a testator had delusions is not sufficient. It must appear that his testamentary act was influenced by the delusion. Zinkula *v.* Zinkula, 171 Iowa, 287, 154 N. W. Rep. 158.

It is only such a delusion or conception as springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind that can be regarded as furnishing evidence that his mind is diseased or unsound. In re Diggins, 76 Ore. 341, 149 Pac. Rep. 73.

[73] See Clark *v.* Fisher, 1 Paige, 171, and cases cited; and Smith *v.* Tebbett, L. R. 1 P. & D. 398.

Proof that testator was permanently mentally incapacitated and that his affliction was progressive raises the presumption of incapacity at the time of making the will. Byrne *v.* Fulkerson, 254 Mo. 97, 162 S. W. Rep. 171.

When insanity is once established the burden rests on the proponent to establish testamentary capacity, and if the whole evidence leaves the issue in doubt, the will cannot be admitted to probate. Matter of Giauque, 83 N. Y. Misc. 684, 145 N. Y. Supp. 364; Matter of Martin, 82 N. Y. Misc. 574, 144 N. Y. Supp. 174.

[74] Stevens *v.* Van Cleve, 4 Wash.

A general or continuing insanity having been shown within a reasonable time prior to the act, the burden is thrown upon the other party to show a lucid interval at the time of the act.[75] Evidence of cessation of the symptoms is not enough, but there must be evidence of sufficient restoration to act intelligently and freely.[76] The reasonableness and good sense of the will itself,[77] and the mode in which it was executed,[78] are competent evidence of the existence of a lucid interval when it was made. In the case of drunkenness, the evidence must be directed to the particular moment, so as to show that the testator was so excited by liquor, or so con-

C. Ct. 262. Compare Terry *v.* Buffington, 11 Ga. 342.

Even if a person was insane and had been so adjudged, his will is valid if made during a lucid interval. Matter of McDermott, 154 N. Y. Supp. 923, 90 Misc. 526; In re Martin, 170 Cal. 657, 151 Pac. Rep. 138.

[75] Dicken *v.* Johnson, 7 Geo. 488, and cases cited; In re Hoope's Estate, 174 Penn. St. 373, 34 Atl. Rep. 603.

When insanity is once established the burden rests very heavily on the proponent to establish capacity to make a will. Matter of Giauque, 83 N. Y. Misc. 684, 145 N. Y. Supp. 364.

The mere fact that some weeks before and some weeks after the execution of the will the testator was not in proper mental condition to execute a will does not militate against the proof of his actual capacity at the very time he executed the will. Lum *v.* Lasch, 93 Miss. 81, 46 So. Rep. 559.

[76] Lucas *v.* Parsons, 27 Ga. 593; Boyd *v.* Eby, 8 Watts (Penn.), 66; Ex parte Holyland, 11 Ves. 10. Insanity cannot be shown by reputation in the family. People *v.* Koerner, 154 N. Y. 355, 48 N. E. Rep. 730.

[77] Cartwright *v.* Cartwright, 1 Phillim. 90, as qualified in Banks *v.* Goodfellow, L. R. 5 Q. B. 549, and Gombault *v.* Pub. Adm'r, 4 Bradf. 226. The contestants of the will may introduce evidence of the manner in which the decedent acquired the property disposed of in the will, as bearing in some degree, however remotely, on the question of testamentary capacity. In re Wilson, 117 Cal. 262, 49 Pac. Rep. 172, 711.

A man has a right to dispose of his property in any way he sees fit. He may give it to whom he pleases, even in disregard of his own blood relatives, if he is mentally competent and knows what he is doing, and is not unduly influenced. Porter *v.* La Rue, 192 Mich. 477, 158 N. W. Rep. 851.

[78] Hall *v.* Warren, 9 Ves. 605, s. c., Ewell's Cases, 702.

ducted himself during the act, as to be at the moment legally disqualified;[79] or there must be evidence of confirmed derangement caused by habitual indulgence.[80] The fact of being deaf and dumb does not now raise a legal presumption of mental incapacity;[81] but necessitates stricter proof of open dealing and intelligent assent. Old age alone does not incapacitate.[82]

63. Conduct and Declarations of Testator.

On the question of mental condition, whether raised as to unsoundness or undue influence, the conduct and declarations of the testator, both before and after execution, are competent to show capacity or incapacity, if they tend to show its existence at the time of execution,[83] but not otherwise.[84]

[79] Peck *v.* Cary, 27 N. Y. 9.

[80] Gardner *v.* Gardner, 22 Wend. 526.

[81] Christmas *v.* Mitchell, 3 Ired. Eq. 535, 541.

[82] Collins *v.* Townley, 21 N. J. Eq. 353; Matter of Neil, 153 N. Y. Supp. 647, 90 Misc. 537; In re Clark, 170 Cal. 418, 149 Pac. Rep. 828. Testimony that the testator was a young man of average intelligence is competent to show testamentary capacity. In re Merriman's Appeal, 108 Mich. 454, 66 N. W. Rep. 372. The question is one of fact. Harp *v.* Parr, 168 Ill. 459, 48 N. E. Rep. 113.

No presumption of incapacity arises because the testator was advanced in years. In re Carpenter, 145 N. Y. Supp. 365; Matter of Brower, 112 N. Y. App. Div. 370, 98 N. Y. Supp. 438; Horn *v.* Pullman, 72 N. Y. 269; Deering *v.* Adams, 37 Me. 264; Campbell *v.* Campbell, 130 Ill. 466, 22 N. E. Rep. 620, 6 L. R. A. 167.

The fact that the decedent was old, slovenly in dress, and given to peculiarities in speech and habit which, at times, were such as to impress witnesses as irrational, is not sufficient to render a testamentary disposition of his property invalid. Matter of McDermott, 154 N. Y. Supp. 923, 90 Misc. 526; Matter of Schober, 154 N. Y. Supp. 309, 90 Misc. 230.

[83] Boylan ads. Meeker, 4 Dutcher, 274.

The time when a contested will was made is always the time of

[84] Kinne *v.* Kinne, 9 Conn. 104.

Testamentary capacity consists in the possession by the testator at the time of making his will of a full understanding of the nature of the business in which he is engaged, a recollection of the property of which he intends to dispose, and the persons to whom he

A sudden change to eccentric and peculiar habits is cogent evidence of insanity.[85] Suicide is not conclusive evidence of insanity.[86] The testator's correspondence, his manner of conducting business, etc., are competent.[87] The fact that

primary importance in estimating the mental capacity of the testator. Evidence of capacity or want of capacity before or afterwards merely aids the investigation of the subject of testamentary capacity at the time the will was executed. Wisner *v.* Chandler, 95 Kan. 36, 147 Pac. Rep. 849.

A person who is unable to understand the nature and importance of the business he is transacting without being prompted, has not the capacity to make a will. Schleiderer *v.* Gergen, 129 Minn. 248, 152 N. W. Rep. 541.

[85] Lucas *v.* Parsons, 27 Ga. 593.

The fact that a testator was a man abnormal in his tastes and habits, a quiet drinker, eccentric as to his walk, carriage and behavior at table, high pitched as to voice, possessed of collections of indecent pictures, degenerate in his desires and inclinations, was not sufficient to show his unfitness to make a will especially where it affirmatively appeared that up to the very time of his death he had transacted his affairs which involved the management of a large estate. In re Smith, 250 Pa. 67, 95 Atl. Rep. 338.

[86] Brooks *v.* Barrett, 7 Pick. 94; and see Burrows *v.* Burrows, 1 Hagg. 109, 146.

The mere fact that the testatrix had taken poison with suicidal intent does not of itself warrant the deduction that her mind was unsound, or that she lacked testamentary capacity at the time of making her will. Roche *v.* Nason, 185 N. Y. 128, 77 N. E. Rep. 1007; Matter of Holmberg, 83 N. Y. Misc. 245, 145 N. Y. Supp. 846.

The fact that an unmarried man committed suicide, that he willed his property away from his aged mother, and his brothers from whom he had not been estranged, were proper to be considered by a jury on the issue of testamentary capacity. In re Wasserman, 170 Cal. 101, 148 Pac. Rep. 931.

[87] Harper *v.* Harper, 1 N. Y. Supm. Ct. (T. & C.) 351, s. p., United States *v.* Sharp, 1 Pet. C. Ct. 118; Irish *v.* Smith, 8 Serg. & R. 578. The facts as to the business transactions of the testator are of much more value than the opinions of witnesses. Messner *v.* Elliott, 184 Penn. St. 41, 39 Atl. Rep. 46.

Less mental capacity is required to execute a valid will than any

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means to give it, and also an understanding of the manner in which he in fact disposes of it, and of the relative claims of the different persons who are, or should be, the objects of his bounty. Brown *v.* Fidelity Trust Co., 126 Md. 175, 94 Atl. Rep. 523.

others dealt with him as sound or unsound of mind, is competent when adduced merely to lay a foundation for evidence of the manner in which he received such treatment, but not otherwise.[88] And evidence of how the testator acted, when his mental condition was spoken of in his presence, is admissible.[89]

other legal instrument. One may not have capacity to transact business and yet make a valid will. Ability to transact ordinary business is strong evidence of testamentary capacity. Matter of Halbert, 15 N. Y. Misc. 308, 37 N. Y. Supp. 757; Matter of Seagrist, 1 N. Y. App. Div. 615, 37 N. Y. Supp. 496; Matter of Armstrong, 55 N. Y. Misc. 487, 106 N. Y. Supp. 671; Matter of Browning, 80 N. Y. Misc. 619, 142 N. Y. Supp. 683; In re Carpenter, 145 N. Y. Supp. 365; Matter of Birdsall, 13 N. Y. Supp. 421, 2 Connoly's Surr. 433.

"There can be no stronger evidence of the soundness of a man's mind and memory than clear convincing proof that he has ability to intelligently, accurately and profitably conduct his own business affairs. Without proof of undue influence or insane delusions, such evidence must convince any reasonable and unprejudiced mind of the competency of the testator to execute a valid will." Walker *v.* Struthers, 273 Ill. 387, 112 N. E. Rep. 961.

[88] Thus letters written to him, even by persons since deceased, are not competent evidence as to his mental soundness, unless his conduct in reference thereto is shown. The fact that they were found in his possession is not enough. Wright *v.* Tatham, 5 Clark & F. 670, 7 Ad. & E. 313. But a witness may testify that he was told by the wife in the husband's presence that he did not attend to business, he was incapable,—and that he said nothing. Irish *v.* Smith, 8 Serg. & R. 578.

The fact that shortly before his death the testator sent drafts of $500 each to each of his sons, the contestants, and they kept the money, is competent to prove as against them that he was able to manage his affairs. Rowcliffe *v.* Belson, 261 Ill. 566, 104 N. E. Rep. 268, Ann. Cas. 1915, A. 359.

[89] In re Will of Fenton, 97 Iowa, 192, 66 N. W. Rep. 997. Conversations of those present at the execution of a will by a third person, in reference to her physical condition, are admissible in evidence as part of the *res gestæ*, in a proceeding to contest the will. Kostelecky *v.* Scherhart, 99 Iowa, 120, 68 N. W. Rep. 591.

In considering the testamentary capacity of a testator, it is proper that his life, surroundings, relationships and friendships should be the subject of inquiry. Matter of McDermott, 154 N. Y. Supp. 923, 90 Misc. 526.

His declarations, if not part of the *res gestæ* of execution, must be offered not as his statement of facts of fraud or undue influence, for in this respect they are hearsay and incompetent, but as statements which, independent of their truth or falsity, disclose his state of mind, strength or weakness of will, independence or infirmity of purpose, capacity or imbecility. What the testator said, the law does not credit, for it is unsworn; but the fact that he said it, the law receives, because to ascertain his state of mind we must hear how he talked, and read what he wrote. His declaration is not evidence of the fact declared but it is evidence of the state of mind from which the declaration proceeded.[90] With this purpose, great latitude is allowed in the admission of such evidence.[91] The rule allows *previous* as well as *subsequent* declarations as to testamentary intentions to be received in evidence.[92] The weight of the declara-

[90] Waterman *v.* Whitney, 11 N. Y. 157; Marx *v.* McGlynn, 88 N. Y. 357; Griffith *v.* Diffenderffer, 50 Md. 466; Boylan *v.* Meeker, 28 N. J. L. 274; In re Calkins, 112 Cal. 296, 44 Pac. Rep. 577; In re Merriman's Appeal, 108 Mich. 454, 66 N. W. Rep. 372; Doherty *v.* Gilmore, 136 Mo. 414, 37 S. W. Rep. 1127; In re Kaufman, 117 Cal. 288, 49 Pac. Rep. 192; Hill *v.* Bahrns, 158 Ill. 314, 41 N. E. Rep. 912.

The declaration of the testator at the time of execution as to why he is disinheriting his daughter is admissible on the issue of testamentary capacity under Civ. Code, 1910, § 2841. Gordon *v.* Gilmore, 141 Ga. 347, 80 S. E. Rep. 1007.

[91] Robinson *v.* Adams, 62 Me. 369, s. c., 16 Am. Rep. 473. The declarations of a testator, on the subject of making wills, are competent on a contest of his will on the ground of mental incapacity. Bower *v.* Bower, 142 Ind. 194, 41 N. E. Rep. 523. Declarations of a testator that he had treated all his children alike, are inadmissible to show mental incapacity or undue influence, in case of a later will. Hill *v.* Bahrns, 158 Ill. 314, 41 N. E. Rep. 912.

[92] Tunison *v.* Tunison, 4 Bradf. 138; Dennison's Appeal, 29 Conn. 399; Den *v.* Vancleave, 5 N. J. Law (2 South.) 589.

Even the draft of a former will more or less similar, directed or approved, though not executed by the testator, is competent. Thornton *v.* Thornton, 39 Vt. 122, s. c., 6 Am. L. Reg. N. S. 341.

Conversations with a testator prior to the execution of the will are competent on the subject of mental condition. Garrus *v.* Davis,

tions depends on their proximity in point of time to the act, and on whether they were before or after it. Declarations before the act are more pregnant of presumption than those made after it; and a state of weakness shown to exist before the act, being presumed to continue, affords more influential evidence than if only shown to exist after the act, because it is possible that the weakness might have intervened.[93] Unreasonableness of a will is, alone, no evidence of incapacity;[94]

234 Ill. 326, 84 N. E. Rep. 924.

Prior declarations of the testator or prior wills cannot be offered for the purpose of varying or controlling the operation of the contested will. Floto *v.* Floto, 233 Ill. 605, 84 N. E. Rep. 712.

Declarations and conduct of a testator after the will is made are admissible to prove lack of testamentary capacity, on the theory that the subsequent condition may be presumed to have existed when the will was made. Leffingwell *v.* Bettinghouse, 151 Mich. 513, 115 N. W. Rep. 731.

Transactions within a reasonable time before and after execution are admissible. McAllister *v.* Rowland, 124 Minn. 27, 144 N. E. Rep. 412, Ann. Cas. 1915, B. 1006; Byrne *v.* Fulkerson, 254 Mo. 97, 162 S. W. Rep. 171.

Where mental capacity is the issue, evidence showing the condition of the testator both before and after executing the will is admissible in order that the jury may find what his condition was at the time of execution. Harris *v.* Hipsley, 122 Md. 418, 89 Atl. Rep. 852.

[93] See 1 Redf. on Wills, 136–163, 548.

[94] Munday *v.* Taylor, 7 Bush (Ky.), 491; Ross *v.* Christman, 1 Ired. L. 209.

A revoked will, executed three years prior to the last will, and at a time when the testator was concededly of sound mind, is admissible for purposes of comparison with the last will. Whisner *v.* Whisner, 122 Md. 195, 89 Atl. Rep. 393.

Where testamentary capacity is in issue, the reasonableness or unreasonableness of the will is a legitimate subject of consideration in determining that issue. Penn *v.* Thurman, 144 Ga. 67, 86 S. E. Rep. 233.

A testator has a right to make an unjust, or an unreasonable, or even a cruel will, and a will may not be legally set aside because of the mere fact that it is such a will. Where, however, a man wills most of his property away from his wife or children with whom he has lived on apparently friendly terms, that fact has weight in determining the mental condition of the testator. In re Martin, 170 Cal. 657, 151 Pac. Rep. 138.

Where one leaves all his property

but in connection with evidence of mental unsoundness, or of weakness and influence, or intoxication, it is to be considered in corroboration or rebuttal of those allegations; and, in such case, evidence of the situation of the family and property is competent for the purpose of throwing light upon the reasonableness of the will.[95] In proportion as the will departs from reasonable and natural division of the estate, evidence of mental competency and evidence to rebut cir-

to a person unrelated to him, he lays the will open to the criticism that it is an unnatural one; but where the evidence shows an apparent lack of intimacy between the testator and his relatives and a seeming lack of interest on their part for the welfare and care of him in his old age and ill health, very little weight should be given to the contention that the provisions are unnatural and indicate a lack of testamentary capacity. Matter of McDermott, 154 N. Y. Supp. 923, 90 Misc. 526.

[95] Per WALWORTH, Ch., Betts *v.* Jackson, 6 Wend. 175. Where proof of sanity or insanity is submitted to the jury, the fact that the testator disinherited all of his children save one to whom he left all his property, is competent evidence to be passed upon by the jury as bearing upon the capacity of the testator. In re Burns' Will, 121 N. C. 336, 28 S. E. Rep. 519.

The relationship of the beneficiaries, their pecuniary condition, the objects of the testator's bounty and whether any of them might reasonably be omitted, are proper questions to look into. Bales *v.* Bales, 164 Iowa, 257, 145 N. W. Rep. 673; Philpott *v.* Jones, 164 Iowa, 730, 146 N. W. Rep. 859.

A wide range of examination should be permitted when testamentary capacity is involved, in order that all facts throwing light on the question may be before the court. Bramel *v.* Crain, 157 Ky. 671, 163 S. W. Rep. 1125.

A person desiring to make a will must understand the nature of the act and its effect. He must understand the nature, situation and extent of the property he has to dispose of, and the claims of others upon his bounty, and he must furthermore he able to hold these things in mind long enough to form a rational judgment concerning them. Schleiderer *v.* Gergen, 129 Minn. 248, 152 N. W. Rep. 541.

The financial condition of those having claims upon a testator's bounty may be taken into consideration in connection with the will itself in determining the question of mental capacity, if it appears that the same was known to the testator. O'Day *v.* Crabb, 269 Ill. 123, 109 N. E. Rep. 724.

cumstances tending to show undue influence becomes necessary.

64. Opinions as to Mental Soundness.

On the question of the testator's mental capacity, a *Subscribing* witness may state the opinion which, at the time of the execution, he formed.[96] It is not necessary that he should first state the facts upon which he formed this impression.[97] The fact that he was an attesting witness gives the right to ask his opinion. All the facts and circumstances seen or known by the witness at the time may be brought out on direct or cross-examination;[98] but the opinion is not excluded, even if the facts engendering it have been forgotten.[99] *An Expert*[1] may testify directly as to the mental capacity, in either of three ways: 1. If he had adequate opportunities of personal examination of the testator, he may state his opinion positively, based upon his personal

[96] Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. Rep. 16. But the testimony of a witness who has attested a will should be weighed and considered the same as that of any other witness. The fact that he is an attesting witness, of itself, does not entitle his evidence upon the question of testamentary capacity to greater weight than it would otherwise be entitled to, except that by reason of his being an attesting witness the law authorizes him to give his opinion of the mental capacity of the testator. Burney *v.* Torrey, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. Rep. 685.

Where only one of the witnesses to a will is living, and testifies to the proper execution thereof, it is incumbent under the Minnesota statutes upon the proponent to establish *prima facie* the sound mind of the testator at the time the will was executed. Bush *v.* Hetherington, 132 Minn. 379, 157 N. W. Rep. 505.

[97] Robinson *v.* Adams, 62 Me. 369, s. c., 16 Am. Rep. 473.

[98] Id.

[99] Clapp *v.* Fullerton, 34 N. Y. 190.

[1] The question whether the witness is an expert is not in the discretion of the judge, but is a question of law on the facts concerning qualifications. Baxter *v.* Abbott, 7 Gray (Mass.), 71. An educated, practicing physician, who attended the testator, is competent, though not specially conversant with insanity; and, in a case of gradual decay, the family physician's opinion is more cogent than that of a stranger who is a specialist. Id.

knowledge of the facts, but not upon hearsay,[2] nor upon conflicting testimony in the cause.[3] 2. An expert who has heard *all* [4] the testimony adduced upon the trial bearing on the question, may, if it is not conflicting, give his opinion on the question, what the facts sworn to, if true, would indicate as to the mental condition.[5] 3. An expert may be asked what a supposed state of facts, put to him hypothetically, but corresponding in details to the facts already in evidence, would indicate as to the mental condition.[6] When the evidence involves conflict, the opinion, if not based wholly on personal examination, should be drawn out by an hypothetical question, having reference to the facts in evidence on one side or both, or on each side separately.[7] The expert is not to be substituted for the jury; and it is not competent for him to give an opinion on the direct question of the testator's capacity to make a will,[8] but so long as the question is

[2] The better opinion is that, under this rule, a medical witness must give the facts on which his opinion is founded, in connection with his opinion. If those facts necessarily include information given him by the attendants of the patient, his opinion is not competent, for those communications are hearsay. Heald *v.* Thing, 45 Me. 396, s. p., Wetherbee *v.* Wetherbee, 38 Vt. 454. An expert witness cannot give an opinion as to the mental condition of a person, based upon statements made to him by such person not in evidence. People *v.* Strait, 148 N. Y. 566, 42 N. E. Rep. 1045.

[3] Woodbury *v.* Obear, 7 Gray (Mass.), 467, 471.

[4] People *v.* Sanchez, 22 N. Y. 147, 154.

[5] Redf. Surr. Pr. 103; People *v.* Lake, 12 N. Y. 358; Commonw. *v.* Rogers, 7 Metc. 500.

It seems that opinion evidence is of small probative value at best. In re Craft, 85 N. J. Eq. 125, 94 Atl. Rep. 606.

[6] Bonard's Will, 16 Abb. Pr. N. S. 128.

[7] Woodbury *v.* Obear (above). This is the better mode of inquiry than referring to the testimony. See Dexter *v.* Hall, 15 Wall. 14, 26.

[8] Hall *v.* Perry, 87 Me. 569, 33 Atl. Rep. 160.

While the witness may be an expert upon the subject of mental and nervous diseases, and may give his opinion in answer to hypothetical questions as to the condition of the party's mind and whether a person was sane or insane, he is not called upon to advise the court and jury as to the

framed according to the principles here stated it can be no objection to it that the issue and the other evidence is such that the question to be submitted to the jury must call for the same answer. An expert may also, within limits not very well defined, be asked general questions upon the laws of mental disorder, decay, or imperfect development, relevant to the case, or upon the consistency with each other of alleged symptoms, for the purpose of enhancing the qualifications of the court or jury to weigh and apply the evidence; and, on cross-examination, he may be interrogated generally for the purpose of testing his qualifications.[9]

An *Ordinary* witness (that is to say, any witness other than an expert or subscribing witness) may testify to facts and circumstances within his own knowledge bearing on the question of mental capacity; and after he has stated them [10] if they show reasonable means of forming an impression,[11] he

degree of mental capacity necessary to enable one to make a valid will. Garrus *v.* Davis, 234 Ill. 326, 84 N. E. Rep. 924; Baker *v.* Baker, 202 Ill. 595, 67 N. E. Rep. 410; Schneider *v.* Manning, 121 Ill. 376, 12 N. E. Rep. 267.

[9] The principal elements of qualification, apart from personal examination of the testator, are knowledge of the subject of mental disorder, experience in dealing with it, freedom from any peculiar abstract theory, and from conceit. The fact of receiving large compensation for testifying is not in itself derogatory to the witness. People *v.* Montgomery, 13 Abb. Pr. (N. S.) 209.

[10] Burney *v.* Torrey, 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. Rep. 685; Stumph *v.* Miller, 142 Ind. 442, 41 N. E. Rep. 812; In re Will of Fenton, 97 Iowa, 192, 66 N. W. Rep. 99; Furlong *v.* Carrahar, 102 Iowa, 358, 71 N. W. Rep. 210; Hay *v.* Miller, 48 Neb. 156, 66 N. W. Rep. 1115; Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. Rep. 681; In re Kimberly's Appeal, 68 Conn. 428, 36 Atl. Rep. 847; Gentz *v.* State, 58 N. J. Law 482, 34 Atl. Rep. 816. A witness may testify to facts, tending to show the mental incapacity of a testator, although he gives no opinion as to the latter's sanity. Bower *v.* Bower, 142 Ind. 194, 41 N. E. Rep. 523.

[11] An opinion of an ordinary witness is competent in connection with the facts observed by him, although founded on observation at a single interview, and of which, notwithstanding a general impression of mental quality, he remembers no distinct marked act of folly or childishness. Clary *v.* Clary,

may be asked, either on direct or cross-examination, the impression as to mental soundness made on his mind at the time by the acts and declarations of the testator to which he has testified, and may characterize them as rational or irrational,[12] but he cannot express an opinion on the general question, whether the mind of the testator was sound or unsound,[13] nor testify to his opinion, or to impressions made

2 Ired. 78; Potts *v.* House, 6 Geo. 324. A non-expert witness is not competent to give an opinion as to the insanity, at the time of death, of a person with whom he had but a passing acquaintance, and to whom he had not spoken for eight months or a year before such death occurred. Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. Rep. 59. But one who was present at, and some time before the death of a testatrix who executed a will the day before her death, may testify as to her physical condition for the two days before her death. Kostelecky *v.* Scherhart, 99 Iowa, 120, 68 N. W. Rep. 591. Statements of a testator, three or four years before the execution of the will, tending to show his mental condition, may be given in evidence by a non-expert witness, as a basis for an opinion by her as to his competency to make a will. Bower *v.* Bower, 142 Ind. 194, 41 N. E. Rep. 523.

[12] Clapp *v.* Fullerton, 34 N. Y. 190; People *v.* Koerner, 154 N. Y. 355, 48 N. E. Rep. 730. A witness giving facts may say, "His countenance indicated childishness." The expression of countenance is matter of fact, though depending in some measure on opinion. Irish *v.* Smith, 8 Serg. & R. 578, S. P., De Witt *v.* Barley, 17 N. Y. 340, 350. A witness having testified to facts was allowed to say, "His insanity manifested itself in hostility to myself," —this being regarded rather as a general statement of fact, than an opinion. Palamourges *v.* Clark, 9 Iowa, 17.

Where it is sought to have a non-expert witness give his opinion formed from facts or observation, the proper practice is to let the witness testify to the facts and then state to the jury his opinion based on those facts. The jury can then determine what weight to give to the opinion. Credille *v.* Credille, 131 Ga. 40, 61 S. E. Rep. 1042.

[13] Clapp *v.* Fullerton, 34 N. Y. 190; People *v.* Youngs, 151 N. Y. 210, 219–220, 46 N. E. Rep. 1150; People *v.* Strait, 148 N. Y. 566, 42 N. E. Rep. 1045; Paine *v.* Aldrich, 133 N. Y. 544, 30 N. E. Rep. 725. Even a mother will not be permitted to testify that her deceased daughter was of unsound mind, although it appeared from other evidence that the two had lived together during the entire lifetime of the daughter, the

upon his mind, independently of stating the facts and circumstances.[14] Nor can he be asked the broad question whether the testator was of sound and disposing mind, or its equivalent in any form. The question must be so framed as not to embrace the law of the case.[15] But where the alleged

mother herself not giving any reason whatever arising from their relationship or the long association between them, or stating any fact upon which her opinion as to her daughter's mental condition was based. Welch *v.* Stipe, 95 Ga. 762, 22 S. E. Rep. 670.

Intimate acquaintances are permitted to testify and to give their opinion upon the question of the sanity or insanity of the deceased, and the weight of this opinion evidence in each instance depends upon the facts forming the basis of it. It is, however, improper for them to testify in answer to hypothetical questions. In re Martin, 170 Cal. 657, 151 Pac. Rep. 138.

[14] Hewlett *v.* Wood, 55 N. Y. 634; Cram *v.* Cram, 33 Vt. 15; Dicken *v.* Johnson, 7 Ga. 484, and cases cited; Hickman *v.* State, 38 Tex. 190. *Contra*, Beaubien *v.* Cicotte, 12 Mich. 459, and State *v.* Pike, 51 N. H. 105, s. c., 11 Am. L. Reg. (N. S.) 233, where the cases are reviewed, and it is held that the opinion is competent or direct, leaving the facts to be brought out on cross-examination. See further on this subject Brooke *v.* Townshend, 7 Gill, 10, 27; Dunham's Appeal, 27 Conn. 192. It has been said, in a criminal case, that the circumstances must be such as to have afforded the opportunity to form an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist. Powell *v.* State, 25 Ala. 21. But this, if applicable at all to testamentary causes, must be taken with the qualification that, when the facts and circumstances are sufficiently connected with the time of execution, the impression of a casual observer of the conduct and language of the testator may be competent. The important elements in the weight of the opinion of a non-expert are the intelligence of the witness, experience with the subject, freedom from abstract theories, and from interest or prejudice, personal acquaintance with the decedent, the nature and adequacy of the facts stated as the ground of the opinion, and the fidelity of the witness's memory of those facts.

On a question of fraud or undue influence in the making of a will, a non-expert witness cannot testify that the testator was very susceptible to influence, without stating the facts upon which such statement is based. Penn *v.* Thurman, 144 Ga. 67, 86 S. E. Rep. 233.

[15] DeWitt *v.* Barley, 17 N. Y.

incapacity is imbecility, as distinguished from delusion, such a witness may be asked to state the character of the testator in respect to decision and independence, and whether he appeared capable of attending to business,[16]—all such statements being preceded by a statement of the facts. Such a witness cannot, either on direct or cross-examination, be asked his opinion on a hypothetical question.[17] Such a witness is, however, competent to testify whether testator was sick or well,[18] able to help himself, or requiring assistance,[19] intoxicated,[20] deaf, dumb,[21] or blind. Whether a non-expert witness is competent to express an opinion upon the question of insanity of an acquaintance is to be determined by the court.[22] *Common repute*, or the opinion of the neighborhood, is not competent evidence on the question of mental capacity.[23] *Books*, whether written by lawyers or physicians, cannot be read to the jury by way of evidence;[24] but may, within proper limits, be read and commented on in argument.

65. Hereditary Insanity.

Where there is evidence directly relating to the testator and tending to show insanity in him (as distinguished from

347; Deshon *v.* Merchants' Bank, 8 Bosw. 461. *Contra*, Beaubien *v.* Cicotte (above).

The court will not allow the question whether the testator was able understandingly to execute a will. Baker *v.* Baker, 202 Ill. 595, 67 N. E. Rep. 410.

[16] Gardiner *v.* Gardiner, 34 N. Y. 155, 165.

[17] Dunham's Appeal, 27 Conn. 192.

[18] Higbie *v.* Guardian Mut. Life, 53 N. Y. 603, 66 Barb. 462.

[19] Sloan *v.* N. Y. Central R. R. Co., 45 N. Y. 125.

[20] People *v.* Eastwood, 14 N. Y. 562, affi'g 3 Park. Cr. 25.

[21] Rex *v.* Pritchard, 7 C. & P. 303, 305; King *v.* Jones, 1 Leach C. C. 102.

[22] Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. Rep. 59.

Witnesses will not be permitted to express an opinion as to the competency of the testator, unless they are qualified to express such opinion. In re Dowell, 152 Mich. 194, 115 N. W. Rep. 972.

[23] Foster *v.* Brooks, 6 Ga. 287; Lancaster Co. Bk. *v.* Moore, 78 Penn. St. 407.

[24] Commonwealth *v.* Wilson, 1 Gray (Mass.), 337. *Contra*, 5 Cent. L. J. 439. Compare 1 Wms. Ex'rs, 6th Am. ed. 415; Pierson *v.* Hoag, 47 Barb. 243.

imbecility) [25], it is competent to show the insanity of a parent or of an uncle.[26] But insanity cannot be proved by mere reputation in the family.[27]

66. Inquisitions and Other Adjudications.

An *inquisition*, if taken on notice to the subject of it,[28] though without notice to the parties to the present action, is *prima facie* evidence of testamentary incapacity during the period expressly [29] overreached by it pursuant to the statute, and, if a guardian is thereupon appointed, is conclusive evidence of incapacity from the time of the finding until further direction of the court, except that a will may be proved to have been made in a lucid interval.[30]

Other Adjudications are not conclusive except as between the parties to them and those claiming under such parties,[31] nor always even competent then.

A verdict on the mental state on a particular day, is held not even *prima facie* evidence of the state on a prior or subsequent day.[32]

[25] Shailer *v.* Bumstead, 99 Mass. 112, 131, s. p., Cole's Trial, 7 Abb. Pr. N. S. 321.

[26] Baxter *v.* Abbott, 7 Gray, 71, 81.

[27] People *v.* Koerner, 154 N. Y. 355, 48 N. E. Rep. 730.

[28] Hathaway *v.* Clark, 5 Pick. 490.

[29] Rippy *v.* Grant, 4 Ired. Eq. N. C. 443.

[30] The general rule here stated is unquestioned; the exception is perhaps open to controversy. See Breed *v.* Pratt, 18 Pick. 115, and cases cited; Wadsworth *v.* Sherman, 14 Barb. 169, 8 N. Y. 382; Lewis *v.* Jones, 50 Barb. 645; Banker *v.* Banker, 63 N. Y. 409; Hall *v.* Warren, 9 Ves. 605.

An adjudication of insanity and the commitment of the testator to an asylum, raises a presumption of mental incapacity, and the presumption continues, notwithstanding that the testator has been released on parole, if there has been no formal discharge from the asylum. The presumption is not conclusive, however, and it may be shown either that the derangement of mind was limited and not general, or that the will was executed during a lucid interval, Woodville *v.* Morrill, 130 Minn. 92, 153 N. W. Rep. 131.

[31] Gibson *v.* Soper, 6 Gray, 279; Supervisors of Monroe *v.* Budlong, 51 Barb. 493; Hovey *v.* Chase, 52 Me. 305; and see 1 Whart. & St. Med. Jur., § 2; Bogardus *v.* Clark, 1 Edw. 266, 4 Paige, 623.

[32] Emery *v.* Hoyt, 46 Ill. 258.

67. Undue Influence—The Burden of Proof.

Where no defect of powers on the part of the testator is indicated, the burden of proving undue influence is on the party alleging it.[33] In such case the mere fact of the existence of an intimate or fiduciary relation between the testator and the person provided for, does not, without evidence that the latter exerted some influence in the making of the bequest, raise the slightest ground for any presumption of undue influence.[34] Nor, again, does the mere fact that a beneficiary

[33] Tyler *v.* Gardner, 35 N. Y. 559; Morton *v.* Heidorn, 135 Mo. 608, 37 S. W. Rep. 504; Doherty *v.* Gilmore, 136 Mo. 414, 37 S. W. Rep. 1127; Baldwin *v.* Parker, 99 Mass. 79, 1 Wms. Ex'rs, 72n. Old age alone is not sufficient ground for presuming imposition. Butler *v.* Benson, 1 Barb. 526.

The burden of proof is primarily on the proponent of a will to show its execution in accordance with the requirements of the law, and that the instrument is the free and voluntary act of the testator. Snodgrass *v.* Smith, 42 Colo. 60, 94 Pac. Rep. 312, 15 Ann. Cas. 548.

Proof of execution of the will according to established formalities and of mental capacity of the testator raises a presumption of validity of the will. Turner *v.* Butler, 253 Mo. 202, 161 S. W. Rep. 745.

The burden of proof of undue influence is on the contestant. Sansona *v.* Laraia, 88 Conn. 136, 90 Atl. Rep. 28; Teckenbrock *v.* McLaughlin, 209 Mo. 533, 108 S. W. Rep. 46.

The burden of proving undue influence is upon the party who asserts it, and while it is seldom susceptible of direct proof, nevertheless in each case there must be affirmative evidence of the facts from which such influence can fairly and reasonably be inferred. Eckert *v.* Page, 161 N. Y. App. Div. 154, 146 N. Y. Supp. 513; Hagan *v.* Sone, 174 N. Y. 317, 66 N. E. Rep. 973; In re Budlong, 126 N. Y. 423, 27 N. E. Rep. 945; Rollwagen *v.* Rollwagen, 63 N. Y. 504.

Where the contestants prove an active interference of the beneficiary in the procurement of the will, the burden shifts. Scarbrough *v.* Scarbrough, 185 Ala. 468, 64 So. Rep. 105.

[34] Parfitt *v.* Lawless, L. R. 2 P. & D. 462, 468, s. c., 4 Moak's Eng. 692; Bleecker *v.* Lynch, 1 Bradf. 458. Otherwise where the formation of the fiduciary relation was induced by fraud and undue influence. Baker's Case, 2 Redf. Surr. 179.

A fiduciary relationship must be proved before the presumption will arise that the testator was unduly influenced. Byrne *v.* Ful-

was the draftsman of the will or gave instructions for it, raise such a presumption,[35] unless he stood in a fiduciary relation.[36] Nor, again, is the mere fact that a beneficiary

kerson, 254 Mo. 97, 162 S. W. Rep. 171.

Where a fiduciary relationship existed the contestants need to prove only a very slight circumstance to shift to the beneficiary the burden of proving freedom from undue influence. In re Gordon (N. J.), 89 Atl. Rep. 33.

But in a case where decedent's testamentary capacity is conceded and there is no evidence of weakened intellect, the burden is upon those asserting undue influence to prove it, even though the bulk of the estate is left to one occupying a confidential relation. In re Phillips, 244 Pa. 35, 90 Atl. Rep. 457; McEnroe *v.* McEnroe, 201 Pa. 477, 51 A. 327; Caughey *v.* Brindenbaugh, 208 Pa. 414, 57 Atl. Rep. 821.

Where a person has testamentary capacity, but is so weak physically or mentally as to be susceptible to undue influence, and a substantial part of his estate is left to one occupying a confidential relation to him, the burden is upon the latter to show that no improper influence controlled in making the will. In re Phillips, 244 Pa. 35, 90 Atl. Rep. 457; Boyd *v.* Boyd, 66 Pa. 283; Robinson *v.* Robinson, 203 Pa. 400, 53 Atl. Rep. 253; In re Yorke, 185 Pa. 61, 39 Atl. Rep. 1119.

Confidential relationship between testator and beneficiary will not of itself raise a presumption of undue influence. There must be proof of actual influence by beneficiary. Lockridge *v.* Brown, 184 Ala. 106, 63 So. Rep. 524.

Nor does the contestant shift the burden of proof as to undue influence by showing that a confidential relationship existed. Jones *v.* Brooks, 184 Ala. 115, 63 So. Rep. 978; Scarbrough *v.* Searbrough, 185 Ala. 468, 64 So. Rep. 105.

[35] Coffin *v.* Coffin, 23 N. Y. 9, 13. Compare Barry *v.* Butlin, 2 Moore P. C. 480, 1 Curt. Ecc. 637.

If a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each case. Snodgrass *v.* Smith, 42 Colo. 60, 94 Pac. Rep. 312, 15 Ann. Cas. 548.

[36] Crispell *v.* Dubois, 4 Barb. 393; Tyler *v.* Gardiner, 35 N. Y. 559, 595.

Undue influence which will vitiate a will, must so destroy the free agency of the testator as to constrain him to do that which is against his will or that which he would not have done if he had been left to himself. It must be some species of moral or physical coercion, which, under the conditions he was unable to resist. It is immaterial from what source it comes, or in what character it appears. It may take the form of physical force, threats, importunity or other domination. In re

possessed influence and ascendancy not shown to be undue, enough, even though the will be unreasonable; [37] although if the evidence justifies the conclusion that the interfering mind must have been conscious that an unjust result was being obtained by personal influence, this evidence of constructive fraud, combined with the unnatural character of the will, may be enough to shift the burden of proof.[38] If, however, it is shown that the beneficiary and the testator stood in an intimate or fiduciary relation toward each other,—such as that of parent and child,[39] or grandchild,[40]

Brengel, 85 N. J. Eq. 487, 95 Atl. Rep. 750.

[37] Kevill *v.* Kevill, 6 Am. L. Reg. N. S. 79. But as to the disposition of juries, see 1 Redf. on Wills, 3d ed. 527, § 37; Redf. Am. Cas. on L. of W. 308, n.

The burden of proving undue influence is upon the party who asserts it, and while it is seldom susceptible of direct proof, nevertheless in each case there must be affirmative evidence of the facts from which such influence can fairly and reasonably be inferred. Eckert *v.* Page, 161 N. Y. App. Div. 154, 146 N. Y. Supp. 513; Hagan *v.* Sone, 174 N. Y. 317, 66 N. E. Rep. 973; In re Budlong, 126 N. Y. 423, 27 N. E. Rep. 945; Rollwagen *v.* Rollwagen, 63 N. Y. 504.

[38] See Redf. Am. Cas. on L. of W. 504, n., and cases cited.

As a general rule the contestant has the burden of proof on the question of undue influence. But when the circumstances connected with the execution of the will are such as the law regards with suspicion, undue influence is presumed, and the proponent must show affirmatively that the will was not procured by it. In re Watkin, 81 Vt. 24, 69 Atl. Rep. 144.

Where the natural object of the testator's bounty is excluded from participation in his estate, where a stranger supplants children, and the will is in favor of the lawyer drawing and advising as to its provisions, there is imposed upon the proponents of the will the burden of proving freedom from undue influence. Lockwood *v.* Lockwood, 80 Conn. 513, 69 Atl. Rep. 8.

Undue influence cannot be predicated alone upon the fact that the will is unfair or unjust in some of its provisions, and for that reason unnatural. In re Bartels, 164 S. W. Rep. (Tex. Civ. App.) 859.

[39] Tyler *v.* Gardiner (above).

A fiduciary relationship between mother and son raises the presumption of undue influence. Grundmann *v.* Wilde, 255 Mo. 109, 164 S. W. Rep. (Mo.) 200; Mowry

[40] See Carrol *v.* Norton, 3 Bradf. 291.

husband and wife,[41] physician and patient,[42] confessor and penitent,[43] guardian and ward,[44] or agent and principal,—and that the beneficiary [45] drew the will,[46] or gave the in-

v. Norman, 204 Mo. 173, 103 S. W. Rep. 15.

A confidential relationship between father and son raises a presumption that the will was the result of undue influence. Wendling *v.* Bowden, 252 Mo. 647, 161 S. W. Rep. 774.

[41] Baker's Case, 2 Redf. Surr. 179, and cases cited; Delafield *v.* Parish (above).

The relationship of husband and wife does not raise the presumption of undue influence. In re Hodgdon, 23 Cal. App. 415, 138 Pac. Rep. 111; In re Cooper, 166 N. C. 210, 81 S. E. Rep. 161.

"The boundary, where legitimate influence on the part of a wife to persuade her husband to make a testamentary disposition of his property in compliance with her wishes ends and illegitimate persuasion or coercion begins, cannot be ascertained with the accuracy of mathematical demonstration. The evidence of course must show that the testator disposed of his property differently than he would have done if he had been left free to exercise his own judgment." Emery *v.* Emery, 222 Mass. 439, 111 N. E. Rep. 287.

[42] Ashfield *v.* Lomi, L. R. 2 P. & D. 477, s. c., 4 Moak's Eng. 700.

[43] See McGuire *v.* Kerr, 2 Bradf. 244; Parfitt *v.* Lawless (above).

[44] See Limburger *v.* Rauch, 2 Abb. Pr. N. S. 271; Matter of Paige, 62. Barb. 476.

[45] Or the husband or wife of such an one. Mowry *v.* Silber, 2 Bradf. 133; Lansing *v.* Russell, 13 Barb. 510.

[46] Crispell *v.* Dubois, 4 Barb. 393. The fact that a will or codicil is procured to be written by persons largely benefited thereby is a circumstance to excite scrutiny, and which requires strict proof of volition. Smith *v.* Henline, 174 Ill. 184, 51 N. E. Rep. 227. Failure of the complainants in a suit contesting a will for undue influence, to connect the beneficiary with the making of the will, either by agent, procurement, suggestion or knowledge, is a strong circumstance indicating the absence of undue influence. Harp *v.* Parr, 168 Ill. 459, 48 N. E. Rep. 113. Where there is no evidence that a beneficiary in a will solicited the bequest himself, or wrote the will or procured it to be written, or that his devise was sought or taken, the existence of intimate friendly relations between the testator and the beneficiary, such as living with him, nursing him and managing his business, does not import undue influence, or shift the burden of proof from those who allege it. Messner *v.* Elliott, 184 Penn. St. 41, 39 Atl. Rep. 46.

Undue influence to vitiate a will must have an effect upon the testator's mind equivalent to that of

structions to the draftsman,[47] or was concerned in clandestine execution,[48] the burden of proof is thrown on him. But the fact that the beneficiary was the attorney of the decedent does not alone create a presumption that a testamentary gift was procured by fraud or undue influence.[49] The existence of an illicit relation between the testator and his beneficiary does not, as a matter of law, raise a presumption of undue influence, but undue influence is more readily inferred in such a case than where the relation between the parties is lawful.[50] Where there is evidence of defect in the powers of the testator, whether it be unsoundness or weakness,[51] or defect of the senses,[52] then either the fact that the beneficiary exercised influence to secure an unequal will,[53] or that he stood in a fiduciary relation above mentioned, and had any agency in framing the document,[54] or exercised control over

coercion or fraud. Such fraud need not be actual; it may be constructive. The coercion need not be physical duress; it may be moral only, and where a transaction is the result of moral, social or domestic force which prevents the free action of the will and a true expression of intention, the courts will afford relief against the transaction on the ground of undue influence. Phillips *v.* Gaither, 191 Ala. 87, 67 So. Rep. 1001.

[47] Delafield *v.* Parish (above).

[48] Ashwell *v.* Lomi (above).

[49] Matter of Will of Smith, 95 N. Y. 516.

The law presumes deeds or wills made by the client to the attorney, or the patient to the physician, to be *prima facie* void. Hitt *v.* Terry, 92 Miss. 671, 46 So. Rep. 829.

"Where a lawyer writes himself as chief beneficiary in a will he must establish that the will is not his will but the will of the testator." Evans *v.* Trimble, 169 App. Div. 363, 155 N. Y. Supp. 25.

[50] Smith *v.* Henline, 174 Ill. 184, 51 N. E. Rep. 227.

The fact that the testator leaves the bulk of his property to a woman with whom he has maintained illicit relations, furnishes no sufficient evidence of coercion or constraint in connection with the making of the will. Weston *v.* Hanson, 212 Mo. 248, 111 S. W. Rep. 44; Saxton *v.* Krumm, 107 Md. 393, 68 Atl. Rep. 1056, 126 Am. St. Rep. 393, 17 L. R. A. N. S. 477.

[51] See Tyler *v.* Gardiner (above).

[52] See Lansing *v.* Russell, 13 Barb. 510.

[53] Harrel *v.* Harrel, 1 Duvall (Ky.), 203, Redf. Am. Cas. on L. of W. 505, n.

[54] See Lee *v.* Dill, 11 Abb. Pr.

the testator,[55] throw upon the proponent the burden of giving evidence of free and intelligent volition.

67a. Competency of Witnesses.

Where the probate of a will is contested on the ground of want of testamentary capacity on the part of the testator, a legatee or devisee, who is not a subscribing witness, is not competent to testify to personal transactions or communications with the decedent, preceding, attending or succeeding the execution of the will.[56]

But where a legatee has executed a valid release of all his interest the disability is removed, and he may properly be examined as a witness.[57]

An attorney, in receiving the directions or instructions of one intending to make a will, although he asks no questions and gives no advice, but simply reduces to writing the directions given to him, still acts in a professional capacity and is prohibited from disclosing any communication so made to

214, and cases above cited in notes, *supra*.

[55] Foreman *v.* Smith, 7 Lans. 443, 450, and cases cited.

Where it is shown that the testator was unduly influenced by the beneficiaries in other matters during his lifetime it may be presumed that he was similarly influenced in the drawing of his will. Fairbank *v.* Fairbank, 92 Kan. 45, 139 Pac. Rep. 1011, aff'd 92 Kan. 492, 141 Pac. Rep. 297.

[56] In re Will of Eysaman, 113 N. Y. 62, 20 N. E. Rep. 613; Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. Rep. 874; In re Will of Bernsee, 141 N. Y. 389, 391–392, 36 N. E. Rep. 314. The probate of a will was opposed by one who was a stranger in blood to the testatrix, but who claimed as a legatee under former wills executed by her. Held, that he was a person deriving an interest under the deceased within the meaning of the statute. Matter of Will of Smith, 95 N. Y. 516.

"The testator's intention must be gathered from the will and while evidence may be received to explain any ambiguity in the designation of a beneficiary, yet neither the scrivener nor any one else can be permitted to testify that the testator meant or intended any disposition of his property not expressed in the will." Wilson *v.* Storthz, 117 Ark. 418, 175 S. W. Rep. 45.

[57] Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. Rep. 874.

him by his client.[58] But a testator, in requesting a person to sign, as a subscribing witness to his will, is presumed to know the obligations assumed by the witness in respect to the proof of the will; among other things, the duty to testify as to the circumstances attending its execution, including the mental condition of the testator at that time, as evidenced by his action, conduct and conversation; and therefore the act of a testator in requesting his attorney, who drew his will, to become a witness to it, is clearly indicative of an intention to waive the statutory prohibition, and so leave the witness free to perform the duties of the office assigned him.[59] An executor and proponent of a will is not disqualified from testifying to such transactions or communications.[60]

68. Indirect Evidence.

Undue influence may be shown by indirect or circumstantial evidence;[61] and so may the freedom of the testator; for

[58] Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. Rep. 874.

[59] In re Will of Coleman, 111 N. Y. 220, 19 N. E. Rep. 71.

The fact that the attesting witnesses were attorneys, and were employed by the widow to oppose a contest of the will, does not make them incompetent to testify. Judy *v.* Judy, 261 Ill. 470, 104 N. E. Rep. 256.

[60] Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. Rep. 874.

[61] Marvin *v.* Marvin, 3 Abb. Ct. App. Dec. 192.

Undue influence must be shown by clear and convincing proof. In re Phillips, 244 Pa. 35, 90 Atl. Rep. 457.

A will cannot be overthrown on account of undue influence unless the latter is proved by direct and substantial evidence. There must be proof of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. In re Hodgdon, 23 Cal. App. 415, 138 Pac. Rep. 111; In re Gleason, 164 Cal. 756, 130 Pac. Rep. 872; In re Ricks, 160 Cal. 467, 117 Pac. Rep. 539; In re Carithers, 156 Cal. 422, 105 Pac. Rep. 127.

Undue influence need not be shown by direct evidence. It may be shown indirectly and arise as a natural inference from other facts in the case. It must not rest on mere opportunity to influence, or on mere suspicion. There must be somewhere proof of undue influence itself, either in fact or presumptively. To be effective it ought to be sufficient to destroy the free agency of the testator at the time of making a will. Teckenbrock

suspicious circumstances, which change the burden of proof, do not alter the mode of proof, but require the court to be vigilant in enforcing the rule.[62]

Opportunity and interest, however, are not alone enough to sustain a finding of undue influence.[63] The evidence must

v. McLaughlin, 209 Mo. 533, 108 S. W. Rep. 46.

[62] 1 Wms. on Ex'rs, 6 Am. ed. 147, and n. 149.

The burden of proof is upon the contestant to prove undue influence and not upon the proponent or beneficiaries to prove the absence of undue influence. In re Bailey, 186 Mich. 677, 153 N. W. Rep. 39.

Undue influence, to affect a will, must be such as subjugates the mind of the testator to the will of the person operating upon it, and an issue on the ground of undue influence is to be refused where the most that can be found from the testimony is that there was an opportunity for its exercise. In re Smith, 250 Pa. 67, 95 Atl. Rep. 338.

[63] Seguine *v.* Seguine, 3 Abb. Ct. App. Dec. 191; Cudney *v.* Cudney, 68 N. Y. 148. Many authorities as to what is sufficient evidence of undue influence, may be found in the cases arising on deeds and other contracts between the living; but these lay down too stringent rules to be applied against a beneficiary under a will. The law allows a person standing in a fiduciary relation to use a degree of influence to obtain a bequest which he cannot use to obtain a grant. Parfitt *v.* Lawless, L. R. 2 P. & D. 462, 468, s. c., 4 Moak's Eng. 693.

Mere opportunity to exercise undue influence is not enough to justify the conclusion that it was exercised. Matter of Schober, 154 N. Y. Supp. 309, 90 Misc. 230; Matter of McDermott, 154 N. Y. Supp. 923, 90 Misc. 526.

Mere proof that some one who is beneficially affected by the will had an opportunity to influence the testator in his favor, or proof that one beneficially affected, not only had an opportunity, but a disposition, to avail himself of opportunities presented, without proof of something done or attempted by him in the way of influencing the testator, would not be sufficient proof of undue influence exercised. Nor would proof of the fact that one who is shown to be hostile to those who did not get recognition in the will had an opportunity to exercise hostile influence on the mind of the testator be sufficient without further proof. Zinkula *v.* Zinkula, 171 Iowa, 287, 154 N. W. Rep. 158.

It is not sufficient to show that there was an opportunity to exercise undue influence, or that there was a possibility that it was exercised, but some evidence must be adduced showing that such influence was actually exercised,

justify the conclusion of a present constraining operative power upon the mind at the time of the act. Influence long before [64] or after [65] the act, is not alone enough, but may, in connection with other circumstances, raise a presumption of its existence at the time.[66]

69. Relevant Facts.

On either side of the question of undue influence a very wide range of inquiry is allowed.[67] Evidence of the disposition and mental qualities of the testator; [68] his condition at the time; [69] his manifestation of feeling toward those ben-

and by evidence is meant something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter not carrying the quality of proof, or having fitness to induce conviction. Brent *v.* Fleming, 165 Ky. 356, 176 S. W. Rep. 1134.

[64] McMahon *v.* Ryan, 20 Penn. St. 329.

The undue influence which must be shown in order to overturn a will must be such influence as dominates the will of the testator at the time of its execution. Padgett *v.* Pence (Mo. App.), 178 S. W. Rep. 205.

[65] Eckert *v.* Flowery, 43 Id. 46.

The point of time to be considered is that at which the testator executed the writing in dispute. In re Craft, 85 N. J. Eq. 125, 94 Atl. Rep. 606.

[66] 1 Wms. on Ex'rs, 6 Am. ed. 72.

No will should be held invalid on the ground of undue influence where the evidence fails to show that sort of pressure which overpowers the mind and masters the volition of the testator at the very moment of the testamentary act. In re Clark, 170 Cal. 418, 149 Pac. Rep. 828.

[67] Redf. on W., 3d ed. 536, § 51; Beaubien *v.* Cicotte, 12 Mich. 459, 1 Wms. Ex'rs, 6 Am. ed. 74, n.

A wide range of examination will be permitted on the question of undue influence. Bramel *v.* Crain, 157 Ky. 671, 163 S. W. Rep. 1125.

[68] Belief in witchcraft, ghosts, spiritualism, etc., in connection with evidence of feeble mind, is competent on the question of undue influence. Woodbury *v.* Obear, 7 Gray (Mass.), 467, Shaw, C. J. Compare Robinson *v.* Adams, 62 Me. 369.

The existence of a delusion in the mind of a testator, even at the time of making his will, as to particular persons or things, does not invalidate the will unless it is the product of the delusion. Brown *v.* Fidelity Trust Co., 126 Md. 175, 94 Atl. Rep. 523.

[69] Directions given by his physician, since deceased, competent

efited,[70] and toward those cut off;[71] their situation in life;[72] the testamentary intentions the testator entertained before he was subjected to influence;[73] the circumstances of the preparation of the instrument;[74] the influence exercised, by

as part of *res gestæ*. Platt *v.* Platt, 58 N. Y. 648.

The reasonableness, naturalness, and the general character of a codicil, while not controlling, are circumstances which may properly considered with other evidence upon the subject of undue influence. In re Bailey, 186 Mich. 677, 153 N. W. Rep. 39.

[70] Beaubien *v.* Cicotte, 12 Mich. 459.

The influence exerted by kindness to the testator, or by feelings, on his part, of gratitude to or affection for the beneficiaries, or those alleged to have brought about the testamentary disposition, is not undue influence. Matter of Schober, 154 N. Y. 309, 90 Misc. 230.

Any reasonable influence obtained by acts of kindness or by appeals to the feelings or understanding, and not destroying free agency, is not undue influence. Brent *v.* Fleming, 165 Ky. 356, 176 S. W. Rep. 1134.

Kindly offices and attentions rendered by a beneficiary and his family to a testator have repeatedly been held to be legitimate rather than undue influences. In re Craft, 85 N. J. Eq. 125, 94 Atl. Rep. 606.

[71] Lewis *v.* Mason, 109 Mass. 169; Fairchild *v.* Bascomb, 35 Vt. 417.

In a proceeding to probate a lost will which has been established, evidence which showed a feeling of antipathy on the part of testator toward the contestant is admissible. In re Keene, 189 Mich. 97, 155 N. W. Rep. 514.

[72] Thus their poverty, and his knowledge of the intemperance of the sole legatee is competent. Fairchild *v.* Bascomb, 35 Vt. 417. Evidence that one who formerly lived in the testator's family was without means, and therefore a more natural object of his bounty than the legatees named in the will, is inadmissible to show lack of testamentary capacity or undue influence. In re Merriman's Appeal, 108 Mich. 454, 66 N. W. Rep. 372.

Where a will is made in accordance with the dictates of natural justice, it will require strong evidence of lack of mental capacity or undue influence to nullify it. Gunderson *v.* Rogers, 160 Wis. 468, 152 N. W. Rep. 157.

[73] Cases in notes (below). As to declarations after it ceased, see Redf. on W. 551, and notes (below).

A will may be set aside on the ground of undue influence even though it results in intestacy. In re Crissick, 174 Iowa, 397, 156 N. W. Rep. 415.

[74] Beaubien *v.* Cicotte, 12 Mich. 459.

Evidence that the lawyer who

the party charged, over the testator in other matters;[75] and the personal relation sustained by them;[76]—is all competent. It is also competent to show that the party charged knowingly made false statements that he was ignorant of the existence of the will, or that its contents were less favorable to him than in fact they were.[77]

70. Declarations and Conduct of Testator.

When there is evidence tending to show fraud or undue

drew the will was retained to do so by the beneficiaries and received all his instructions from them is competent. In re Beck, 79 Wash. 331, 140 Pac. Rep. 340.

The fact that the testator made a change in his will is not in itself proof of undue influence. Gregg *v.* Moore, 33 Ohio Cir. Ct. R. 534.

[75] Evidence of instances in which the person charged with undue influence exercised controlling authority over the testator by imperious language, to which the testator submitted, is competent. Lewis *v.* Mason, 109 Mass. 169. And evidence of other transfers of property obtained by the same person, and the testator's forgetfulness of them, is competent. Lewis *v.* Mason, 109 Mass. 169.

While a belief in spiritualism or in any other religious creed if played upon by one designing to influence, and thereby actually influencing the believer's testamentary disposition of his property, may invalidate the will on the ground of undue influence, the belief is of itself no evidence of insanity. In re Hanson, 87 Wash. 113, 151 Pac. Rep. 264.

[76] The unlawful cohabitation of a testator with the mother of an illegitimate child, a legatee in the will, is not of itself sufficient evidence to justify a jury in finding undue influence on the part of the mother. Rudy *v.* Ulrich, 69 Penn. St. 177, s. c., 8 Am. Rep. 238. But if the relation of intimacy was consciously *unlawful*, as in the case of a married man living with a paramour, and making his will in favor of her or her children, undue influence may be inferred by the jury, as a question of fact. Dean *v.* Negley, 41 Penn. St. 312; Monroe *v.* Barclay, 17 Ohio St. 302. "The personal and family relations of a testator, the pecuniary condition of his children, and what he may have said of them in connection with his will, are all admissible, and may be considered either to sustain or to rebut the claim that certain inclusions or exclusions were unnatural and indicative of mental influences." Kirkpatrick *v.* Jenkius, 96 Tenn. 85, 90, 33 S. W. Rep. 819.

[77] Fairchild *v.* Bascomb, 35 Vt. 404, 418. And see Platt *v.* Platt, 58 N. Y. 648. Compare Jenkins *v.* Hall, 7 Jones L. N. C. 295.

influence, then the conduct and declarations of the testator not only at the time of execution, but before and after, are relevant for the purpose of manifesting his mental qualities and disposition, and consequent susceptibility to the fraud or undue influence;[78] his intelligent understanding of the will made; his testamentary intentions existing before he was subjected to the influence,[79] and his satisfaction or dissatisfaction with it after the influence was removed.[80] It seems to be now considered that a declaration which is competent for throwing light on the testator's mind is not to be excluded merely because it includes his narratives of menace, or confessions of fear, or acknowledgments of submission

[78] Shailer *v.* Bumstead, 99 Mass. 119. "Though the cases are not harmonious, we think the great weight of authority, and of reason, is to the effect that subsequent declarations of an alleged testator may be considered by the jury upon the issue of mental incapacity, but that they cannot be considered upon an issue of undue influence, unless there be independent proof indicating the presence of undue influence, and then only to show a condition of mind susceptible to such influence, and the effect thereof upon the testamentary act." Kirkpatrick *v.* Jenkins, 96 Tenn. 85, 89, 33 S. W. Rep. 819.

To justify breaking a will on the ground of undue influence, such influence must affirmatively be shown and, apart from declarations of the testator, be of a character to destroy the free agency of the testator in the disposition of the property. Woodville *v.* Morrill, 130 Minn. 92, 153 N. W. Rep. 131.

[79] 1 Redf. on W., 3d ed. 536, § 51; Redf. Am. Cas. on L. of W. 487, n.; Neel *v.* Potter, 40 Penn. St. 483; Denison's Appeal, 29 Conn. 402. So also is evidence of his pecuniary arrangements for the benefit of those charged with undue influence in procuring the later will. Beaubien *v.* Cicotte, 12 Mich. 459.

It is improper to ask a subscribing witness whether any fraud, duress or undue influence was used in order to cause the testator to subscribe his name to the will. O'Day *v.* Crabb, 269 Ill. 123, 109 N. E. Rep. 724.

[80] Thus to rebut evidence of undue influence, evidence that the influence was afterwards wholly removed, and the testator, though he lived long in freedom made no alteration, is competent (Wilson *v.* Moran, 3 Bradf. 172, 1 Redf. on W. 526, par. 35); and so *a fortiori*, is evidence that he affirmatively recognized the will. Taylor *v.* Kelly, 31 Ala. 59. *Contra*, Lamb *v.* Girtman, 26 Geo. 625.

to pressure or urgency, or even his statement that the will previously made was not freely or not intelligently executed; but that all that is requisite to the competency of the declarations is that they be of a nature to manifest the mental quality, and be sufficiently approximate in point of time to throw light on the mental quality at the time of execution; and the jury are to be directed not to regard them as evidence of the fact declared.[81] In other words, the declarations of the testator as to the acts or influence of others are not, alone, competent evidence of such acts or influence,[82] except when part of the *res gestæ*,[83] or so far as made in the presence of the parties against whom they are adduced; although, when the acts are proved, the declarations of the testator may be given in evidence to show the operation they had upon his mind.[84] To rebut the idea of fraud or undue influence, and to show that the will is the deliberate mind of the testator, previous declarations of testator, consistent with the scheme of the will, are admissible.[85]

71. Fraud.

Fraud in obtaining a will may be shown by indirect and circumstantial evidence; and any circumstance, howsoever

[81] Shailer *v.* Bumstead, 99 Mass. 113, and Beaubien *v.* Cicotte, 12 Mich. 459. Thus, declarations that he was afraid of his wife and compelled to submit to her demands, in order to have peace, were held competent. Beaubien *v.* Cicotte (above).

[82] 1 Redf. on W. 546, § 39. And the fact that they were dying declarations does not render them competent. Jackson *v.* Kniffen, 2 Johns. 32.

[83] Doe *v.* Allen, 8 T. R. 147; Rosc. N. P. 22. Diaries kept and letters written by a testator either before or after the execution of the will, while proper evidence as bearing upon the mental capacity, and the condition of the mind of the testator with reference to objects of his bounty, are not competent evidence of the facts stated in them or to prove fraud or undue influence. Marx *v.* McGlynn, 88 N. Y. 357.

[84] Cudney *v.* Cudney, 68 N. Y. 148.

[85] Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. Rep. 16; Harp *v.* Parr, 168 Ill. 459, 48 N. E. Rep. 113.

slight, if not wholly irrelevant to the issue of fraud, may be admitted.[86]

72. Revocation.

The modes of revocation are now usually prescribed by statute;[87] and statutes declaring that specified acts shall be deemed a revocation, create a conclusive presumption, which is not rebuttable by extrinsic evidence.[88] Where the statute makes the testator's intent an essential element, as in the case of marring the document, parol evidence is admissible in respect to the intent, within the limits hereafter stated. In other cases, extrinsic evidence is admissible to show the situation upon which the legal question of revocation according to the statute depends; and the effect of these facts under the statute is matter of law which cannot be varied by evidence of testator's actual intent.[89]

[86] Davis *v.* Calvert, 5 Gill & J. 269. The testimony of a disinterested party who drew up the will is admissible to show that the will when probated was in the same form and condition, as to the paper upon which it was written, as it was when executed. Harp *v.* Parr, 168 Ill. 459, 48 N. E. Rep. 113.

[87] 2 N. Y. R. S. 64, 4 Kent's Com. 521. This statute excludes all other modes. Ordish *v.* McDermott, 2 Redf. Surr. R. 463, and cases cited.

[88] Lathrop *v.* Dunlop, 4 Hun, 213, aff'd in 63 N. Y. 610; Walker *v.* Hall, 34 Penn. St. 483, 486.

Mutual wills may or may not be revoked at the pleasure of either party, according to the circumstances and understanding upon which they were executed. In order that either party be denied the right to revoke such a will, it must appear by clear and satisfactory evidence, or on the face of the wills, that these were executed in pursuance of a contract or compact between the parties each in consideration of the other; but even then either party may revoke during the lifetime of both, providing the other have notice of the intention so to do. Campbell *v.* Dunkelberger, 172 Iowa, 385, 153 N. W. Rep. 56.

[89] Adams *v.* Winne, 7 Paige, 99.

When it appears upon the face of a will that the names of certain beneficiaries have been stricken out by pen, evidence of declarations of the testator made after the execution of his will, that he meant to strike out of his will the names of such beneficiaries so that they would not share in his estate, is competent. Barfield *v.* Carr,

73. Marring the Document.

When a revocation by burning, cancelling, tearing, or obliterating, is relied on, it must appear that the testator had testamentary capacity at the time,[90] and that the act was done [91] by him or his authority,[92] with intent to revoke.[93]

169 N. C. 574, 86 S. E. Rep. 498.

[90] Idley *v.* Bowen, 11 Wend. 227.

Where the contents of the parts excised from a will may be shown by competent evidence, the will, including the missing clauses, should be probated. In case such evidence is not forthcoming, that part of the will which remains should be probated. Matter of Kent, 169 App. Div. 388, 155 N. Y. Supp. 894.

[91] Compare Pryor *v.* Goggin, 17 Geo. 444; Mundy *v.* Mundy, 15 N. J. Eq. (2 McCarter), 290; Malone *v.* Hobbs, 1 Robt. (Va.) 246; Runkle *v.* Gates, 11 Ind. 95; Boyd *v.* Cook, 3 Leigh (Va.), 32.

[92] The *onus* of making out that the cancellation of a will was the act of the testator himself lies upon those who oppose the will. 1 Wms. Ex'rs, Am. ed. 196, 2 Whart. Ev., § 894.

Where the will found among the testator's papers has the signature entirely torn off, the presumption is that the testator marred the paper *animo revocandi*. Whitehead *v.* Kirk, 104 Miss. 776, 61 So. Rep. 737, 62 So. Rep. 432, 51 L. R. A. N. S. 187, Ann. Cas. 1916, A. 1051.

Where the executor finds the will in the place in which the testator's instructions said it would be found, and the first page of such will is missing, the legal presumption arises and prevails that the deceased removed the first page. In re Sheaffer, 240 Pa. 83, 87 Atl. Rep. 577.

The presumption is that marks made upon a will which was in the possession and control of the testator up to the time of his death are those of the testator. Pyle *v.* Murphy, 180 Ill. App. 18; Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. Rep. 628.

Where a will found among testator's papers is sufficiently mutilated to amount to a revocation, the presumption is that the testator mutilated it *animo revocandi*. Matter of Francis, 73 N. Y. Misc. 148, 132 N. Y. Supp. 695.

[93] Clark *v.* Smith, 34 Barb. 140, and cases cited.

Under the common law, where there is nothing to show at what time an interlineation or alteration was made in a will it would be presumed to have been made before execution. Matter of Easton, 84 N. Y. Misc. 1, 145 N. Y. Supp. 373.

Where an interlineation, fair upon the face of an instrument, is entirely unexplained, there is no presumption that it was fraudulently made after the execution of the instrument. Crossman *v.*

The intent may be disproved by evidence that the testator had not the freedom and intelligence requisite for a testamentary act.[94] Direct proof of the act and intent is not essential; for evidence that a will, last seen or heard of in the custody of the testator, was, after his death, found among his effects, cancelled, raises a presumption that the cancellation was done by him with intent to revoke.[95] Feeble and

Crossman, 95 N. Y. 145; In re Conway, 124 N. Y. 455, 26 N. E. Rep. 1028, 11 L. R. A. 796; Matter of Dake, 75 N. Y. App. Div. 403, 78 N. Y. Supp. 29.

Unattested or unexplained alterations in a will are presumed to have been made after execution. Wetmore *v.* Carryl, 5 Redf. (N. Y.) 544.

A presumption that alterations in a will were made after execution may be rebutted by internal evidence apparent on the face of the will itself that the alteration was made before execution, or by extrinsic evidence, such as the oath of an attesting witness, or the declarations of the testator if made before execution. Matter of Easton, 84 N. Y. Misc. 1, 145 N. Y. Supp. 373.

Where a codicil, which is found in actual or constructive custody of the testatrix, is torn into fragments, the presumption is that the tearing was done by her *animo revocandi*. In re Kathan, 141 N. Y. Supp. 705.

Where a will after its execution remains in the possession of the testator until his death, at which time it is found among his papers with his name erased, the presumption is that the testator erased his name, and that he did so with the intention of revoking it. Crosby *v.* Crosby, 30 Ohio Cir. Ct. Rep. 14.

[94] Batton *v.* Watson, 13 Geo. 62.

[95] Evans *v.* Dallow, 31 L. J. Prob. 128.

Where the will remains in the possession of the testator and after his death certain portions of the will were found to have been cancelled the presumption is that the testator cancelled those provisions with intent to revoke them. Home of the Aged of M. E. Church *v.* Bantz, 107 Md. 543, 69 Atl. Rep. 376.

If when a will is taken from the testator's valuable effects, the same having previously been in his custody, it is found that the signature of the testator is torn entirely through, dividing all the letters of the name as near in half as it could well be done, and that the will is marked on its face in two prominent and material portions "Cancelled by Isaac Wellborn" (the testator), a presumption is raised calling for an explanation from the propounder, and the burden is placed on him to prove the will notwithstanding the circumstances. In re Well-

incomplete efforts to cancel or destroy may be sufficient, where the evidence of intent is direct and clear.[96]

74. Disappearance of the Document.

Evidence that a will was once in existence, and last heard of in the possession of the testator, and that it was not to be found at his death, raises a presumption that it was destroyed by him with intent to cancel it.[97] This presumption is not

born, 165 N. C. 636, 81 S. E. Rep. 1023.

Where a will remains in testator's possession until his death, and is then found among his papers, with erasures, alterations, cancellations or tearings, the presumption is that such act manifest upon the will was done by the testator with the intention of revocation. Burton *v.* Wylde, 261 Ill. 397, 103 N. E. Rep. 976.

Where words in a will are stricken out by a mark running through them it will be presumed that it was done by the testator. Wilkes *v.* Wilkes, 115 Va. 886, 80 S. E. Rep. 745.

[96] See Dan *v.* Brown, 4 Cow. 483, 490. Compare Burns *v.* Burns, 4 Serg. & R. 295; Sweet *v.* Sweet, 1 Redf. Surr. 451; Smock *v.* Smock, 11 N. J. Eq. (3 Stock.) 156; Bennett *v.* Sherrod, 3 Ired. L. (N. C.) 303; Bethel *v.* Moor, 2 Dev. & B. L. (N. C.) 311; Bell *v.* Fothergill, L. R. 2 P. & D. 148; Giles *v.* Warren, Id. 401; Card *v.* Grinman, 5 Conn. 164.

[97] Idley *v.* Bowen, 11 Wend. 236; Bulkley *v.* Redmond, 2 Bradf. 281. A principle of universal acceptance in both the English and American courts. 1 Redf. on Wills, 328 (48). It seems that the nature of the contents is material to the question whether the testator destroyed it. Per Sir J. Hannen, Sugden *v.* Ld. St. Leonards, L. R. 1 Prob. Div. 176, 195.

If it be established that the decedent made a will such as the statute permits to dispose of property, and it was last seen in the possession or under the control of the decedent, and at his death no will can be found upon proper search, the presumption obtains that the will was destroyed *animo revocandi*. Hard *v.* Ashley, 88 Hun, 103, 34 N. Y. Supp. 583; Burton *v.* Wylde, 261 Ill. 397, 103 N. E. Rep. 976; St. Mary's Home for Children *v.* Dodge, 257 Ill. 518, 101 N. E. Rep. 46; Taylor *v.* Pegram, 151 Ill. 106, 37 N. E. Rep. 837; Griffith *v.* Higinbotom, 262 Ill. 126, 104 N. E. Rep. 233, Ann. Cas. 1915, B. 250.

Where a will is executed in duplicate only one of the duplicates (called the authentic) need be probated, but the other must be produced in court, as a revocation of one is a revocation of both. So where the testator had one duplicate in his custody during his life, and after his death it

conclusive,[98] but it serves to throw upon the party relying on the will the burden of showing that it was not so destroyed, or that the testator was not of sound mind at the time.[99] The presumption is not to be rebutted merely by parol evidence of intent to make another will.[1] Evidence that the lost will, when last known of, was in the control of a person having adverse interest, is sufficient to sustain a finding that it was in existence at testator's death, or was fraudulently destroyed by another.[2] The fact that the testator, after

cannot be found, the presumption is that he destroyed it *animo revocandi*, and it follows that the other duplicates cannot be probated. Matter of Schofield, 72 Misc. 281, 129 N. Y. Supp. 190.

Where a will cannot be found after the death of the testator, who had the will in his custody, the presumption is that he destroyed it *animo revocandi;* but the presumption may be rebutted. In re Cunnion, 201 N. Y. 123, 94 N. E. Rep. 648, Ann. Cas. 1912, A. 834; St. Mary's Home for Children *v.* Dodge, 257 Ill. 518, 101 N. E. Rep. 46; Matter of Ascheim, 75 N. Y. Misc. 434, 135 N. Y. Supp. 515; In re Ziegenhagen, 148 Wis. 382, 134 N. W. Rep. 905.

In order to probate the copy of a will which was made some nineteen years after the will was executed, the absence of the original will must be accounted for, its custody from the time of its execution must be shown, and some explanation must be given showing who made the copy or by whom it was produced. In re Francis, 94 Neb. 742, 144 N. W. Rep. 789, 50 L. R. A. N. S. 861.

[98] Brown *v.* Brown, 8 Ellis & & B. 884, s. c., 92 Eng. C. L. 875. But it is more or less strong, according to the nature of the custody. Per Cockburn, C. J., Sugden *v.* Ld. St. Leonards, L. R. 1 Prob. Div. 154, 218.

Where a will cannot be found at the death of the testator, after proper search, and especially where the will is not traced out of his possession, it is to be presumed that it was destroyed by him *animo revocandi*, but this presumption of revocation may be met by declarations of the testator. In re Keene, 189 Mich. 97, 155 N. W. Rep. 514.

[99] Idley *v.* Bowen (above).

The burden of proof that a lost will was the last of the decedent, is on the proponent of the lost will. Cassem *v.* Prindle, 258 Ill. 11, 101 N. E. Rep. 241.

[1] Betts *v.* Jackson, 6 Wend. 173.

Evidence that the lost will was in existence at the time of the testator's death, but disappeared since, will overcome the presumption. Griffith *v.* Higinbotom, 262 Ill. 126, 104 N. E. Rep. 233, Ann. Cas. 1915, B. 250.

[2] See paragraph 78.

being informed of the loss or destruction of his will, failed to make another, is competent but slight evidence of intent to revoke; and this presumption may be rebutted by evidence that the loss or destruction was without his agency.[3]

75. Testator's Declarations.

Declarations of the testator, not made in testamentary form, are not competent as principal evidence of a revocation, because the statute must be complied with;[4] but if there is direct evidence of an act of revocation, such as the statute requires, or if such an act is legally presumable, for instance, where the will cannot be found,—evidence of his declarations is competent to repel or strengthen the presumption of cancellation.[5] A declaration which is a narrative of a past act,—for instance, that he had duly revoked his will,—is incompetent, even for the purpose of proving the intent. It is only declarations forming part of the *res gestæ* which are competent for such purpose.[6] Other declarations, before or

[3] Steele *v.* Price, 5 B. Monr. 58.

In order to prove the contents of a list will the declarations of the testator are admissible, but only to corroborate the testimony of other witnesses as to their knowledge of the contents of the will. Griffith *v.* Higinbotom, 262 Ill. 126, 104 N. E. Rep. 233, Ann. Cas. 1915, B. 250.

[4] Adams *v.* Winne, 7 Paige, 97.

The declarations of a decedent made after the execution of the will cannot be used to overturn it. Padgett *v.* Pence, 178 S. W. Rep. (Mo.) App. 205.

[5] Bulkley *v.* Redmond, 2 Bradf. 285; Steele *v.* Price, 5 B. Monr. (Ky.) 58.

[6] Dan *v.* Brown, 4 Cow. 483; Sisson *v.* Conger, 1 N. Y. Supm. Ct. (T. & C.) 569; Waterman *v.* Whitney, 11 N. Y. 162. Per S. L. Selden, J. *Contra*, Youndt *v.* Youndt, 3 Grant's Cas. 140; Lawyer *v.* Smith, 8 Mich. 411. Compare Sugden *v.* Ld. St. Leonards, L. R. 1 Prob. Div. 154; Taylor Will Case, 10 Abb. Pr. N. S. 306; Keen *v.* Keen, L. R. 3 P. & D. 105. Under the freer rules of evidence now administered, several important qualifications of this rule remain to be considered, viz.: Whether the *res gestæ* do not include the custody of the will from the time of execution to the testator's death, and whether his declarations characterizing his possession—as, for instance, if he should use the will as evidence in a proceeding against the party charged with obtaining its execution by duress, or if he delivered

after the act, are not usually competent as bearing on the intent, unless the question of intent depends on unsoundness of mind or undue influence, in which case declarations not too remote in point of time are competent for the purpose of proving the state of the mental powers.[7]

it, mutilated, to counsel as being revoked, and as part of his instruction for drawing a new will, or if he should say he had made his will, pointing to the place where it would be found,—are not in all cases admissible, not as principal evidence of execution or revocation, but as material to the ambulatory existence and custody of the will and the circumstances of its production or its disappearance, and as competent on the question of intent, without connection with the testamentary act. The English rule admits the declarations of the testator to show the continuing existence of the will in his possession at the time they were made. Sugden *v.* Ld. St. Leonards, L. R. 1 Prob. Div. 154, 225. Per COCKBURN, C. J. Another principle which will clear up much apparent conflict in the language of the cases as to restoration, is, that revocation does not result from cancellation without intent to revoke; hence, where the testator was insane or delirious when he tore or cancelled the paper (and, perhaps, when he acted under mistake as to its validity), declarations afterwards intelligently recognizing it as his will are competent; for they are not offered to prove a testamentary act. But after an intelligent revocation, a rejoining of the fragments, and a confirmation of the will, on a change of purpose, ought not to be competent. Compare Colagan *v.* Burns, 57 Me. 449; Patterson *v.* Hickey, 32 Geo. 156; Whart. Ev., § 900, and cases cited.

The acts and declarations of the testator at the time of executing a subsequent will as to his intention of revoking the former will are admissible. Murphy *v.* Clancy, 177 Mo. App. 429, 163 S. W. Rep. 915.

The declarations of testator at the time of mutilation or destruction of his will are admissible to prove his intent in such mutilation or destruction. Burton *v.* Wylde, 261 Ill. 397, 103 N. E. Rep. 976.

Where a testator had wholly or partly destroyed or mutilated, torn, or cancelled his will, the declarations made by him at the time of the doing of such act are admissible as part of the *res gestæ* to show with what intent he mutilated or destroyed the instrument. Burton *v.* Wylde, 261 Ill. 397, 103 N. E. Rep. 976; Managle *v.* Parker, 75 N. H. 139, 71 Atl. Rep. 637, 24 L. R. A. N. S. 180, Ann. Cas. 1912, A. 269.

[7] Waterman *v.* Whitney (above).

In a will contest, the declaration made by the testator in a deposition made prior to his death in a

76. Subsequent Testamentary Act.

Evidence that the testator executed a subsequent will does not, without proof that its contents were inconsistent with the earlier,[8] or that its disappearance was by spoliation committed by the party claiming under the earlier will,[9] prove a revocation of the earlier. But the loss of the later will having been proved, its contents may be shown by parol, for the purpose of proving that it revoked the earlier will.[10] Extrinsic evidence cannot be received to show that

law suit to the effect that his attorney has custody of his will, is admissible in support of the will, but the deposition is not admissible. Rucker *v.* Carr, 163 S. W. Rep. (Tex. Civ. App.) 632.

In Illinois, declarations of the testator made *after* destroying or mutilating his will are admissible to show intent. Burton *v.* Wylde, 261 Ill. 397, 103 N. E. Rep. 976; Boyle *v.* Boyle, 158 Ill. 228, 42 N. E. Rep. 140.

[8] Nelson *v.* McGiffert, 3 Barb. Ch. 165, and cases cited. It is not enough that the later will be shown to be different, without showing in what the difference consists. Dickinson *v.* Stidolph, 11 C. B. N. S. 357, s. c., 103 Eng. C. 356.

One who claims that a subsequent will, since destroyed, revoked a prior will now offered for probate, has the burden of proving that the subsequent will contained a revocation clause. Connery *v.* Connery, 175 Mich. 544, 141 N. W. Rep. 615.

Where a subsequent will, containing a revocation clause, is refused probate on account of incapacity and incompetence of the testator, the entire will, including the revocation clause, becomes inoperative and a prior will may then be proved. In re Goldsticker, 192 N. Y. 35, 84 N. E. Rep. 581, 18 L. R. A. N. S. 99, 15 Ann. Cas. 66.

While there is no presumption that a will drawn by a lawyer contains a revocation clause, the inference is that such would ordinarily be the fact. Matter of Wylie, 162 N. Y. App. Div. 574, 145 N. Y. Supp. 133.

One who claims under a later will, which has been destroyed, has the burden of proving by a preponderance of evidence that the later will contained a revoking clause. Fitzpatrick's App., 87 Conn. 579, 89 Atl. Rep. 92.

[9] Jones *v.* Murphy, 8 Watts & S. 301; Betts *v.* Jackson, 6 Wend. 180.

A will cannot be revoked by a subsequent instrument in writing which is not testamentary in character. Moore *v.* Rowlett, 269 Ill. 88, 109 N. E. Rep. 682, L. R. A. 1916, E. 89, Ann. Cas. 1916, E. 718.

[10] Brown *v.* Brown, 8 Ellis & B

the cancellation of a later will was intended to revive a former one.[11]

77. Constructive Revocations.

Implied or constructive revocations, such as those resulting from marriage, the birth of issue, etc., are not generally defined and limited by the statutes, the terms of which usually control the question of evidence.[12] In the absence of such a statute, or in case of a will or alleged revocation before the statute,[13] a substantial change in the situation of the testator's family or property, or both, so great as to raise new testamentary duties,[14] may be treated by the court as effecting a revocation; or if there is evidence of an equivocal act of the testator tending to show an actual intent to revoke, then a substantial change in the situation, such as might have furnished a reasonable motive for revocation, may be given in evidence to support the inference of revoca-

876, s. p., Matter of Griswold, 15 Abb. Pr. 299. And it has been held that an express revocation contained in it may be thus proved, although the disposing provisions are not susceptible of proof. Day *v.* Day, 2 Green. Ch. 549, 557; but, on the contrary, where the only disposing provisions in the later will are void for undue influence, it is held that the clause of revocation alone is not sufficient evidence of the testator's intention to revoke a former will; for the presumption is, that, if the second will is found to be invalid, the testator intended that the first should stand, rather than that he should die intestate. Rudy *v.* Ulrich, 69 Penn. St. 177, s. c., 8 Am. Rep. 238.

A will is ambulatory, inoperative, ineffectual and without legal existence until the death of the testator. The destruction of a subsequently executed will containing a revocation clause will operate to revive a former will. Moore *v.* Rowlett, 269 Ill. 88, 109 N. E. Rep. 682, L. R. A. 1916, E. 89, Ann. Cas. 1916, E. 718.

[11] 2 N. Y. R. S. 66, § 53; 5 Centr. L. J. 397, and cases cited; 1 Redf. on W. 317 (27); *contra*, Id. (36). But it has been received to show that a later was not intended to supersede a former will. Dempsey *v.* Lawson, 36 L. T. N. S. 515.

[12] 2 N. Y. R. S. 64; Lathrop *v.* Dunlop, 4 Hun, 213, aff'd in 63 N. Y. 610. Compare Wheeler *v.* Wheeler, 1 R. I. 364.

[13] As to the time when the statute took effect on previous wills, see 4 Bradf. 447, 8 Paige, 446.

[14] Sherry *v.* Lozier, 4 Bradf. 450, and cases cited.

tion; [15] but evidence of the relative wealth or poverty of members of the family, there being no substantial change in situation, is not competent.[16]

At common law, the revocation presumed from marriage and birth of issue otherwise unprovided for, cannot be rebutted by parol evidence of intent. The question, in a court of law at least, is not of actual intent, but the revocation is a legal presumption.[17] But the presumption raised by the birth of a child, in connection with other circumstances than marriage, is not at common law conclusive.[18] Even in case of constructive revocation, replication cannot be proved by parol.[19]

78. Action to Establish Lost or Destroyed Will.[20]

The proof of a lost or destroyed will is one of secondary evidence exclusively; and the law accepts the best evidence that the nature of the case admits, as to its valid execution, its contents, its existence at testator's death, and its loss; [21] and is satisfied if it tend with reasonable certainty to establish those facts.[22] But the proof of the contents must be

[15] Betts *v.* Jackson, 6 Wend. 173, 176.

[16] Id. Compare Warner *v.* Beach, 4 Gray, 162; Brush *v.* Wilkins, 4 Johns. Ch. 506.

[17] Marston *v.* Roe, 8 Ad. & El. 14, s. c., 35 Eng. C. L. 303, 1 Wms. Ex'rs, 195, 196, 1 Redf. on W. 300, n. 24; and see Bloomer *v.* Bloomer, 2 Bradf. 339.

[18] Sherry *v.* Lozier, 4 Bradf. 453.

[19] Carey *v.* Baughn, 36 Iowa, 540, s. c., 14 Am. Rep. 534.

[20] Under the statute. 2 N. Y. Code Civ. Pro., § 1861.

The probate court has jurisdiction to admit to probate lost, destroyed or suppressed wills. Prentice *v.* Crane, 234 Ill. 302, 84 N. E. Rep. 916.

[21] Grant *v.* Grant, 1 Sandf. Ch. 235.

The right to probate a destroyed will offered by parties with full knowledge of the facts, will not be defeated merely because of a long delay in the institution of a suit to establish such will. This is, however, a circumstance to be considered by the court. Dudgeon *v.* Dudgeon, 119 Ark. 128, 177 S. W. Rep. 402.

[22] See Everitt *v.* Everitt, 41 Barb. 385, 387, and Sugden *v.* Ld. St. Leonards, L. R. 1 Prob. Div. 154, 239.

In an action to establish a lost will the precise language need not be proved, as long as the substance

clear and cogent, though it need not always be complete.[23] To prove the existence of the will at the time of testator's death, direct evidence is not essential; [24] but if testator had access to it when last known, its existence at his death cannot be inferred from his declarations, made a month or so previously, that he had it in his possession.[25] In such case the presumption rather is of destruction by the testator.[26] But any presumption of destruction by him, arising merely from its disappearance, is entirely rebutted by evidence that he had deposited it with another person, and did not afterwards have access to it.[27]

Where actual destruction is not shown, parol evidence is not admissible until it has been proved that diligent search for the will has been made by or at the request of the party interested, at the place where it is most likely it would be found,—as for instance (if last traced to testator's possession), search among his papers at his usual place of residence.[28] The mere fact that a person having an adverse interest had opportunities of access to the will while it was in the testator's custody, does not raise a presumption of fraudulent destruction; [29] but the fact that when last known of it was in the control of such a person, may sustain that

is established. Jones *v.* Casler, 139 Ind. 382, 38 N. E. Rep. 812, 47 Am. St. Rep. 274.

[23] Compare, on this point, Sugden *v.* Ld. St. Leonards, L. R. 1 Prob. Div. 154, and Davis *v.* Sigourney, 8 Metc. (Mass.) 487, which exhibit the two opposing views. The true principle seems to be that entire provisions may be established, if shown to have been not dependent on nor affected by the portion which cannot be proved—except where the proceeding is to establish the will under a statute which requires the whole to be proved. An illustration of this is the rule that the revoking clause may be proved, to defeat a prior will, although the disposing clauses are not capable of proof. See also Redf. Am. Cas. on L. of Wills, 217, n.

[24] Schultz *v.* Schultz, 35 N. Y. 653.

[25] Knapp *v.* Knapp, 10 N. Y. 276.

[26] Paragraph 74.

[27] Schultz *v.* Schultz (above).

[28] Dan *v.* Brown, 4 Cow. 491.

[29] It is not even enough to go to the jury. Knapp *v.* Knapp, 10 N. Y. 276, 280.

conclusion.[30] Evidence that the testator gave it into the custody of another who never parted with its possession, but locked it up, and after testator's death could not find it, is enough, for it proves either its existence at his death or fraudulent destruction in his lifetime.[31] Direct evidence of actual intent to defraud any particular person, is not essential. The fraud contemplated by the statute is the unauthorized defeating of the will.[32] Evidence of fraud or undue influence, inducing the testator to destroy the will himself is sufficient,[33] but a destruction by his direction if freely given is not enough, even though the destruction was not so performed as to amount to a revocation under the statute.[34] Unless the statute otherwise provides,[35] the contents of a lost or destroyed will may be proved by a single witness.[36] Declarations, written or oral, made by the testator, whether before, at, or after the execution of the will, are competent secondary evidence of its contents; [37] but the con-

[30] Jones *v.* Murphy, 8 Watts & S. 299.

[31] Schultz *v.* Schultz (above), and see Hildreth *v.* Schillenger, 10 N. J. Eq. (2 Stockt.) 196.

[32] Id.

[33] Voorhees *v.* Voorhees, 39 N. Y. 463, affi'g 50 Barb. 119.

[34] Timon *v.* Claffy, 45 Barb. 438.

[35] N. Y. Code Civ. Pro., § 1865, requires the provisions to be "clearly and distinctly proved, by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness."

[36] Sugden *v.* Ld. St. Leonards, L. R. 1 Prob. Div. 154, and see Fetherly *v.* Waggoner, 11 Wend. 599. Even though he himself destroyed it under excusable mistake, and he is residuary legatee. Wyckoff *v.* Wyckoff, 1 C. E. Green, 401. That all the witnesses must be produced or accounted for—see Thornton *v.* Thornton, 39 Vt. 122, s. c., 6 Am. L. Reg. N. S. 341.

A lost will may be proved by a single witness who read it through and remembers its contents. Jacques *v.* Horton, 76 Ala. 238.

[37] Clark *v.* Turner, 50 Neb. 290, 69 N. W. Rep. 843; Sugden *v.* Ld. St. Leonards, L. R. 1 Prob. Div. 154, 225, 241; and see Johnson *v.* Lyford, L. R. 1 P. & D. 546. The testimony of a witness as to the contents of a will, his knowledge being derived from the testator's reading the will to him, and not from having inspected it, is in effect only testimony as to the testator's declarations. Clark *v.* Turner (*supra*).

Declarations of a testator, shortly before his death, as to his manner

tents of a lost will cannot be proved solely by the declarations of the testator, though such declarations are admissible to corroborate more direct evidence.

79. Foreign Will.

A foreign will is proved by producing in the same way as a domestic will a probate by a probate court within the State, granted either upon original proof or upon production there of an exemplified copy of a foreign probate. Ancillary probate thus granted within the State, is equivalent as evidence to original probate here.[38] The foreign exemplification, even if itself receivable in evidence, by virtue of the act of Congress,[39] and competent on the question of the rights and liabilities of the parties arising in such other State,[40] cannot be received for the purpose of affecting title to land within the State (unless expressly authorized by the statutes of the State); but if it has not been recorded in a probate court within the State, the original will must (for

of disposing of his property, are admissible to show the contents of an alleged lost will, and whether it remained unrevoked at his death, where the existence of such lost will must be proved to establish the right of the contestants of another will to maintain their action. McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. Rep. 336.

[38] Bromley *v.* Miller, 2 Supm. Ct. (T. & C.) 575; Townsend *v.* Downer, 32 Vt. 183, 216; Miller *v.* James, L. R. 3 P. & D. 4.

[39] U. S. R. S., §§ 905, 906. In such case the recital in the record of notice of the proceedings is *prima facie* evidence that it was given, but not conclusive if jurisdiction depended on it. Clark *v.* Blackington, 110 Mass. 369, 374.

The law of the State of the domicile of the testator determines the validity of the will as a distribution of personalty. Matter of Martin, 173 App. Div. 1, 158 N. Y. Supp. 915.

[40] Robertson *v.* Barbour, 6 T. B. Monr. (Ky.) 523.

Wills executed by persons domiciled in a State are governed by the laws of that State although executed beyond its territorial limits. Worsham *v.* Ligon, 144 Ga. 707, 87 S. E. Rep. 1025.

Even though a person is a resident of this country he may make a will according to the law of a temporary domicile and the law will govern. Matter of Connell, 155 N. Y. Supp. 397, 92 Misc. 324.

such purpose) be produced, or its loss accounted for so as to admit secondary evidence.[41]

80. Ancient Will.

An ancient will is competent *prima facie* evidence, without probate, if it appear that the testator is dead, and that it is regular on its face, that is apparently executed with legal formalities, and is shown to have come from the proper custody, if more than thirty years have elapsed since the testator's death,[42] and if it is corroborated by other circumstances, such as the fact that possession has been continuously held under it. Mere efflux of time is not enough to dispense with proof of execution, but it is not always essential to show possession. It is enough if such account be given of it as may, under the circumstances, be reasonably expected, and as will afford the presumption that it is genuine.[43] Inability to prove handwriting should be shown.[44] If the original is lost, its antiquity and contents may be proved by secondary evidence.[45] Evidence of the acts and declarations of third persons, when in posssesion of the lands, are competent to prove the continued possession under the will.

[41] Graham *v.* Whitely, 26 N. J. L. 260. Whether the original is competent without such probate, depends on the local statutes. See Ives *v.* Allyn, 12 Vt. 589; Barstow *v.* Sprague, 40 N. H. 27.

The will of a person domiciled in Louisiana must be probated there, irrespective of the fact that the will was executed in a foreign country. Drysdale's Succ., 121 La. 816, 46 So. Rep. 873.

[42] Staring *v.* Bowen, 6 Barb. 109. The appearance of the paper itself, and the date, are, in the absence of anything to raise suspicion, competent on the question of age. Enders *v.* Sternbergh (below).

A will thirty years old is presumed to be without living witnesses to its execution. Matter of Hall, 154 N. Y. Supp. 317, 90 Misc. 216.

[43] This is the New York rule. Enders *v.* Sternbergh, 2 Abb. Ct. App. Dec. 36, 43; Jackson *v.* Luquere, 5 Cow. 211. *Contra,* Merrill *v.* Sawyer, 8 Pick. 297.

[44] Northrop *v.* Wright, 7 Hill (N. Y.), 476.

[45] Enders *v.* Sternbergh, 2 Abb. Ct. App. Dec. 42; Jackson *v.* Van Dusen, 5 Johns. 144.

X. EXTRINSIC EVIDENCE AFFECTING WILLS

81. Effect of the Statute of Wills.

The Statute of Wills, by requiring testamentary acts to be expressed and authenticated in writing, precludes us from treating oral declarations as a testamentary act, or even as any part of such an act.[46] Every disposition which the testator makes must be embodied in a writing that conforms to the statute. Extrinsic evidence cannot establish a provision shown to have been omitted by mistake, nor even supply any essential or vital part left blank, in a provision the frame of which was inserted by the testator.[47] A will may be construed in connection with another writing to which it refers;[48] but it cannot, even by expressing an intention to do so, make an unattested instrument a part of itself, so as to effect a testamentary disposition without compliance with the statutory formalities.[49]

[46] Mann *v.* Mann, 14 Johns. 1, affi'g 1 Johns. Ch. 231.

Oral statements by a testator made before the time of making his will are not admissible to show his intention. Cochran *v.* Lee, 27 Ky. Law Rep. 64, 84 S. W. Rep. 337.

There being no ambiguity in the language employed, parol proof of the declaration of the deceased as to his purpose must be excluded. Scott *v.* Scott, 137 Iowa, 239, 114 N. W. Rep. 881, 126 Am. St. Rep. 277, 23 L. R. A. N. S. 716.

[47] Per SHAW, C. J., Tucker *v.* Seaman's Aid Society, 7 Metc. 205.

Parol evidence cannot be received to give a will operative elements, language, or provisions not in it before; it is only admissible for the purpose of affording light whereby what is in the will may be read, understood and applied. In re Root, 187 Pa. 118, 40 Atl. Rep. 818; Bower *v.* Bower, 5 Wash. 225, 31 Pac. Rep. 598; Gilmore *v.* Jenkins, 129 Iowa, 686, 106 N. W. Rep. 193, 6 Ann. Cas. 1008.

Extrinsic evidence cannot be introduced where there is no ambiguity in the will. Scott *v.* Roethlisberger, 178 Mich. 581, 146 N. W. Rep. 307; In re McVeigh, 181 Mo. App. 566, 164 S. W. Rep. 673; Dale *v.* Dale, 241 Pa. 234, 88 Atl. Rep. 445.

A gift cannot be cut down by anything which does not, with reasonable certainty, indicate an intention to that effect. Goffe *v.* Goffe, 37 R. I. 542, 94 Atl. Rep. 2, Ann. Cas. 1916, B. 240.

[48] Jackson *v.* Babcock, 12 John. 389.

[49] Langdon *v.* Astor, 16 N. Y. 9;

82. Legitimate Objects of Extrinsic Evidence.

Notwithstanding these restrictions, extrinsic evidence is freely admitted for certain purposes, which in a practical aspect may be defined as four, viz. To aid in *reading*, *testing*, *applying*, and *executing* the testamentary declaration of intention.[50]

Thompson *v.* Quimby, 2 Bradf. 449; Clayton *v.* Ld. Nugent, 13 M. & W. 200.

A memorandum which forms no part of the will, and is not attested, is merely a parol declaration of the testator, introduced to aid in interpreting the will, and as such is extrinsic evidence. Where the language of the will is sensible, intelligible and clear, extrinsic proof cannot vary it. Williams *v.* Freeman, 83 N. Y. 561.

Where there is no ambiguity on the face of a will, taken in connection with the surrounding facts, so that there is no doubt as to the subject-matter of a bequest, or as to the identity of a legatee, no extrinsic memorandum can be admitted to change the intention expressed. Lincoln *v.* Perry, 149 Mass. 368, 21 N. E. Rep. 671, 4 L. R. A. 215; Best *v.* Berry, 189 Mass. 510, 75 N. E. Rep. 743, 109 Am. St. Rep. 651.

No effect can be given to a sealed letter of dispositive and testamentary character found with the will, as a part of the will, even if the evidence offered proves that it was in existence and known to the testator at the time the will was executed. The letter must be executed in conformity with the statute regulating the testamentary disposition of property. Bryan *v.* Bigelow, 77 Conn. 604, 60 Atl. Rep. 266, 107 Am. St. Rep. 64.

A letter which explains an obscure provision in a codicil made after the letter was written is admissible for the purpose of ascertaining the intention of the testator. Ladies' Union Benev. Soc. *v.* Van Natta, 43 N. Y. Misc. 217, 88 N. Y. Supp. 413.

[50] Kent's statement of the rule, in the leading American case (Mann *v.* Mann, 1 Johns. Ch. 281), is, "Parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases: 1, where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; and 2, to rebut a resulting trust. All the cases profess to proceed upon one or the other of these grounds."

Wharton (2 Whart. Ev., § 992) lays down the rule thus: "With two exceptions, evidence of the testator's intentions is inadmissible in explanation of a will. These exceptions are as follows: (1) What is said at the time of the execution and attestation is admissible as part of the *res gestæ*, though not to contradict the will.

The confusion in the cases upon this subject arises partly from the difficulty of preserving the distinction between

(2) When it is doubtful as to which of two or more extrinsic objects a provision, in itself unambiguous, is applicable, then evidence of the testator's declarations of intention is admissible; not, indeed, to interpret the will, for this is on its face unambiguous, but to interpret the extrinsic objects."

Wigram's seven rules are (Wigr. Ex. Ev.): "I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

"II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

"III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

"IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words.

"V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator,

receiving extrinsic evidence to establish the testamentary intention, which is never allowable—and receiving it to enable us to understand the intention he has expressed, which is always allowable. No extrinsic evidence to interpret the will, is admissible except as light thrown upon the words of the will; and the only intention of the testator which the court can sanction, is that which they can derive through the will itself, it may be by the aid of such light. There is a class of cases, in which direct evidence of the testator's declarations of his intention can be received, to enable us to apply a provision of the will accordingly, viz., in cases where there are several persons or things equally answering the designation,—but these cases are not in truth an exception to the rule, for the declarations are not allowed to affect the intention, but only to show "what he meant to do"; and when we revert to the will, we may perceive from the will that he has done it by the general words used, if in their

or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts, can, in any way, be made ancillary to the right interpretation of a testator's words.

"VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see Proposition VII.) will be void for uncertainty.

"VII. Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined,—where the object of a testator's bounty, or the subject of disposition (*i. e.*, the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

If the language used in a will has a clear meaning, it must be accepted as disclosing the intent of the testator, and this intent must

ordinary sense they properly bear that construction.[51] If, after understanding the intention, we do not find that the will has declared it with the statute formalities, the court cannot give it effect, no matter how clear may be the evidence.

be upheld if consistent with the accepted rules of law. Nolan *v.* Nolan, 169 App. Div. 372, 154 N. Y. Supp. 355.

[51] Ld. Abinger in Doe ex dem. Hiscocks *v.* Hiscocks, 5 M. & W. 363.

The intention of the testator must be gathered from the will itself. La Tourette *v.* La Tourette, 15 Ariz. 200, 137 Pac. Rep. 426, Ann. Cas. 1915, B. 70.

Extrinsic evidence to establish testamentary intention is not allowable. Duensing *v.* Duensing, 112 Ark. 362, 165 S. W. Rep. 956.

Extrinsic evidence cannot be introduced to contradict the terms of the will. Hopper *v.* Sellers, 91 Kan. 876, 139 Pac. Rep. 365.

In construing a will the chief purpose of the courts is to ascertain the intention of the testator and to give to the will the interpretation and meaning which the testator intended, so that such intention may be carried out whenever it can be done without violating some established rule of law or public policy. To find the true intention of the testator, the will and codicils and all of their parts must be construed together. Spencer *v.* Spencer, 268 Ill. 332, 109 N. E. Rep. 300.

Where the intention of the testator is plain, the court may and should go to the uttermost limits of construction authority to discover it expressed in the language used to that end. Boeck's Will, 160 Wis. 577, 152 N. W. Rep. 155, L. R. A. 1915, E. 1008.

A fundamental rule in the construction of wills is to consider the whole scope and plan of the testator and to compare the various provisions with one another, construing them if possible so that all can stand. Nixon *v.* Nixon, 268 Ill. 524, 109 N. E. Rep. 294.

In construing wills, the intent of the testator must be found from the entire instrument. Edwards *v.* Mudge, 186 Mich. 71, 152 N. W. Rep. 902; Goffe *v.* Goffe, 37 R. I. 542, 94 Atl. Rep. 2, Ann. Cas. 1916, B. 240; Crowell *v.* Rose, 38 R. I. 93, 94 Atl. Rep. 683; Peaslee *v.* Rounds, 77 N. H. 544, 94 Atl. Rep. 263.

The testator's right to dispose of his property by will and to whom he sees fit, has no limitation except that he cannot dispose of those rights given by statute to the widow, and the disposition must be such as not to offend the settled principles of morality or public policy. Canaday *v.* Baysinger, 170 Iowa, 414, 152 N. W. Rep. 562.

83. Reasons for Its Liberal Admission.

In favor of the liberal application of the rule allowing extrinsic evidence, it may be said that text writers of high authority [52] declare that the rules for the admission and exclusion of parol evidence in regard to wills are essentially the same which prevail in regard to contracts generally; and it may be further urged that the right to dispose by will is of great importance; [53] that it is commonly exercised under circumstances unfavorable to formality and exact expression; and that the court ought to have every aid that the conduct and declarations of the testator can give, to guide in ascertaining his intention.

84. Reasons for Its Strict Exclusion.

On the other hand, it is to be considered that the rules allowing parol evidence in aid of the interpretation of contracts are not fully applicable to wills, for they rest on several reasons that are foreign to these instruments. 1. A will is not a transaction *between parties*, but a silent and private act; and the principle of good faith which may bind a contracting party by what passed in conversation, does not justify disposing of the rights of heirs and next of kin by what may have fallen from their ancestor. 2. Nor is a will a grant or effective act during the testator's life, but a revocable expression of intention, made frequently under circumstances likely to involve secrecy, if not fickleness and change; and the law does not bind a man by his expressions of intention, much less by his oral declarations that he has

[52] Redf. on W. 496, 1 Greenl. Ev., § 287. As a practical guide, this maxim would be very misleading. It would be less inexact to compare wills to statutes.

Where the intention of the testator is left obscure and uncertain it is competent to resort to extrinsic evidence in order to find the real intention. Ladies' Union Benev. Soc. *v.* Van Natta, 43 N. Y. Misc. 217, 88 N. Y. Supp. 413.

[53] See Maine's Anc. Law, 194.

A will should receive the most favorable construction which will accomplish the purpose intended. Chew *v.* Sheldon, 214 N. Y. 344, 108 N. E. Rep. 552, Ann. Cas. 1916, D. 1268.

expressed certain intentions in a revocable writing.[54] 3. It is a matter of common observation that testators are instinctively disposed to shroud their testamentary acts in secrecy, and disguise their intentions, and to baffle with equivocation or misrepresentation the importunities of the expectant and the inquisitiveness of the curious. The law regards this concealment as a right of the testator; and even positive deceit by him, however questionable morally, is not a legal wrong unless fraud is accomplished by it.[55] Therefore the testator's representations as to what he has or has not done, much more those as to what he intends, fail to afford any substantial presumption as to the testamentary act. 4. Besides this absence of reasons for admitting extrinsic evidence so freely as in cases of contracts, the objections to hearsay evidence apply in the strongest manner in many cases; and the fact that the controversy in which such evidence is offered usually arises between those who stood in very unequal degrees of personal intimacy with the testator, and that his own lips are sealed by death, render the resort to such evidence peculiarly liable to abuse, which it is the object of the statute to avoid by requiring every testamentary act to be expressed in a written and authenticated will. Such considerations as these have led the courts in recent years to restrict the admission of extrinsic evidence within the limits I shall now endeavor to indicate.[56]

[54] If the testator bound himself by a promise, it is to be enforced, if at all, as a contract. Ridley *v.* Ridley, 11 Jur. N. S. 475; and see 50 N. Y. 88; McGuire *v.* McGuire, 11 Bush (Ky.), 142.

[55] See Stickland *v.* Aldridge, 9 Ves. 516.

What the testator told outsiders after the will was executed as to his intentions with respect to his property is not admissible. Properly executed wills do not need such help, and defective or impossible wills cannot be pieced out by such extrinsic evidence, which at best is very unreliable. Lehnoff *v.* Theine, 184 Mo. 346, 83 S. W. Rep. 469.

[56] Earlier cases, and not a few later ones founded on earlier rulings, admit such evidence more freely, and it will not be difficult to find cases to the contrary of some of the propositions stated in the text in this connection, but I confine myself to a statement of the rule, and a selection of cases

85. Exceptional Rule as to Evidence in Rebuttal.

The considerations to which I have adverted, however, it will be seen do not militate against impeaching or disproving the validity of the testamentary act; nor, on the other hand, against evidence tending to show that the intention was really just what is expressed on the face of the will; and hence, in this class of cases, there is peculiar practical importance in the principle of evidence, that when one party may and does attempt to prove a fact, the other party thereby acquires a right to adduce evidence to the contrary. It will be seen that the method of attack sometimes enlarges the scope of the defense, and admits evidence that the rule would exclude if offered in the first instance.[57]

86. Extrinsic Aid in Reading.

Whatever is necessary to possess the court with an understanding of the language or characters in which the will is written, may be supplied by extrinsic evidence; [58] and it

illustrating it, as now administered in the courts of highest authority.

[57] Where one party proved the nature of a transaction with the testator to affect the construction or application of the will,—*Held*, that the other might give testator's declarations to the contrary, in evidence, by way of contradiction. Denio, J., Tillotson *v.* Race, 22 N. Y. 127.

[58] See Wigram's 4th proposition above. In case of latent ambiguity in a will, extrinsic evidence may be resorted to, not for the purpose of contradicting or adding to the will, but to determine the existence or non-existence of such ambiguity, and to enable the court to look upon the will in the light of facts and circumstances surrounding the testator at the time of its execution. Whitcomb *v.* Rodman, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. Rep. 553. Extrinsic evidence may be admitted in a proper case, where the effect of it is merely to explain or make certain what the testator has written; but such evidence is never admissible to show what the testator intended to write. Sturgis *v.* Work, 122 Ind. 134, 17 Am. St. Rep. 349, 22 N. E. Rep. 996; Hawhe *v.* Chicago, etc., R. Co., 165 Ill. 561, 46 N. E. Rep. 240; Heidenheimer *v.* Bauman, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. Rep. 382. In construing a will no evidence of the testator's instructions to the draftsman of the will, or of his declarations, is admissible to show his intention or to

will readily be seen that the principle is the same, whether the difficulty in reading the will arises from the fact that it was written in a foreign language, or a peculiar dialect, or from the fact that the testator habitually used words of the common language in a peculiar way, or used characters and hieroglyphics instead of the common notation of language. But the competency of the evidence consists not in its showing what testator intended in this particular case,[59] but in showing what his habitual speech and notation were, leaving the court, in the light of this fact, to read the will and ascertain thence what his intention was.[60] Accord-

aid in the interpretation of the will. Frick *v.* Frick, 82 Md. 218, 33 Atl. Rep. 462.

Extraneous and parol evidence is admissible to explain a will when there is a latent ambiguity arising dehors the instrument, but never to supply, contradict, enlarge or vary the written words. Brown *v.* Quintard, 177 N. Y. 75, 69 N. E. Rep. 225.

Courts of Chancery have no power to add to or reform a will on the ground of mistake. The intention which is to be sought for in the construction of a will is not that which existed in the mind of the testator, but that which is expressed in the language of the will. Williams *v.* Williams, 189 Ill. 500, 59 N. E. Rep. 966; Engelthaler *v.* Engelthaler, 196 Ill. 230, 63 N. E. Rep. 669.

[59] Id. Parol evidence *aliunde* the will is admissible for the purpose of showing that certain of the testator's children, who did not receive anything under the will, were intentionally omitted. Whittemore *v.* Russell, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. Rep. 197.

Where the primary meaning of the words leads to an absurd result the courts will not follow it but may adopt other meanings. Matter of Kear, 133 N. Y. App. Div. 265, 117 N. Y. Supp. 667.

[60] Hence neither the testator's declarations of what he meant, nor the testimony of the draftsman as to the meaning of the clause, is competent (1 Redf. on W. 535, § 50, and cases cited) nor is a letter to the testator from his solicitor (Wilson *v.* O'Leary, L. R. 7 Ch. App. 448, s. c., 2 Moak's Eng. 342).

While extrinsic evidence cannot be resorted to for the purpose of changing or explaining a will, it may be for the purpose of showing the circumstances characterizing the making and, for the purpose of determining the meaning, in fact, and intended to be expressed therein, it may be read in the light of such circumstances. Boeck's Will, 160 Wis. 577, 152 N. W. Rep. 155, L. R. A. 1915, E. 1008.

ingly, if a will is written in a foreign language or in shorthand or cipher, it may be translated by competent evidence;[61] if it contains terms which the writer habitually used in a peculiar sense, that habit can be shown;[62] if it contains terms with which, as a member of a particular trade or calling, he was familiar, or language which has a provincial or local meaning,[63] persons acquainted with the meaning of the words may be received as witnesses to translate or define them. If he was accustomed to designate a person by a short name, such as the surname alone,[64] or the baptismal name alone,[65] or a pet name;[66] or habitually to misname the person through confusing several names,[67] or to use abbreviations or a cipher,—as, for instance, a private price mark for goods in

[61] Clayton *v.* Ld. Nugent, 13 Mees. & W. 200.

[62] Per BRADFORD, J., Hart *v.* Marks, 4 Bradf. 163; Doe *ex dem* Hiscocks *v.* Hiscocks, 5 Mees. & W. 363.

In construing a will, the ordinary, primary meaning is to be given its language unless other terms used disclose that such meaning is repugnant to the testator's intent as it appears from the whole. Mace *v.* Hollenbeck, 175 S. W. Rep. (Mo.) 876.

[63] Ryerss *v.* Wheeler, 22 Wend. 152, and cases cited.

Parol evidence may be received of a usage or custom to explain the meaning of terms used in a foreign will, but only for the purpose of enabling the court to properly interpret the true intention of the testator. Peet *v.* Peet, 229 Ill. 341, 82 N. E. Rep. 376, 13 L. R. A. N. S. 780, 11 Ann. Cas. 492.

Evidence is admissible to show that expressions used in the will had acquired an appropriate meaning either generally or by local usage, or amongst particular classes, and where there is any doubt, the sense and meaning may be investigated by evidence dehors the instrument. In re Rayner, [1904] 1 Ch. 176.

[64] Clayton *v.* Ld. Nugent, 13 Mees. & W. 200, 207.

[65] Wigr. by O'Hara, 139.

[66] 1 Redf. on W. 630.

A will is to be interpreted by an examination of the whole thereof in an attempt to arrive at the intention of the testator, and the technical import of words is not to prevail over the obvious intent of the testator. Such intent, however, must not only clearly appear but be capable of being carried out. Asbury *v.* Shain, 191 Mo. App. 667, 177 S. W. Rep. 666.

[67] Lee *v.* Pain, 4 Hare, 251, approved in Jarman, 3d ed., vol. 1, 392, but questioned by Redfield, 1 Redf. on W. 632.

his business,[68]—and such names or characters appear in his will, they may be explained by evidence of his usage. But extrinsic evidence of what testator intended by using initials or ciphers in a bequest, as distinguished from evidence of what it was his common habit of speech or writing to use them for, is not admissible.[69] Another important, but not very well defined qualification of this rule exists in respect to those technical legal words to which the law fixes a definite legal meaning, such as "next of kin." Such meaning cannot be varied by parol. And a contradiction in terms of legally settled import appearing on the face of the will, must be settled by rules of interpretation, without resort to extrinsic evidence.[70]

[68] Viell *v.* Charmer, 23 Beav. 195.

Words in a will are not to be treated as a nullity. They are to be construed, if possible, in a way to give them effect. In re Irish, 89 Vt. 56, 94 Atl. Rep. 173, Ann. Cas. 1917, C. 1154.

[69] The distinction is well exhibited thus: A bequest to Lady ——, is void, and the blank cannot be supplied by extrinsic evidence (Hunt *v.* Hort, 3 Bro. C. C. 311). But a bequest to —— Page may be sustained in favor of a person of that name on evidence that testator was accustomed to call him "Page" (Price *v.* Page, 4 Ves. 679, and see Miller *v.* Travers, 8 Bing. 244, and cases cited). Thus where the beneficiaries were only indicated by initials and blanks, and there was pasted into the will at time of attestation a slip referring to a card in his desk, as constituting a key to the significance of the initials, and the only card found was dated long after the will, and not proven to be a copy, but proven to have a general resemblance to a card seen lying with the will,—*Held*, that the key was not admissible and the bequests were void (Clayton *v.* Ld. Nugent, 13 Mees. & W. 200).

In construing a will the word "or" may be construed to mean "and" in order to carry the testator's intention into effect. Ham *v.* Ham, 168 N. C. 486, 84 S. E. Rep. 840, Ann. Cas. 1917, C. 301.

[70] Weatherhead *v.* Baskerville, 11 How. (U. S.) 329. Parol evidence of facts and circumstances surrounding a person executing an instrument of gift may be received to show that such instrument was intended as a will, and not a donation *inter vivos;* and may also be received to ascertain the subjects and objects of the testator's bounty, and to show that another, whose signature appears upon the instrument in connection with that of the maker, did not sign as a joint testator. Smith *v.* Holdan,

87. Alterations.

When the question is not foreclosed by a conclusive probate,[71] extrinsic evidence is competent within certain limits, and sometimes necessary, to explain alterations in the original will. Unattested alterations in a will are not, as in case

58 Kan. 535, 50 Pac. Rep. 447.

Where an estate or interest is given by will in words of clear and ascertained legal signification, it shall not be enlarged, cut down, or destroyed by superadded words in the same or subsequent clauses, unless they raise an irresistible inference that such was the intention. Adams *v.* Verner, 102 S. C. 7, 86 S. E. Rep. 211.

The word "issue" though generally equivalent to the words "heirs of the body" is not as strong as a word of limitation as the expression "heirs of the body." Adams *v.* Verner, 102 S. C. 7, 86 S. E. Rep. 211.

The use of the word "lawful" before the word "heirs" makes no difference in the legal effect of the expression. In re Irish, 89 Vt. 56, 94 Atl. Rep. 173, Ann. Cas. 1917, C. 1154.

Husband and wife are not next of kin. In re Garrett, 249 Pa. 249, 94 Atl. Rep. 927.

Where there is an irreconcilable inconsistency between two provisions of a will, effect will be given to the later in preference to the earlier clause, as being the latest expression of the testator's intention. Nolan *v.* Nolan, 169 App. Div. 372, 154 N. Y. Supp. 355; Goffe *v.* Goffe, 37 R. I. 542, 94 Atl. Rep. 2, Ann. Cas. 1916, B. 240.

Where a valid testamentary disposition has already been made, a subsequent clause vague and incapable of any construction which will bring it into harmony with anything that has gone before, must be held to be wholly nugatory. Goffe *v.* Goffe, 37 R. I. 542, 94 Atl. Rep. 2, Ann. Cas. 1916, B. 240.

A will must be considered as a whole. The order in which the will is paragraphed does not control except where a later clause is repugnant to a preceding one, and, if given force, destroys that which precedes. Canaday *v.* Baysinger, 170 Iowa, 414, 152 N. W. Rep. 562.

The original will and codicils are to be considered and construed as an entirety. If the provisions of any of the codicils conflict with or are repugnant to the provisions of the original will, the provisions of the instrument last executed, the codicil or codicils, shall prevail, but the provisions of each should, as far as practicable, be given such effect as the testator intended them to have. Guthrie *v.* Guthrie, 168 Ky. 805, 183 S. W. Rep. 221.

[71] See paragraph 60.

of a deed, presumed to have been made before execution.[72] It has been usually said that in the absence of evidence there is a presumption that an unattested alteration appearing in a will was made after its execution.[73] It more accurately represents the present practice to say that the burden is upon him who asserts the alteration to be valid, to give some evidence from which it may be inferred that it was made before execution,[74] unless it may be inferred that such was the case from the face of the document.[75] The time when the alterations were made may be shown by proving the declarations of the testator, whether uttered at the execution of the will, or before it, even by way of expression of an intention which would be defeated by disregarding the alteration.[76] The testimony of a subscribing,[77] or other eye-witness, is of course competent; and so is the opinion of an expert.[78] The testimony of an eye-witness is of more weight than that of experts.[79] In the absence of other evidence as to when the alterations were made, the fact that dates prior to that of the will were affixed to some of them by the testator is not sufficient to show that they were made before execution.[80]

[72] 1 Redf. on W. 314–316 (23).

[73] Rosc. N. P. 160, 2 Whart. Ev., § 897; Steph. Dig. Ev., art. 89.

[74] Goods of Sykes, L. R. 3 P. & D. 26, s. c., 5 Moak's Eng. R. 521, and cases cited.

[75] As, for instance, where an interlineation consists of words necessary to complete the sense, and apparently written at the same time and with the same ink. Goods of Cadge, L. R. 1 P. & M. 543. Another instance is the correction of an absurdity. If the question arises on the face of the paper alone, the question is usually for the jury. See Van Buren *v.* Cockburn, 14 Barb. 118.

[76] Goods of Sykes (above), 1 Wms. Ex'rs, 6 Am. ed. 411; Dench *v.* Dench, 25 Weekly R. 414. Compare 2 Whart. Ev. 252, § 1008.

[77] Charles *v.* Huber, 78 Pa. St. 448.

[78] Re Hindmarch, 1 L. R. Prob. 307, s. P., Dubois *v.* Baker, 30 N. Y. 355, affi'g 40 Barb. 556. Compare Sackett *v.* Spencer, 29 Barb. 180.

[79] Testimony of one who drew a will and saw it executed, that it has not been altered, outweighs testimony of many who speak only from an inspection of the paper, as produced. Malin *v.* Malin, 1 Wend. 625.

[80] Goods of Adamson, L. R. 3 Prob. & Div. 253, s. c., 14 Moak's

Alterations may be effectual although made only in pencil.[81] But where there are both pencil and ink interlineations, and some of the penciled words are under the words in ink, but extend beyond them, with additional provisions, the inference may be drawn that as the ink superseded some, it was intended to supersede all of the penciled words, and that the latter were merely deliberative.[82] Where a testator has entirely erased the name of a legatee, and substituted another name in its place, with intent to revoke only by substitution, evidence will be received to show what the original name was.[83]

88. Mistakes.

The court may correct obvious clerical mistakes appearing on the face of the will;[84] but the only case in which extrinsic evidence is clearly admissible to correct an error by substituting something necessary to be inserted, is in respect to an error of the date.[85]

Eng. 704. The presumption that sheets bound together and constituting a will, as found in the testator's desk, were so bound together at the time of the execution, is not necessarily rebutted by the fact that the numbering shows that one of the original sheets had been removed and another of them transposed into its place. Rees *v.* Rees, L. R. 3 P. & D. 84, s. c., 6 Moak's Eng. 365.

[81] Matter of Tonnelle, 5 N. Y. Leg. Obs. 254; but see 12 Barb. 595.

[82] Goods of Adams, 2 Moak's Eng. R. 151.

[83] Goods of McCabe, L. R. 3 P. & D. 94, s. c., 6 Moak's Eng. 372, and cases cited.

[84] Thus "and" may be read "or," and conversely. Jackson *v.* Blanshan, 11 Johns. 54, and other cases in 2 Abb. N. Y. Dig. (2d ed.) 669, 6 Id. 178, 181. "May leave," may be read "may have." Dubois *v.* Ray, 35 N. Y. 162, s. P. in L. R. 16 Eq. 239. "Reviving," may be read "surviving." Pond *v.* Bergh, 10 Paige, 140. "Preparat*ory* meeting," in the designation of the donee, may be read "preparat*ive* meeting," that being in the true name of the only claimant. Dexter *v.* Gardner, 7 Allen, 245.

Courts will change a word where it appears from the will that it was used by mistake. Kahn *v.* Tierney, 135 N. Y. App. Div. 897, 120 N. Y. Supp. 663.

[85] Goods of Thomson, L. R. 1 Pr. & M. 8; Reffell *v.* Reffell, Id. 139. Where the attorney, drawing the codicil, intended to con-

89. Extrinsic Aid in Testing Validity.

In practice, all the questions involved in the validity of the instrument are usually tested upon probate, as we have seen. It will suffice here to observe that when the question of validity is not concluded by the probate, the same evidence is competent as would be in a proceeding for probate; and also that when the instrument as a whole is not impeached, it is still competent to show that a particular part of it was not the testator's will; as, for instance, that a clause was interlined by another hand without authority,[86] or that a particular part was inserted through undue influence,[87] or that a sheet was not in the will at the time of its execution.[88] But due execution is presumptive evidence that the testator knew the contents of the will, and that it conforms to his intentions;[89] and it is not competent to show that he acted

clude the codicil with a paragraph "in all other respects, I confirm my said will," but by mistake wrote "revoke" instead of "confirm," and in this State the codicil was executed,—it was *held* that parol evidence could not be received to correct the mistake. In re Davy, 5 Jur. N. S. 252, s. c., 1 Sw. & Tr. 262, 1 Redf. on W. 592, § 25. On the contrary, where the fourth codicil revoked the three previous codicils, and a fifth codicil purported to confirm the four codicils, —*Held*, that extrinsic evidence was admissible to show that four meant fourth. Goods of Thomson, L. R. 1 Pr. & M. 8. See Hart *v.* Tulk, 2 De Gex, M. & G. 300, where, on extrinsic evidence of the situation of the family and property, the court, in order to set right what appeared to them to be an obvious clerical error, held that the words "fourth schedule" in a will should be read as if they were "fifth schedule."

Punctuation and even capitalization are uncertain guides, and may be disregarded when they serve to obscure the true meaning to be gathered from all parts of the will. Tapley *v.* Douglass, 113 Me. 392, 94 Atl. Rep. 486.

[86] Doe *v.* Palmer, 16 Q. B. Ad. & E. 747; Charles *v.* Huber, 78 Pa. St. 448.

[87] Ld. Trimlestown *v.* D'Alton, 1 Dow. & Cl. 85; Florey *v.* Florey, 24 Ala. 241.

[88] See Miller *v.* Travers, 8 Bing. 244.

[89] 1 Redf. on Wills, 3d ed. 536, § 57. The fact that a capable testator read or heard read the provision before attesting it, cannot be countervailed by the testimony of the scrivener that he inserted it by inadvertence, and without instructions. Guardhouse *v.*

under a mistake of forgetfulness of fact as to persons or property, for the purpose of inferring that he would not have intended a certain express gift if he had been rightly informed.[90] Nor can it be shown that he gave different instructions as to the clause to be inserted, and executed the instrument in ignorance of the draftsman's mistake.[91] And even if it be admissible to show that he intended a clause not to take effect except in a certain contingency,[92] this cannot be done by proving that he gave instructions to have it drawn in one way, and that it was drawn and executed in another.[93] Unless words have been inserted in a will by fraud or mistake, without the testator's knowledge, the court cannot correct the error either by omission or insertion of words.[94]

90. Rebutting Evidence.

But wherever extrinsic evidence is admitted to negative the genuineness of the testamentary act, extrinsic evidence is admissible to affirm it; and for this purpose even the testa-

Blackburn, L. R. 1 P. & M. 109.

[90] Jackson *v.* Sill, 11 Johns. 201. See Gifford *v.* Dyer, 2 R. I. 99; Algood *v.* Blake, L. R. 8 Eq. 160. Compare Crossthwaite *v.* Dean, 5 Id. 245.

The presumption is that the testator did not intend to devise any property that did not belong to him. La Tourette *v.* La Tourette, 15 Ariz. 200, 137 Pac. Rep. 426, Ann. Cas. 1915, B. 70.

[91] 1 Redf. on W. 604, n.; 2 Whart. Ev. 240, § 995.

[92] Lister *v.* Smith, 3 Sw. & Tr. 282.

[93] Ordway *v.* Dow, 55 N. H. 12.

[94] Wallize *v.* Wallize, 55 Pa. St. 242. So held in a Court of Probate. Harter *v.* Harter, L. R. 3 P. & D. 11, s. c., 5 Moak's Eng. 508.

Where the testator made no provision in his will for his children, extrinsic evidence is admissible to show that it was his intention to omit them entirely. In re Peterson, 49 Mont. 96, 140 Pac. Rep. 237, Ann. Cas. 1916, A. 716.

If a clause of a will is manifestly incomplete and no effect can be given to it except on the assumption that some words are missing, the apparent omission cannot be supplied if there is nothing in the will which makes it certain that the words sought to be inserted are the ones intended. Clarke *v.* Rathbone, 221 Mass. 574, 109 N. E. Rep. 651.

tor's declarations of intention may be received. They are not in this case adduced to eke out a testamentary act insufficient under the statute; but merely to show that the sufficient expression of intention contained in the will was genuine.

91. Extrinsic Aid in Applying.

It is a familiar rule that, in order to understand the intention of the testator, for purposes of construction, we must advert to his situation at the time of making the will, and consider such circumstances as the number of his family, the different kinds of property which he had, etc.;[95] and a

[95] Doe *v.* Provoost, 4 Johns. 61; Shulters *v.* Johnson, 38 Barb. 80.

Extrinsic evidence is admissible to show the circumstances surrounding the testator so that the court may put itself in his position. La Tourette *v.* La Tourette, 15 Ariz. 200, 137 Pac. Rep. 426, Ann. Cas. 1915, B. 70; In re Glasgow, 243 Pa. 613, 618, 90 Atl. Rep. 332, 334; Jacobs *v.* Ditz, 260 Ill. 98, 102 N. E. Rep. 1077; Matter of Bartholomew, 82 N. Y. Misc. 1, 143 N. Y. Supp. 695; White *v.* Holland, 92 Ga. 216, 18 S. E. Rep. 17, 44 Am. St. Rep. 87; La Tourette *v.* La Tourette, 15 Ariz. 200, 137 Pac. Rep. 426, Ann. Cas. 1915, B. 70.

Parol evidence to show the situation and surroundings of the testator and the objects and persons with whom he was familiar, and upon whom his affections were resting is competent. German Pioneer Verein *v.* Meyer, 70 N. J. Eq. 192, 63 Atl. Rep. 835.

A will may be considered by the court in the light of the surrounding circumstances at the time of its execution. McGoldrick *v.* Bodkin, 140 N. Y. App. Div. 196, 125 N. Y. Supp. 101; Hoyt *v.* Hoyt, 85 N. Y. 142; McManus *v.* McManus, 179 N. Y. 338, 72 N. E. Rep. 235.

In the construction of a will it is proper to take into consideration the family, character and amount of the estate, in order to ascertain the intent of the testator. Crick's Estate, 35 Pa. Super. Ct. 39.

Evidence as to the testator's acquisition of bonds and also his disposition of them, and evidence as to his habits and methods of business, is admissible in so far as it relates to the situation of the testator's estate at the time of the will, or to the disposition subsequently of property referred to in the will. Blair *v.* Scribner, 65 N. J. Eq. 498, 57 Atl. Rep. 318.

Declarations of the testatrix that the value of her real estate holdings have greatly depreciated, and that through her illness her personal estate was rapidly de-

general and pervading obscurity in a will drawn by an illiterate person, is justly regarded as strengthening the reason for receiving extrinsic evidence of the circumstances of the testator and his family, and the claims on him of a legatee whose gift is ambiguous.[96]

The principles which regulate the competency of extrinsic evidence for this purpose, are the same whether the question relates to the subject or to the object of the gift; and the decisions under either class of cases are applicable to the other.[97] But for greater practical convenience the com-

creasing, are admissible under R. S., c. 175, § 66, and the facts are admissible as facts in the light of which the will is to be construed. George *v.* George, 186 Mass. 75, 71 N. E. Rep. 85.

Extrinsic evidence is admissible to show the intention of a testator that certain legacies in a codicil should be substituted for corresponding legacies in his will and not added to them. Gould *v.* Chamberlain, 184 Mass. 115, 68 N. E. Rep. 39.

While it is true that we must search for the intent of the testator only within the four corners of his will, still when we come to consider it and interpret its meaning, we must do so in the light of all the circumstances by which he was surrounded when he made it and by which he was probably influenced. In re South, 248 Pa. 165, 93 Atl. Rep. 954.

[96] Terpening *v.* Skinner, 30 Barb. 373. See a further decision in 29 N. Y. 505; Doe *v.* Provoost, 4 Johns. 61.

If wills were always drawn by counsel learned in the law, it would be highly proper that courts should rigidly adhere to precedents because every such instrument might justly be presumed to have been drawn with reference to them. But in a country where, from necessity, or choice, every man acts as his own scrivener, his will is subject to be perverted by the application of rules of construction of which he was wholly ignorant. McCaffrey *v.* Manogue, 196 U. S. 563, 25 Sup. Ct. 319, 49 L. Ed. 600; Abbott *v.* Essex Co., 18 How. 202, 15 L. ed. 352; Atkins *v.* Best, 27 App. D. C. 148.

Evidence of the testator's relation to persons or the amount, character and conditions of his estate is sometimes admissible to explain the ambiguities of description in his will, but never to determine the construction or the extent of the devises therein contained. Atkins *v.* Best, 27 App. D. C. 148; Barber *v.* Pittsburg, etc., R. Co., 166 U. S. 83, 17 Super. Ct. 488, 41 L. ed. 925.

[97] American Bible Society *v.* Pratt, 9 Allen, 11, and cases cited.

To ascertain and carry into

petency of evidence to identify the object of the gift, that is to say, the beneficiary, will first be explained.

92. —in Identifying the Person.

It is not essential that a legatee or devisee be *named;* a reference by which he may be ascertained when the time comes is enough; and then extrinsic evidence is competent to identify him.[98] If the whole designation used in the will to indicate the person, whether of a beneficiary or an executor, applies with exactness to one claimant, extrinsic evidence, no matter how persuasive, is not admissible for the purpose of showing that some other one, to whom it does not accurately apply, was the person intended.[99] And if a ben-

effect the testator's intention courts may hear evidence of extrinsic facts and circumstances, not for the purpose of varying or modifying the provisions of the will, but to remove latent ambiguities and to enable the court to identify either the subject-matter or the object of the testator's bounty. Hall *v.* Grand Lodge, I. O. O. F., 55 Ind. A. 324, 103 N. E. Rep. 854.

[98] Holmes *v.* Mead, 52 N. Y. 332.

If the description of the legatee is uncertain extrinsic evidence is admissible to identify who was intended. Duensing *v.* Duensing, 112 Ark. 362, 165 S. W. Rep. 956, Hitchcock *v.* Board of Home Missions of Presbyterian Church, 259 Ill. 288, 102 N. E. Rep. 741, Ann. Cas. 1915, B. 1.

If there is more than one person who might answer the description given by the testator, extrinsic evidence may be introduced to ascertain who was intended. Abbott *v.* Lewis, 77 N. H. 94, 88 Atl. Rep. 98.

Where the testator left his residuary estate to his "heirs in Germany" and it is found that all his heirs but one reside in a German canton in Switzerland and that the one heir resided in Germany without the testator's knowledge, it should be held that the residue should go to the testator's heirs wherever they reside. Giger *v.* Busch, 122 Ill. App. 13.

[99] Tucker *v.* Seaman's Aid Soc., 7 Metc. 188, 1 Redf. on W. 613, § 41. Thus where the executor named was but twelve years old, the court refused to receive parol evidence that testator intended to name the lad's father, whose name was, with the exception of a part of the middle name, identical with the son's. Goods of Peel, L. R. 2 Pr. & M. 46.

Unless there is a latent ambiguity in the will extrinsic evidence is not admissible. Griffith *v.* Witten, 252 Mo. 627, 161 S. W. Rep. 708; Murphy *v.* Clancy, 177 Mo. App. 429, 163 S. W. Rep. 915;

eficiary is once adequately and accurately named or described in the will, this is conclusive; and if the same name is mentioned a second time in the same instrument without any description other than "said," extrinsic evidence is not admissible to show that a different person was intended the second time.[1] Where the second reference is not thus identified, but is so expressed that it may be referred to either of two persons previously named, extrinsic evidence is admissible to remove the ambiguity, and for this purpose the testator's declarations are competent.[2]

93. —in Case of Names of Relationship.

Prima facie the word "children" means legitimate children.[3] There must be clear evidence to establish another application of the word.[4] Hence, under a bequest to testator's "children," "nephews," etc., without anything on the face of the will to show a different intent,[5] none but the testator's own and legitimate children or nephews can take, if such there are. But extrinsic evidence is admissible to show

Peck *v.* Peck, 76 Wash. 548, 137 Pac. Rep. 137; Hanvy *v.* Moore, 140 Ga. 691, 79 S. E. Rep. 772.

[1] Webber *v.* Corbett, L. R. 16 Eq. 515, s. c., 6 Moak's Eng. 841. Thus, where testator in one clause gave the personal property on his farm to "William, Samuel, *Benjamin* and James; in another clause gave the farm to Samuel, William and James" (not naming Benjamin), and in the next clause gave other lands "to the said last named Samuel, William, *Benjamin* and James,"—*Held*, that the ambiguity, if any, was patent, and could not be aided by parol evidence of testator's declarations of intention to give a share of his farm to Benjamin, and his instructions to the draftsman to include him. Hyatt *v.* Pugsley, 23 Barb. 285.

In construing a will it is proper to read it in the light of surrounding conditions, the relations between the testator and his intended beneficiaries, the amount and nature of his estate, and other relevant circumstances which legitimately tend, in cases of doubt, to show the probabilities of his intentions one way rather than another. Tapley *v.* Douglass, 113 Me. 392, 94 Atl. Rep. 486.

[2] Doe *v.* Needs, 2 M. & W. 129; Doe *v.* Morgan, 1 C. & M. 235.

[3] Cromer *v.* Pinckney, 3 Barb. Ch. 466.

[4] Hill *v.* Crook, R. R. 6 H. of L. 265, s. c., 7 Moak's Eng. 1.

[5] Brower *v.* Bowers, 1 Abb. Ct. App. Dec. 214.

that there are none such, and that he was never married, but left illegitimate offspring, and that he recognized them as his children.[6] So, also, of illegitimate nephews. In like manner evidence is admissible that the only nephews and nieces in the family were those of testator's wife.[7] Where the words of relationship such as "children," "cousin," etc., are used with nothing in the will, read in the light of surrounding circumstances, to show that a broader meaning is intended [8] than the ordinary meanings, such as legitimate

[6] Gardner *v.* Heyer, 2 Paige, 11; Laker *v.* Hordern, L. R. 1 Ch. Div. 644, s. c., 16 Moak's Eng. 672, 34 L. T. N. S. (Ch. D.) 88. Compare Lepine *v.* Bean, L. R. 10 Eq. 170.

[7] Sherratt *v.* Mountford, L. R. 8 Ch. App. 928, s. c., 7 Moak's Eng. 479. In such case evidence of his ill-feeling toward them, or other circumstances rendering it improbable that he intended them, was held not admissible. Id. If the bequest to children refers to those of another than testator, there must be evidence that he knew there were illegitimate children and none other, and that they, in their reputed character, would answer the description, in order to enable them to take. In re Herbert, 6 Jur. N. S. 1027; and see 1 Sm. & Giff, 126.

[8] Redf. on W. 658; Brower *v.* Bowers, 1 Abb. Ct. App. Dec. 214.

Where the testator uses the word "children" in his will, parol evidence will not be admissible to substitute the word "sons" for it unless it was the plain intention of the testator as shown in his will to favor the sons to the exclusion of the daughters. Weatherhead *v.* Baskerville, 11 Howard, 329, 13 L. ed. 717.

Where a testator made a provision in his will for "my nieces" without naming them, his oral declarations made subsequent to the making of the will as to which nieces were intended are inadmissible. In re Holt, 146 Cal. 77, 79 Pac. Rep. 585.

The word "children" in a will does not include grandchildren unless it appears from the context to have been so intended by the testator, or such meaning is necessary to carry out his manifest intent. In re Scull, 249 Pa. 52, 94 Atl. Rep. 474.

The word "children" as it is ordinarily used in a will means immediate descendants of the first generation. It does not include grandchildren unless it is necessary to ascribe to it such a meaning in order to give effect to the will or unless the testator has clearly shown by other language that he does not use the word in its ordinary sense but intends it to have a more extended significance.

sons and daughters, first cousin, etc., independent extrinsic evidence, having no connection with the words of the will, cannot be received to enlarge the import.

94. —in Case of Corporate Designation.

It is not essential that a corporation be designated by its legal corporate name. It may be designated by the name by which it is usually or popularly called or known, or by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation; and when another than the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation, and identify it as the body intended, and to distinguish it from all others and bring it within the terms of the will may, in all cases, be proved by parol.[9]

95. —Applying Erroneous Designation.

If it be once shown by extrinsic evidence that there is no person in existence who exactly and fully corresponds with

Crowell *v.* Rose, 38 R. I. 93, 94 Atl. Rep. 683.

A bequest to the "wife and children" of the testator will not include his grandchildren unless the contrary intent is shown by necessary implication, as where there are no children, but there are grandchildren, or where the term children is further explained by a limitation over in default in issue. Thompson *v.* Batts, 168 N. C. 530, 84 S. E. Rep. 858.

The use of the word "family" in a will, means parents and children whether living together or not. Higgins *v.* Safe Deposit, etc., Co., 127 Md. 171, 96 Atl. Rep. 322.

A bequest "to my cousins" means first cousins only. Walker *v.* Chambers, 85 N. J. Eq. 376, 96 Atl. Rep. 359.

[9] Lefevre *v.* Lefevre, 59 N. Y. 434, rev'g in part 2 Supm. Ct. (T. & C.) 330; First Parish in Sutton *v.* Cole, 3 Pick. 237, and cases cited.

Where there is a misnomer of a legatee, extrinsic evidence is admissible to explain the ambiguity. Webster *v.* Morris, 66 Wis. 366, 28 N. W. Rep. 353, 57 Am. Rep. 278.

Extrinsic evidence is admissible to show the testator's intention where he has misnamed a charitable corporation. Faulkner *v.* National Sailors' Home, 155 Mass. 458, 29 N. E. Rep. 645.

the designation or description used in the will to indicate the donee, extrinsic evidence is then admissible to ascertain to whom the designation points,[10] and for this purpose it is competent to adduce evidence of the circumstances and habits of the testator, and the state of his family at the time he made the will, so as to put the court in the position of the testator, in order to ascertain the bearing and application of the language which he has used, and whether there exists any person to whom the whole description given in the will can be with sufficient certainty applied.[11] Parol evidence

[10] Hart *v.* Marks, 4 Bradf. 161.

Extrinsic evidence is admissible to show the testatrix's intention when she named a charitable institution which does not exist. In re Paulson, 127 Wis. 612, 107 N. W. Rep. 484, 5 L. R. A. N. S. 804, 7 Ann. Cas. 652.

[11] Charter *v.* Charter, L. R. 7 H. of L. 364, s. c., 12 Moak's Eng. R. 1, affi'g 1 Moak's Eng. 249; Thomas *v.* Stevens, 4 Johns. Ch. 607. Thus, by the aid of parol evidence, the American Bible Society, the American Tract Society, the General Synod of the Reformed Protestant Church, the New York State Colonization Society, and the American Seaman's Friend Society, respectively were allowed to take bequests of a residue expressed thus, to the treasurers of the following societies: "Am. Bible, Tract, Synods, Board of Missions, Domestic Missions, N. Y. Colonization, and Seaman's Friend." Hornebeck *v.* American Bible Society, 2 Sandf. Ch. 133. The "Boston Asylum and Farm School for Indigent Boys," was enabled to take a bequest expressed to be to the "Boys' Asylum and Farm School," there being no other claimant. Minot *v.* Boston Asylum, 7 Metc. 416. So the First Congregational Society in A. may take a bequest to "The Congregational Society of A.," it appearing that at the date of the execution of the will there was no other such Society in A., and there being no other claimant. Howard *v.* Am. Peace Soc., 49 Me. 297. So the "Preachers' Aid Society of the Maine Conference of the Methodist Episcopal Church," may take a bequest to "the Maine Methodist Conference Ministers' Aid Society," if the circumstances indicate that this and no other society was intended, there being no other claimant. Preachers' Aid Soc., 45 Me. 552. The testator who lived in C., made bequests "to the Presbyterian Church in C.," "to the Methodist Church in C.," and "to the Baptist Church," not adding in C.: *Held*, that the former gifts were sufficient, there being one of each such churches in C., but in the absence of anything to identify the Baptist Church with that in C.,

is admissible to show who was the person whom the testator designated by a particular name.[12]

96. —Rejecting False Words.

Where a designation otherwise correct, contains words which are false or inapplicable to the claimant, the false or inapplicable part may be rejected, if enough remain, in the light of competent extrinsic evidence, to identify the donee. The origin of the rule seems to have been in rejecting a false description added to a correct name, but the rule is not confined to this class of errors. It is not the rule that the name controls the description, in the absence of evidence.[13] The

the latter was void for uncertainty. Lefevre *v.* Lefevre, 2 Supm. Ct. (T. & C.) 341. In this case no evidence whatever was given on the trial as to the usage of the testator, in speaking of the Baptist Church or Society.

When the description of the legatee is uncertain, extrinsic evidence may be introduced to show who the legatee was intended to be. Matter of Miller's Estate, 26 Pa. Super. Ct. 443.

[12] Phillips *v.* Ferguson, 85 Va. 509, 17 Am. St. Rep. 78, 8 S. E. Rep. 241. "And since we are seeking to dispel a latent ambiguity lurking in the name of the beneficiary, if she herself has declared whom she thereby named, why should we not accept that declaration to the extent that we believe it to be true? The rule of exclusion of oral declarations of the testator's intentions in the case of the construction of the dispositive provisions of the will rests upon the sound basis that, as the will must be in writing, the writing must declare the intention, otherwise an oral will might replace the written one; but in case of an equivocation in writing the name of the beneficiary, the fact is that the testatrix has written the name explicitly enough according to her understanding of it, but as we are not possessed of her exact understanding, we fail to recognize the person thus named. If, now, we accept the testatrix's oral designation of the person named, we do not replace the beneficiary written in the will by another not written therein, but we now read the written name in the light of the testatrix's identification of the person thus named." Matter of Wheeler, 32 App. Div. (N. Y.) 183, 187–188.

[13] Drake *v.* Drake, 8 H. of L. Cas. 178. In this case the draftsman's testimony to his instructions, was excluded as incompetent. Compare Gillett *v.* Gane, L. R. 10 Eq. 29; Doe *v.* Roast, 11 Jur. 99; Farrer *v.* St. Catherine's Coll., L. R. 16 Eq. 19; Nunn's Trusts,

name may be rejected as false, leaving the description to control.[14] Upon the same principle evidence is competent that the testator was accustomed to call a person by the name used in his will, which is not the true name,[15] or even by a name which the scrivener mistook by similarity of sound for that written in the will, and to which no other person answers.[16] Evidence of other acts of beneficence shown to the

L. R. 19 Eq. 331; Camoys *v.* Blundell, 1 H. of L. Cas. 786.

While words may not be added to a will nor inserted in lieu of other words stricken therefrom, yet if in a will there is a misdescription of the subject of a devise, and if, after striking out that portion of the description which is false, enough of the description remains, when read in the light of the circumstances surrounding the testator at the time the will was executed, the remaining portion of the description may be so read and the testator's purpose given effect. Douglas *v.* Bolinger, 228 Ill. 23, 81 N. E. 787, 119 Am. St. Rep. 409; Felkel *v.* O'Brien, 231 Ill. 329, 83 N. E. Rep. 170.

[14] Thus, in a bequest to "my brother John," the word "John" might be rejected on proof that the testator had but one brother, James. In a bequest to "my brother Cormac," described elsewhere in the will as the father of testator's nephew Cormac, the name Cormac was rejected, and the legacy awarded to testator's brother James, the father of the nephew Cormac, on proof of these facts, and that the only other brother of testator was dead, and so believed by testator to be. Connolly *v.* Parden, 1 Paige, 291.

Where a testator makes a bequest to his half-brother, naming him, and he had no such half-brother, extrinsic evidence will be admissible to show that the testator's brother-in-law who bore the name mentioned and who lived with the testator, was intended. Rathjens *v.* Merrill, 38 Wash. 442, 80 Pac. Rep. 754.

Where the language used by the testator in describing an institution is not the technical corporate name of such institution extrinsic evidence may be introduced to aid the court in finding the intention. Matter of Pearson, 52 N. Y. Misc. 273, 102 N. Y. Supp. 965.

Where the testatrix made a bequest to "Christian Missionary Society of this State" extrinsic evidence will be admitted to show that she intended the Missionary Society of the Churches of Christ in Indiana. Van Gorder *v.* Smith, 99 Ind. 404; Gilmer *v.* Stone, 12. U. S. 586, 7 Super. Ct. 689, 30 L. ed. 734; Chappell *v.* Missionary Society of Church of Christ, 3 Ind. App. 356, 29 N. E. Rep. 924, 59 Am. St. Rep. 276, note.

[15] Hart *v.* Marks, 4 Bradf. 161.

[16] Beaumont *v.* Fell, 2 P. Wms.

claimant by the testator while living is competent; [17] so is evidence of a bequest to him in a prior will of the same testator,[18] and evidence of a general belief in the family [19] that the testator was his godfather.[20] Where one person answers to the name only, and another to the description only, without anything in the will to decide the question, there must be competent extrinsic evidence supporting the application to one in preference to the other, or the bequest will be void for uncertainty.

97. —Adverse Claimants.

We have thus far been considering chiefly cases where there is but one claimant, the question being whether that claimant shall take, or the gift fail for uncertainty. Where the only claimant is a natural person, designated inexactly or incompletely by name, it is incumbent on him to give some evidence tending to show that no other person of the name is entitled; but where the only claimant is a corporate body, not precisely, but nearly, answering to the designation in the will, it cannot be assumed without some proof that there is or has been any other institution bearing a name or description similar,[21] unless the designation is matter of description, by words judicially known to be applicable to many such

141, 2 Phil. on Ev. 729, n. 2. If there were a claimant answering the mistaken description such evidence would not be competent.

[17] Price *v.* Paige, 4 Ves. 679.

[18] In re Gregory, 11 Jur. N. S. 634.

[19] Id.

[20] Wagner's Appeal, 43 Penn. St. 102. And in New York it has been held competent to prove testator's declarations at the time of executing the will, and adduce the testimony of the draftsman to his instructions, and a mistake in engrossing which caused the inapplicability of the description. Ex p. Hornby, 2 Bradf. 420. But see Charter *v.* Charter, above cited, where it was held that evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things.

[21] Shaw, C. J., Minot *v.* Boston Asylum, etc., 7 Metc. 419.

bodies.[22] But if the question is which of two adverse claimants are entitled, the rules of evidence differ materially. Where the name and description lead to a reasonable belief that they apply to some one person, and there is no other person to whom they can with any probability apply, then slight evidence will be sufficient to prove that that person was intended by the designation. But if, with such proof in favor of one, there is similar or stronger proof identifying another, then the claim of the former, though such that, if it stood alone, it would be *prima facie* proved, is controlled by the claim of the other, who is more precisely identified.[23] In the case of adverse claimants of the same gift, the following rules apply:

1. If one (being competent to take) alone precisely answers the whole designation of the will,[24] or is identified by the context,[25] extrinsic evidence that the other was intended is competent.

2. If both precisely answer the whole designation and indications of the will, a latent ambiguity or "equivocation" is presented, and extrinsic evidence is competent; and in this class of cases direct evidence of the testator's intention, even by proving his declarations of purpose, is admissible.

3. If neither precisely answers the designation and in-

[22] See Lefevre *v.* Lefevre, above.

[23] Shaw, C. J., Minot *v.* Boston Asylum, etc., 7 Metc. 418, s. p., Kilvert's Trust, L. R. 7 Ch. 170.

[24] Extrinsic evidence is admissible to show that the P. E. "church" in N., in a bequest, means the incorporated "Society" of that name, which is proven to be usually and popularly called the church, and not the "church" strictly so called, which is unincorporated, and consists of the communicants united in connection with the society. Ayres *v.* Weed, 16 Conn. 291. But, where testator's brother, Mark Ingle, had died, leaving a son of the same name, who was abroad, and in fact living, but whom testator had been led to suppose, shortly before making the will, was dead and testator gave a share to the children "of my late nephew, Mark Ingle,"—*Held*, that evidence of intention to give to his late brother was not admissible. Ingle's Trusts, L. R. 11 Eq. 578.

[25] Per McCoun, V. C., Smith *v.* Smith, 1 Edw. 191.

dications of the will, but both do so approximately, this is also a case of latent ambiguity, admitting extrinsic evidence; and in this class of cases, too, according to the better opinion, the testator's declarations of intent may be proved.

A latent ambiguity is made out within these rules, not only where there is a legal *name* which fits several, but equally where there is a description only,[26] or a name used in common parlance,[27] or a name which fits one claimant only, coupled with a description which fits the other only,[28] or a designation which without rejection of some terms is false in application.[29] But in applying these rules, the principle is to be kept in mind that if the one claimant is designated with substantial accuracy, and by extrinsic evidence it appears that there is another claimant answering less nearly to the designation, evidence of intention is not competent.[30] But, on the other hand, if the designation is substantially imperfect in its application to each, the court is not bound to determine in favor of the one that most nearly answers it, but extrinsic evidence is admissible.[31]

[26] Brewster *v.* McCall, 15 Conn. 292; Button *v.* Am. Tract Soc., 23 Vt. 350.

Where there is an ambiguity in the description of real estate in a will, parol evidence is admissible to explain it in order to enable the court to ascertain the intention of the testator. St. James Orphan Asylum *v.* Shelby, 75 Nebr. 591, 106 N. W. Rep. 604.

[27] Ayres *v.* Weed, 16 Conn. 300.

Where there are two townships of the same name, one being a civil township and the other a school township, a bequest to the township for the benefit of the common schools therein will be held to relate to the school township. Skinner *v.* Harrison Township, 116 Ind. 139, 18 N. E. Rep. 529, 2 L. R. A. 137.

[28] Drake *v.* Drake, 8 H. of L. C. 178.

[29] See Still *v.* Hoste, 6 Madd. 192, well explained in 1 Redf. on W. 627, n.

[30] In such a case, evidence of testator's knowledge of the latter, and ignorance of the former, and that his instructions named the latter, but the draftsman, under mistake as to the true name, prevailed on him to insert the former name, meaning to designate the other, is not competent to establish the claim of the latter, even though the designation would enable the latter to take, if the former were not named. SHAW, Ch. J., Tucker *v.* Seaman's Aid Soc., 7 Metc. 209.

[31] Ld. PENZANCE, Charter *v.*

98. —Circumstantial Evidence of Intention.

For the purpose of identifying the intended donee, it is competent to prove the circumstances of his relations and dealings with the testator, and the testator's habits of conduct and kindness to him.[32] The fact that testator was intimately acquainted with one, and but little known to the other, of two who are equally near to a mistaken designation, sustains a presumption of fact, that he intended the former.[33] So of the fact that one was nearer of kin to him than the other.[34]

99. —Case of Gifts to Charities.

To identify the society which the designation in the will intends, the appropriate evidence includes such facts as the testator's knowledge or ignorance of the society in question,[35]

Charter, L. R. 2 P. & D. 315, 324, s. c., 1 Moak's Eng. 249, 259. Where, however, the designation is adequate for either of several societies, some of which are capable of taking, and others not, there is a presumption that the testator intended one of the former rather than the latter. Brewster *v.* McCall, 15 Conn. 294.

Extrinsic evidence is admissible only if it be shown that the description of the legatee is doubtful or imperfect. In re Dominici, 151 Cal. 181, 90 Pac. Rep. 448.

If there is no defect in the language of the will but an uncertainty arises when an attempt is made to apply it, the ambiguity is latent, and extrinsic evidence is admissible to ascertain the intention. Jennings *v.* Talbert, 77 S. C. 454, 58 S. E. Rep. 420.

[32] Above, paragraph 96.

Where two or more persons answer the description given by a testator of a legatee, parol evidence is admissible to show the intention of the testator. In re Hubbuck [1905], Prob. 129.

[33] Smith *v.* Smith, 1 Edw. 192; Careless *v.* Careless, 1 Merw. 384, s. c., 19 Ves. 601.

[34] Smith *v.* Smith (above).

[35] Howard *v.* Am. Peace Soc., 49 Me. 298. Thus, the "American Board of Commissioners for Foreign Missions" may take a bequest to "The Congregational Foreign Missionary Association," on proof that it was the only Foreign Missionary Society identified with the "Congregational" churches, and that the testator knew of, spoke of, and contributed to it, alone, and desired to make a bequest to it but did not know its corporate name; and although Baptist and Methodist churches had foreign missionary societies,

his visits to its institution or field of labor, and the fact that he conversed about it before making his will,[36] the facts that he expressed a strong interest in it in conversation [37] or in letters,[38] or expressed a preference for it over other similar agencies,[39] that he subscribed to its funds,[40] or had made a special gift to it,[41] or that the church he attended was accustomed to take a contribution for it; [42] that he had been an

and the Baptist churches are in organization congregational, and although there was also an American Missionary Association engaged in connection with Congregational churches in missions at the South. Id.

Where the will makes a bequest to "The Public Library of Phelps" and there are two such institutions, extrinsic evidence to show the name by which the library was known to the testator will be admitted. Matter of Dickinson, 56 N. Y. Misc. 232, 107 N. Y. Supp. 386.

A misnomer or misdescription of a legatee or devisee will not invalidate the provision or defeat the intention of the testator, if, either from the will itself or *dehors* the will, the object of the testator's bounty can be ascertained. Lefevre *v.* Lefevre, 59 N. Y. 434; Bowman *v.* Domestic, etc., Missionary Soc. of Protestant Episcopal Church, 100 N. Y. App. Div. 29, 90 N. Y. Supp. 898, rev'g 42 N. Y. Misc. 574, 87 N. Y. Supp. 621.

[36] This was in effect fully determined in Lefevre *v.* Lefevre, N. Y. Ct. of App. Cas. 1875.

The burden is upon religious and charitable institutions to which legacies are given to show not only their incorporation but that it is competent for them to take such legacies. Hughes *v.* Stoutenburgh, 168 App. Div. 512, 154 N. Y. Supp. 65.

[37] Button *v.* Am. Tract Soc., 23 Vt. 349.

[38] Hornbeck *v.* Am. Bible Soc., 2 Sandf. Ch. 133.

[39] Button *v.* Am. Tract Soc. (above). It was there held that "The American Tract Society" might take, as against "The American Home Missionary Society," a bequest to "the American Home Mission Tract Society for our Western Missions," on extrinsic evidence that testator was acquainted with the objects and operations of the Tract Society; that those operations were mainly confined to the Western States; that he took a lively interest in it, contributed to its funds, and expressed a preference for it over other charitable institutions.

[40] Kilvert's Trust, L. R. 7 Ch. 170, modifying L. R. 12 Eq. 183; Am. Bible Soc. *v.* Wetmore, 17 Conn. 186.

[41] Hornbeck *v.* Am. Bible Soc. (above).

[42] Am. Bible Soc. *v.* Wetmore (above). In that case it was held

officer of the society or one of its auxiliaries,[43] or that his religious sentiments accorded with those of the society.[44]

100. — or Misnomer.

Upon a question of misnomer, both the usage of the testator in speaking of the society,[45] his ignorance of its true name,[46] and the common usage of the public, are competent;

that "The American Board of Commissioners for Foreign Missions" might take a bequest to "The Foreign Mission Society," upon extrinsic evidence that it was commonly known by that name to the testatrix and the members of the church to which she belonged, and that she was friendly to its objects and a contributor to it. In Gilmer *v.* Stone (120 U. S. 586), extrinsic evidence was admitted to identify the institutions described as "the board of foreign and the board of home missions." In Howard *v.* Am. Peace Soc., (49 Me. 298), to show that "The American Board of Foreign Missions" was intended by a bequest to the "Congregational Foreign Missionary Society," evidence was received and relied on by the court, that testator, before making his will, knew of its existence as a society gathering donations from Congregational churches and their members, for foreign missions, so far that a periodical collection was taken therefor in the Congregational churches in proximity to which he resided; that testator expressed a desire to make a bequest to it, speaking of it in contradistinction to certain Methodist and Baptist Societies; and he gave instructions for such bequest, but neither he nor his draftsman knew its corporate name.

[43] Brewster *v.* McCall, 15 Conn. 294.

[44] Id.

[45] Evidence that the testator, in speaking of the affairs of the society (a religious corporation in contradistinction from the church in connection with which it was organized), always called it "the church," is admissible for the purpose of ascertaining which body should take a bequest to "the church." Ayres *v.* Weed, 16 Conn. 290.

Where there is a misnomer of the legatee, the court may supply the correct name from extrinsic evidence. Matter of Sliney, 81 N. Y. Misc. 389, 143 N. Y. Supp. 351.

[46] In The Trustees, etc., *v.* Peasley (15 N. H. 317), the bequest was to "the Franklin Seminary of Literature and Science, Newmarket, N. H.," and again "to said Franklin Seminary." It appeared that the school was at South Newmarket, in the town of Newmarket, and known by the name of "The Franklin Seminary of Literature and Science," but before the will was made the name

and for the latter purpose, it is competent to prove that correspondents of the institution frequently addressed it by the name used in the will; and an officer of the society or other witness cognizant of the facts may be asked to state generally how it is designated in their correspondence, circulars, and advertisements; and how it was commonly called by persons having dealings with it.[47]

was changed by incorporation to "The Trustees of the South Newmarket Methodist Seminary." There was only one public school at Newmarket, and this was taught by and under the control of Methodists, although it does not appear that it was a sectarian school. The testator was a Methodist clergyman, and once asked another Methodist clergyman to what institution he should make a donation, and was told "The Franklin Seminary at South Newmarket." This name was written down by the testator's wife, at his request, and placed by him in his pocket-book. The court says, "The evidence tends strongly to show that he did not know that the name of the school had been changed. He inquired how the school at South Newmarket prospered, and often spoke about it. Now, these facts clearly show that the testator had in his mind the school which was afterwards incorporated by its present name. What its peculiar designation was, must have been indifferent to him, for it was the institution, by whatever name it was known, which he desired to patronize and benefit."

Where a bequest was made to a city for the benefit of the indigent children in its Protestant schools, and there were no schools known as Protestant schools, the intention and purpose of the testator was carried into effect by construing the word "Protestant" as meaning "public." Peaslee *v.* Rounds, 77 N. H. 544, 94 Atl. Rep. 263.

[47] Lefevre *v.* Lefevre, 59 N. Y. 434.

Where a bequest is made to the "Second National Bank of Mercer" and no such bank exists, extrinsic evidence will be admitted to show that another bank was commonly known by that name and so called by the testator. In re Snyder's Estate, 217 Pa. St. 71, 66 Atl. Rep. 157, 118 Am. St. Rep. 900, 11 L. R. A. N. S. 49, 10 Ann. Cas. 488.

Where the name or description is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake will not defeat the bequest; the rule applies to corporations as well as to individuals. Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. Rep. 302.

The mere misnomer of a legatee or devisee does not render the gift void, if, from the context of the

101. —Direct Evidence of Intention.

Some of the English decisions [48] declare that direct evidence of intention is inadmissible, unless the two claimants whose description by extrinsic evidence creates the ambiguity answer the designation of the will with an *equal* degree of accuracy; and although the better opinion is as I have stated it above, yet, except in such cases, it is the safer practice, in jurisdictions where the rule is not settled, to rely on evidence of testator's situation and relation to the claimants, and his usages of speech in regard to them, if these are sufficient, rather than on direct evidence of his intention. Of course, where direct evidence of intention is admissible, any fact or circumstance which, from experience or observation, may fairly be presumed to have had an influence on his mind in inducing him to prefer one of the persons described by him to another, is admissible to prove his intention.[49]

will or proof *dehors* the instrument it can be ascertained who was actually intended. Second United Presbyterian Church *v.* First United Presbyterian Church, 71 Nebr. 563, 99 N. W. Rep. 252.

[48] See Doe ex dem. Hiscocks *v.* Hiscocks, 5 Mees. & W. 363; Charter *v.* Charter, L. R. 7 H. of L. 564, s. c., 12 Moak's Eng. 1, affi'g s. c., 1 Moak's Eng. 249, and cases cited. The English cases are not, however, consistent in confining the admission of direct evidence of intention to cases where it fits both persons or subjects with precisely equal accuracy or appropriateness. Earlier cases held that in any latent ambiguity or misdescription, though there be only one claimant or subject, evidence of declarations of intent is admissible, especially if made at the time of making the will. Trustees *v.* Peaslee, 15 N. H. 330, and cases cited.

[49] Ayres *v.* Weed, 16 Conn. 200.

The intention must be gathered from the will and not from extrinsic evidence. Extrinsic evidence may aid in reading the intention out of the will. Duensing *v.* Duensing, 112 Ark. 362, 165 S. W. Rep. 956; La Tourette *v.* La Tourette, 15 Ariz. 200, 137 Pac. Rep. 426, Ann. Cas. 1915, B. 70.

Verbal testimony which is admissible in the case of an ambiguity will not be admitted if it has the effect of changing the testamentary disposition. Quinlan's Succ., 118 La. 602, 43 So. Rep. 249.

The declarations of the testator are not admissible on any question involving the construction of his will. App. *v* App, 106 Va. 253,

102. —Aid in Applying to the Property Intended.

The same principles which regulate the resort to extrinsic evidence to aid in applying the language to the person, regulate it in applying the language to the property. Extrinsic evidence is not admissible to change a specific and explicit designation of the property given in the will, so as to substitute a different subject, although part of the description be equally applicable to either piece of property; [50] and it cannot be made admissible even by showing that the testator did not own the parcel designated in the will, and did own another, and that the draftsman made the mistake,—for instance, to show that he designated the west half instead of the east half, or section 1 instead of section 2.[51] Nor can an explicit and sufficient designation be enlarged by extrinsic

55 S. E. Rep. 672; Shipley *v.* Mercantile Trust, etc., Co., 102 Md. 649, 62 Atl. Rep. 814..

[50] Robinson *v.* Williams, 1 Weekly Notes (Pa.), 337.

Extrinsic evidence cannot be introduced where there is no ambiguity in the will. Scott *v.* Roethlisberger, 178 Mich. 581, 146 N. W. Rep. 307; In re McVeigh, 181 Mo. App. 566, 164 S. W. Rep. 673; Dale *v.* Dale, 241 Pa. 234, 88 Atl. Rep. 445.

If the testator specified that certain amounts of indebtedness are to be deducted from certain legacies if not paid during his lifetime, extrinsic evidence will not be admitted to dispute the amounts of indebtedness as specified by the testator. Hopper *v.* Sellers, 91 Kan. 876, 139 Pac. Rep. 365.

Where there is an imperfect description of the property bequeathed, extrinsic evidence may be introduced to correct it, but the declarations of the testator are not admissible for this purpose. In re Dominici, 151 Cal. 181, 90 Pac. Rep. 448.

[51] Fitzpatrick *v.* Fitzpatrick, 36 Iowa, 674, s. c., 14 Am. Rep. 533, and cases cited; Kurtz *v.* Hibner, 55 Ill. 514, s. c., 8 Am. R. 665, 669. But see criticisms on this doctrine in 10 Am. L. Reg. N. S. 94, 353, and see 1 Redf. on W. 584 (11), and cases cited. In some such cases, the false word or number may be rejected.

Where a testator devises the "north half" of a piece of property, "comprising 80 acres," and it is found that the testator does not own such half, the court may strike out the false word "north," if the extrinsic evidence shows that the testator owned a tract of 80 acres which constituted the east half of the said piece of property. Felkel *v.* O'Brien, 231 Ill. 329, 83 N. E. Rep. 170.

evidence that the testator meant more than the words will bear; for instance, that by "moneys" he meant to pass choses in action, securities,[52] etc.

103. —Identifying the Property.

If the subject of the bequest is indicated in the will by words which do not have a fixed legal meaning, and especially words which refer to extrinsic circumstances,—for example, a devise of "the home and garden I now live in,"—the meaning is to be ascertained by evidence explaining what were those extrinsic circumstances,[53] at the time referred to in the will,[54] and *a fortiori*, if the designation bears no sufficient signification to a reader unaided by extrinsic evidence—for example, a devise of "all my back lands,"—evidence is admissible of the declarations of the testator before and after the making of the will, showing his habit

[52] Thus, where the testator gives his wife "all the rest, etc., of the moneys belonging to my estate at the time of my decease," extrinsic evidence is not admissible of his intention to leave securities to her; nor that he had been accustomed to support the family from the proceeds of such securities, and made an otherwise inadequate provision for her. Mann *v.* Mann, 14 Johns. 1, affi'g 1 Johns. Ch. 231; but compare Knight *v.* Knight, 30 L. J. Ch. 644.

Where the testator makes a bequest of "all personal effects belonging to me and on storage" and makes no further reference to personal property in his will, the beneficiary will receive all of the personal estate except certain specific legacies of sums of money. Matter of Donohue, 46 N. Y. Misc. 370, 94 N. Y. Supp. 1087.

[53] Doe ex dem. Clements *v.* Collins, 2 T. R. 498.

Extrinsic evidence is admissible to aid the court in ascertaining the subject-matter of a bequest or the object of the testator's bounty. Hall *v.* Grand Lodge, I. O. O. F., 55 Ind. A. 324, 103 N. E. Rep. 854; Temple *v.* Bradley, 119 Md. 602, 87 Atl. Rep. 394.

Where the testator makes a devise to "William Wilson's children" and he had no relative by the name of William Wilson, extrinsic evidence may be introduced to show who was intended. Miller's Estate, 26 Pa. Super. Ct. 443.

[54] Stanford *v.* Lyon, 8 Vroom (N. J.), 426, s. c., 18 Am. Rep. 736.

Extrinsic proof may be heard to show what the testator meant by "my home farm," P'Simer *v.* Steele, 32 Ky. Law Rep. 647, 106 S. W. Rep. 851.

in the use of such expression, and what property he was accustomed to designate in this way.[55] Upon this principle, evidence that he and his steward were accustomed to call the estate by the name used in the will, and their entries of that name in their accounts, are competent.[56] And as a

[55] Ryerss *v.* Wheeler, 22 Wend. 148.

Where a conveyance describes all the land between the "beach and highway" the grantee might adopt the beach at low water or at high water, whichever is most favorable to him. Merwin *v.* Backer, 80 Conn. 338, 68 Atl. Rep. 373.

A devise of "my farm of 95 acres in Fillmore County" is not void for uncertainty; extrinsic evidence may be introduced to identify the property. Sorenson *v.* Carey, 96 Minn. 202, 104 N. W. Rep. 958.

A devise by a testator of all his "upland" is not void for uncertainty. Whatever land it can be shown he had in his mind and intended to dispose of by describing it as "upland" passes to the devisee; if he owned only "bottom" lands and "second bottom" lands, the ambiguity can be cured by extrinsic evidence to show that he regarded the "second bottom" lands as uplands. Vandiver *v.* Vandiver, 115 Ala. 328, 22 So. Rep. 154.

Where the will contains a devise of the "David D. A. Wortendyke Farm," extrinsic evidence is admissible to show that the testator owned three tracts which he bought from Wortendyke and all three of which he regarded as one farm. Ackerman *v.* Crouter, 68 N. J. Eq. 49, 59 Atl. Rep. 547.

The question of description of property is one of degree only, and if the devise be of an entire plantation, parol evidence is admissible to ascertain the geographical extent and limit of the property covered thereby. Flannery *v.* Hightower, 97 Ga. 592, 25 S. E. Rep. 371.

Where the will describes lands by government boundaries without naming the sections, parol evidence is admissible to supply them. Higgin *v.* Tennessee Coal, etc., Co., 184 Ala. 639, 62 So. Rep. 774.

Where the will refers to lands in "range 9" and the only lands testator owned were in range 10, parol evidence may be relied on to supply the correct designation. Pemberton *v.* Perrin, 94 Neb. 718, 144 N. W. Rep. 164, Ann. Cas. 1915, B. 68.

[56] Ib. and cases cited. It was there said that evidence of such declarations *at the time* of executing the will would not be competent. But see Ex p. Hornby, 2 Bradf. 420. The sculptor Nolleken's will provided that "all the marble in the yard, the tools in the shop, bankers, mod. tools for carving," shall be the property of A. (a favor-

general principle, if the subject of the bequest is described by reference to an extrinsic fact, extrinsic evidence is competent to show what was intended.[57]

104. —Rejecting False Words.

When resort to extrinsic evidence has shown that the description is false in part, the false part may be rejected, if the residue, with the aid of the extrinsic evidence properly applicable, will be legally sufficient to indicate the gift. Thus a bequest of bank stock, describing it as stock in the A. bank, will pass stock in the B. bank, if that was the testator's only bank stock; for after the name of the bank is re-

ite and long employed workman). Extrinsic evidence was admitted that in the trade "*mod.*" would be understood as meaning models, and that there were no such tools known as modeling tools for carving; also of the relative value of the moulds and models, and of the personal relations between the testator and legatee. Goblet *v.* Beechey, 3 Sim. 24. Reversed, on the ground that the models were otherwise bequeathed. 4 R. & M. 624.

The term "household furniture" includes all personal chattels which contribute to the use or convenience of the householder and to the ornament of the house, such as plate, linen, china, both useful and ornamental, and pictures. A bequest of "furniture" means the same as one of "household furniture." Matter of Kathan, 153 N. Y. Supp. 366, 90 Misc. 540.

[57] Thus, where testatrix directed that a mortgage on her house be paid, and also "all debts now due to" certain persons named, to an amount specified, extrinsic evidence that the only mortgage on the house was the one made with her assent, by a person who owned it jointly with her; and that the same person owed debts of the amount specified to the persons named, was competent to show that these were intended. Pritchard *v.* Hicks, 1 Paige, 270.

A legacy of the "contents" of a safe deposit box, a desk or a chest, plainly means whatever might be therein at the time of the death of the testator. If the contents of the box are specifically mentioned, and merely described as being in the box, and the language of the will does not localize the subject of the legacy, it might be immaterial whether the articles thus mentioned remained in the box or not. In re Thompson, 217 N. Y. 111, 111 N. E. Rep. 762.

The term "money in bank" includes, not only checking accounts, but also time and savings deposits of the testator as well. Lyons *v.* Lyons, 224 Fed. Rep. 772.

jected, enough is left to ascertain the thing by; [58] but this cannot be done where, after rejecting the false designation, the bequest is left uncertain.[59] If, however, all the words

[58] Roman Catholic Asylum *v.* Emmons, 3 Bradf. 144. But there being a corporation in Dedham, entitled "The President, Directors and Company of the Dedham Bank," and generally called "The Dedham Bank," a bequest of "all moneys due me, *at the time of my decease*, from Dedham Bank, Dedham, Mass.," will not pass a deposit in "Dedham Institution for Savings," though generally known as the Dedham Savings Bank, and though, at the date of the will, testator had a deposit there. This is not a case of false description; for testator refers to what may be at the time of death. American Bible Society *v.* Pratt, 9 Allen, 109; approved in 1 Redf. on W. 665, n. Where testator gave a specified "part of my stock in the $4 per cent. annuities"; and it appeared that he had previously sold all such stock and reinvested the proceeds in long annuities. *Held*, that evidence of the situation of the funds was admissible; but direct evidence of testator's intent, and the scrivener's mistake in copying from an old will, was not. See Redfield's comments on Selwood *v.* Mildmay, 3 Ves. 306, in 1 Redf. on W. 597, and n.

Where a testator devises "lot 78" in a certain block, and he did not own such lot, but did own lot 68 in said block, it must be shown that he owned only lot 68 in such block before the court will substitute 68 for 78. Oliver *v.* Henderson, 121 Ga. 836, 49 S. E. Rep. 743, 104 Am. St. Rep. 185.

Parol evidence cannot be introduced for the purpose of showing that a mistake was made by writing "Section 24" instead of "Section 14." Equity will not entertain a bill to reform a will under the guise of an attempt to construe the will. Lomax *v.* Lomax, 218 Ill. 629, 75 N. E. Rep. 1076, 6 L. R. A. N. S. 942.

Where the will devises the southeast one-quarter of a section of land and the only land the testator owned was the southwest one-quarter of such section, the word southeast may be rejected and then by extrinsic evidence the subject of the devise can be ascertained. Eckford *v.* Eckford, 91 Iowa, 54, 58 N. W. Rep. 1093, 26 L. R. A. 370; Christy *v.* Badger, 72 Iowa, 581, 34 N. W. Rep. 427.

[59] Thus, where the only description was "the farm I now occupy," it was held that the words "I now occupy," could not be rejected, because no sufficient designation would be left. Hence extrinsic evidence that the testator intended by this to give all his real estate at W., including a farm occupied by a tenant, was not admissible. Thompson, J., Jackson *v.* Sill, 11 Johns. 201. But where the description was "the old homestead, whereon I lived at the time of making my will, containing 100

can be consistently applied, though some of them restrict others which alone would have been sufficient, the court will not reject the restrictive words.[60]

acres,—*Held*, that the property was identified by the designation "old homestead," there being evidence that this 100-acre farm had always been known by that name in the family; and that the words, "whereon I lived, &c.," did not let in parol evidence of the extent of testator's occupation, or of his declarations as to the boundary. Waugh *v.* Waugh, 28 N. Y. 94. So where the description was "my farm at B. in the tenure of J. S.," and part of the farm was not in his tenure—*Held*, that the latter clause might be rejected. Ld. MANSFIELD, Goodtitle *v.* Paul, 2 Burr. 1089. So in a devise of "all the land I own, which lies along the S. Creek, and known by the name of T.'s patent," the latter clause may be rejected on parol evidence that the farm lying along the creek was not in T.'s patent, and that the lot in T.'s patent did not lie along the creek. Doe *v.* Roe, 1 Wend. 541. In this case, the ambiguity being latent, the scrivener's testimony to the testator's instructions, and to his own mistake, was admitted. So a devise of the M. farm, containing eight fields, may pass nine fields, by extrinsic evidence that he occupied nine. This renders the restriction to eight void for uncertainty. Coleman *v.* Eberly, 76 Penn. St. 197.

No inapt use of words by a testator may defeat his manifest intention, unless they compel the application of some rule of law which itself defeats testamentary intention. In re Garrett, 249 Pa. 249, 94 Atl. Rep. 927.

The court must confine itself to construing the will. It cannot make a new one. It may insert or leave out provisions, if necessary, but only in aid of the testator's intent and purpose. Nolan *v.* Nolan, 169 App. Div. 372, 154 N. Y. Supp. 355.

[60] Thus by a gift of "all my lands in lot 25, in H. Patent, lying in the County of G.," such only of testator's lands in the lot and patent named, as lie in G. will pass. The court will not reject an intelligible and applicable restriction, merely because the general words are enough without it. Hunter *v.* Hunter, 17 Barb. 85, S. P., Pedley *v.* Dodds, L. R. 2 Eq. 819. But if, instead of "all my lands in lot 25, &c., lying in G.," testator had written "all my B. estate, which lies in G.," parol evidence would be admissible to show that he habitually called the whole property his B. estate, and the court might reject the partially inconsistent words, "which lies in G." Doe *v.* Earl of Jersey, 1 B. & Ald. 550, 3 B. & Cr. 870.

The court must get the intention of the testator from the words he has used. Baker *v.* Gerow, 126 N. Y. Supp. 277.

A testamentary intention de-

105. —Uncertainty as to Which of Two Parcels.

As in the case of an equivocal designation of the beneficiary, so in the case of a similar ambiguity as to the property given, if it is shown that a designation in the will, which upon its face is unambiguous and sufficient, applies equally in all its parts to more than one subject—as where a testator devises his manor of S., and it appears that he has two such, one of North S. and one of South S.—extrinsic evidence must determine which passes; and for this purpose the testator's declaration of intention may be proved.[61] This rule applies also where realty is described as personalty and *vice versa*. Thus a bequest of land will pass a mortgage on the land if testator had no other interest.[62]

clared in a lawful manner and having a legal purpose has paramount potency and cannot be thwarted or nullified. It overrides the inadequacy or incorrectness of the language or the punctuation, or any crudity of the will. To effectuate it the courts will transpose or insert or disregard words of phrases. Eidt *v.* Eidt, 203 N. Y. 325, 96 N. E. Rep. 729, rev'g 142 N. Y. App. Div. 733, 127 N. Y. Supp. 680.

[61] See paragraph 97 (above) for the limits of this rule. Where a devise is of lands described as being in a specified parish or town, and the expression does not indicate an exclusion of lands beyond its true limits, extrinsic evidence is admissible to show that the whole lands were, at the date of the will, by common repute and in the understanding of the testator, within the parish or town. See 1 Redf. on W. 650–4, and cases cited. Where usage differed as to the limits indicated by a geographical name used in the description, evidence of testator's usage of the term would be competent. Where the testator devises all of his "upland," and there is evidence that the testator has no "upland" strictly so called, but that his lands were "bottom" and "second bottom" or "bench" lands, evidence of the intention of the testator in making the devise is competent; and for the purpose of showing his intention, the declarations of the testator at the time of making the will are admissible in evidence. Vandiver *v.* Vandiver, 115 Ala. 328, 22 So. Rep. 154.

Where the testator devises premises "known as 250 Fifth Avenue," extrinsic evidence may be introduced to show that the testator intended to include a lot and stable at 1 West 28th Street, adjoining the premises at the rear. Clark *v.* Goodridge, 51 N. Y. Misc. 140, 100 N. Y. Supp. 824.

[62] Woods *v.* Moore, 4 Sandf. 579. But if the words of the will are in-

The principles which contend for control in this class of questions are, that, on the one hand, where a devise is in general terms, subsequent words of description, restriction, exception, or limitation, should control the general terms; but, on the other hand, where the primary or larger description is sufficiently specific and certain to indicate the intent, words of identification inconsistent with it may be rejected as false or mistaken.[63]

106. Nature of Estate Given.

Where the words of the will are not ambiguous, and no latent ambiguity or "equivocation" is produced by extrinsic evidence, it is not competent to adduce evidence of the declarations of the testator or his instructions to the draftsman, for the purpose of showing that a different estate or interest from that indicated was intended,[64] as, for instance,

sufficient to carry real estate, it is not competent to show, from the condition of the testator's property, or his own memoranda and declarations, that he must have so intended. Allen's Ex'rs *v.* Allen, 18 How. U. S. 385, 1 Redf. on W. 606, note.

Uncertainty of meaning may arise as well by application of the words of a will to the subject with which it deals as from the words of the will themselves. Boeck's Will, 160 Wis. 577, 152 N. W. Rep. 155, L. R. A. 1915, E. 1008.

[63] For an illustration of the arguments, *pro* and *con.*, see Van Kleck *v.* Dutch Church, 20 Wend. 456, where the court, including BRONSON, BEARDSLEY, NELSON, COWEN, JJ., and others were equally divided on such a question.

Generally speaking the testament bears its own testimony, but where the description of the property sought to be devised is so uncertain as to leave in doubt what was the subject of disposition, parol evidence is to be received and considered. Such evidence is received, not to contradict the provisions of the will, but to explain to what particular pieces of land the language of the will referred. In re Phipps, 214 N. Y. 378, 108 N. E. Rep. 554.

[64] Ehrman *v.* Hoskins, 67 Miss. 192, 19 Am. St. Rep. 297, 6 So: Rep. 776; Hill *v.* Felton, 47 Ga. 455, s. c., 15 Am. R. 643, 654. And where the question was whether the devise was of a life estate or a fee—*Held*, that evidence that the lands were wild and uncultivated was inadmissible. Charter *v.* Otis, 41 Barb. 525. *Contra*, Sargent *v.* Tonne, 10 Mass. 303.

A devise by a husband to his

that a gift so expressed as to vest in interest at testator's death, was intended to lapse if the beneficiary did not survive until it vested in possession.[65]

107. Raising a Trust.

Extrinsic evidence to charge the apparent beneficiary as trustee for a third person is competent only when the intent is shown to have been communicated to the apparent beneficiary,[66] or when admissible on principles previously explained to aid in interpretation, or where the legatee is named as a trustee, or where the probate court could afford no remedy, or where one name was fraudulently inserted for the other.[67]

108. Aid in Executing the Will.

There are several classes of cases where the language of each disposition of the will is clear, but extrinsic evidence

wife of certain lands does not bar her dower in the husband's remaining real estate, unless it appears clearly from the will that the devise was in lieu of dower. Cowdrey *v.* Cowdrey, 72 N. J. Eq. 951, 67 Atl. Rep. 111, 12 L. R. A. N. S. 1176.

[65] Ordway *v.* Dow, 55 N. H. 11.

Where a will contains only money legacies, and makes no mention of or reference to real estate, extrinsic evidence cannot be introduced to show that the testator intended that the legacies should be a charge on the real estate. Fries *v.* Osborn, 190 N. Y. 35, 82 N. E. Rep. 716, 19 L. R. A. N. S. 457.

[66] Robotham *v.* Dunnett, 26 W. R. 530, and cases cited.

"Where a testator makes a devise or bequest absolute in from but upon a private understanding with the devisee or legatee that he will apply the estate to objects named by the testator, a trust arises which a court of equity will enforce and this whether the trust arises through expressed promise of the devisee or legatee or his assent which may be implied from his silence." Fickes' Estate, 59 Pa. Super. Ct. 535.

[67] 1 Redf. on Wills, 60, citing 1 Ho. of L. Cas. 191; Gaines *v.* Chew, 2 How. U. S. 619. Compare Irvine *v.* Sullivan, L. R. 8 Eq. 673; Collier *v.* Walters, L. R. 17 Eq. 252, s. c., 7 Moak's Eng. 798; Duke of Cumberland *v.* Graves, 9 Barb. 595. It seems that a devisee may also, in some cases, upon parol proof of testator's agreement to devise to another, be held a trustee for that other. Howland Will Case, 4 Am. Law Rev. 661, and cases cited.

is necessary to guide the administration in carrying them into effect. It will be seen that it is allowed in these cases, not to alter the meaning of the will, but to confirm and insist on it when, without such evidence, equity would in some way dispense with the literal fulfillment of the language. As a general principle, after extrinsic evidence to rebut such a presumption has been received, but not before, the like evidence is admissible to support the presumption, that is to say, to contradict the extrinsic evidence first given.[68]

109. —as to the Administrative Character of the Gift.

Extrinsic evidence is admissible to aid in determining whether a bequest of stock is a specific or a pecuniary legacy;[69] and where the will designates a specific fund which extrinsic evidence shows does not exist, extrinsic evidence is admissible to show that such fund formerly existed, and how the mistake arose; and, in a proper case, the legacy may upon such evidence be sustained as a general gift payable out of the estate.[70] But the necessary legal consequences involved in an expressed intention cannot be varied by extrinsic evidence. Thus since the gift of a specific legacy entitles the legatee to its income, not as an equitable presumption of intention, but as a matter legally included in the gift, in such case extrinsic evidence is not admissible to

[68] Phillips *v.* McCoombs (below); 1 Redf. on Wills, 647; Hall *v.* Hill, 1 Dru. & War. 94, 116.

Where the language of wills has been inexact or ambiguous, the courts frequently transpose or insert words or phrases, or even leave out or insert provisions in order to effectuate an intention that is, with reasonable certainty, to be gathered from the whole text of the instrument. Matter of Robbin, 152 N. Y. Supp. 1067, 89 Misc. 345.

[69] Boys *v.* Williams, 2 Russ. & M. 689, rev'g 3 Sim. 563. And see Pierrepont *v.* Edwards, 25 N. Y. 128.

[70] Lindgren *v.* Lindgren, 9 Beav. 358, 363. Compare 28 Id. 484, 520.

Where a testator bequeaths five shares of bank stock, and it is found he did not own any such shares, extrinsic evidence may be introduced to show that he intended five shares which he treated as his own but which never belonged to him. Paulus *v.* Besch, 127 Mo. App. 255, 104 S. W. Rep. 1149.

show the intention of the testator, as to the income of such legacies, where the will is silent.[71]

110. —as to Bequest to Creditor.

Where it appears that one to whom a legacy, expressed in terms appropriate to a pure gift, was a creditor of the testator, the court will not presume that the bequest was intended to satisfy the debt, if, by reason of the amount or the time for payment, the bequest would not be as beneficial as ordinary payment by the estate;[72] and in such case extrinsic evidence that the testator only intended to satisfy the debt is not competent.[73] Where the bequest and the debt are such that an equitable presumption arises that the bequest was intended in satisfaction, then extrinsic evidence, even by the declarations of the testator, is admissible to rebut the presumption, because it simply tends to show that he intended precisely what the will says.[74] The rule is in no

[71] Loring *v.* Woodward, 41 N. H. 391; 1 Redf. on Wills, 665, § 73. Whether parol evidence to show that testator intended to dispose of property not his own is admissible for the purpose of putting a beneficiary to an election,—see note to Dillon *v.* Parker, 1 Swanst. 402, 403, 2 Wms. Ex'rs, 6 Am. ed. 1550; Havens *v.* Sackett, 15 N. Y. 365.

A bequest of "my stock, standing in my name, on the books of the N. B. Corporation," is specific and identifies the property. In re Noon, 49 Or. 286, 90 Pac. Rep. 673, 88 Pac. Rep. 673.

The presumption is that in a will of personal property the intention of the testator is that the will shall speak as of the time of his death, but this presumption in the case of specific legacies may be rebutted when the nature of the property or thing bequeathed, or the language used by the testator in making the bequest, indicates that he intended it to speak as of the time of making the will. In re Thompson, 217 N. Y. 111, 111 N. E. Rep. 762.

As to specific legacies, a will speaks as of the time of its execution. Burt *v.* Harris, 152 N. Y. Supp. 956.

[72] See Fort *v.* Gooding, 9 Barb. 371, and cases cited.

[73] Phillips *v.* McCoombs, Oct. 1873, Cas. in N. Y. Ct. App., Opin. of Doolittle, J., approved in 53 N. Y. 494, overruling in part Williams *v.* Crary, 5 Cow. 368, 8 Id. 246, 4 Wend. 443.

[74] Id.

case to admit extrinsic evidence against construction upon the words of the will.[75]

111. —or to Heirs or Next of Kin in Advance.

Where the will directs the mode of dealing with advances which the testator has made to children or others expecting to share in his estate, extrinsic evidence of his intent in making the advances referred to is competent for the purpose of determining what obligations are within the terms of the will.[76]

112. —as to Presumptively Cumulative Gifts.

Where the same sum is given twice in the same will to the same legatee, courts of equity have recognized a presumption that the latter sum is a mere repetition or substitution; but where the two gifts are in different instruments,—*e. g.*, where one is given by will and the other by codicil,[77]—the presumption is that both were intended. In either case, extrinsic evidence is competent for the purpose of rebutting the equitable presumption,[78] so far as to enable the court to place itself in the testator's situation at the time of making the will; but his declarations cannot be proved to show an intent or motive in the will, against its legal construction.[79]

[75] Hall *v.* Hill, 1 Dru. & War. 115, and cases cited, SUGDEN, L. C.

[76] Tillotson *v.* Race, 22 N. Y. 122. Compare Chase *v.* Ewing, 51 Barb. 957.

[77] Or by separate instruments made at the same time. Whyte *v.* Whyte, L. R. 17 Eq. 50, s. c., 7 Moak's Eng. 672.

Where the testator in his will bequeaths $3,000 to his niece, remainder to his heirs at law, then makes a codicil giving her $2,000 more, and then makes another codicil revoking the previous legacies to his niece, and giving her a new legacy of $3,000 and no more, and upon his death it develops that she is his only next of kin, she will receive the entire estate; the courts will not hold that the residue goes to the testator's next of kin whoever they may be after eliminating the niece. Wilkinson *v.* Rosser, 31 Ky. Law Rep. 1262, 104 S. W. Rep. 1019.

[78] De Witt *v.* Yates, 10 Johns. 156, and cases cited; and see Russell *v.* St. Aubyn, L. R. 2 Chan. Div. 405, s. c., 16 Moak's Eng. 818.

[79] Martin *v.* Drinkwater, 2 Beav. 215, 218.

113. —as to Ademption.

If a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards,[80] in his lifetime, gives a portion or makes a provision for the beneficiary, even without expressing it to be in lieu of the legacy, it will, in general, be deemed a satisfaction or ademption of the legacy.[81] When a legacy is given for a particular purpose specified in the will, and the testator, during his life, accomplishes the same purpose, or furnishes the intended beneficiary with money for that purpose, the legacy is presumed to be satisfied.[82] The parental relation is evidence from which it may be inferred that payment, not a fresh gift was intended; but this presumption may of course be overcome

[80] A *previous* advance may be shown to be an ademption by extrinsic evidence. Rogers *v.* Prince, 19 Geo. 316.

"Ademption is the extinction or withholding of a legacy in consequence of some act of the testator. A gift will be taken as an ademption only when made to a child or one to whom the testator stands *in loco parentis*." Ellard *v.* Ferris, 91 Ohio St. 339, 110 N. E. Rep. 476, L. R. A. 1916, C. 613.

[81] Langdon *v.* Astor, 16 N. Y. 9, 34; Hine *v.* Hine, 39 Barb. 507, and cases cited. Even though the amount is less. Richards *v.* Humphreys, 15 Pick. 136. And a republication of the will does not necessarily rebut the presumption. Paine *v.* Parsons, 14 Id. 320.

Where the bequest is from a person *in loco parentis*, parol and other evidence is admissible to show that advancements were intended as an ademption of the legacy. Miller *v.* Payne, 28 App. D. C. 396.

[82] Hine *v.* Hine (above), and cases cited. At least, if the intent were made known to the beneficiary, see Langdon *v.* Astor, 16 N. Y. 37.

When a general legacy is given of a sum of money without regard to any particular fund, and thereafter the testator pays this legacy to the legatee, or advances him even a small sum with intent to discharge the legacy or to substitute the advancement for the bequest, the legacy is satisfied or adeemed. In re Brown, 139 Iowa, 219, 117 N. W. Rep. 260.

Where a testator directed his executors to purchase an annuity for his daughter, the same to be in addition to annuities already held, and after the execution of the will, he himself purchased an additional annuity for her, it was held not to be an ademption of the legacy. Matter of Langdon, 153 N. Y. Supp. 574, 89 Misc. 333.

by evidence that such was not the intention; and such evidence when admitted, may be answered by other evidence of the same character.[83] But the extrinsic evidence is competent, in such cases, not to vary the terms of the will, but to establish, on behalf of the claimants, the acts and intents of the testator, so as to rebut the presumption of satisfaction arising in behalf of the adverse party; and it is only when such evidence has been received, that extrinsic evidence is competent in reply in support of the presumption of satisfaction.[84] For this purpose the declarations of the testator relevant to the question whether the bequest was made *in loco parentis*,[85] as well as those relative to the question of intent to adeem, are competent[86] (especially if not contradictory to the terms of a writing), both when made at the time of the transaction,[87] and when made before or after it;[88]

[83] Langdon *v.* Astor, 16 N. Y. 34, 35.

Where the testatrix is the grandmother of the legatee, and after drawing her will makes a contract with the father of the legatee to accomplish the same purpose for which the legacy was intended, the contract cannot be held to have been made in satisfaction of the legacy because the testatrix clearly did not stand *in loco parentis* to the legatee. In re Youngerman, 136 Iowa, 488, 114 N. W. Rep. 7, 15 Ann. Cas. 245.

Where the testator was not *in loco parentis* to the legatee, the legacy is not adeemed unless it appears on the face of the will to have been given for a particular purpose. A legacy "for the use and benefit" is not one which can be adeemed by reason of the settlement by the testator of a similar sum upon the legatee for his benefit. In re Smythies, [1903] 1 Ch. 259.

[84] Id.; Hall *v.* Hill (above); Richards *v.* Humpheys, 15 Pick. 139, 2 Wms. Ex'rs, 6 Am. ed. 1412, 1444; Miner *v.* Atherton, 35 Penn. St. 528. *Contra*, Sims *v.* Sims, 2 Stockt. Ch. (N. J.) 163.

[85] Powys *v.* Mansfield, 3 Myl. & Cr. 359, 370; Gill's Estate, 1 Pars. Eq. Cas. 139. And his acts also. 2 Wms. Ex'rs, 6 Am. ed. 1446.

[86] Whately *v.* Spooner, 3 Kay & J. 542.

[87] Richards *v.* Humphreys, 15 Pick. 139.

[88] See conflicting authorities cited in Gilliam *v.* Chancellor, 43 Miss. 437, s. c., 5 Am. R. 498.

Statements and declarations made by the testatrix to witnesses at the time the advancements were made, and shortly thereafter, that the amounts advanced were to be deducted from the legacy, form

but they are not competent, to construe the language of the will, except within the general rules previously explained, nor are they competent to raise a presumption of ademption where none would arise on the face of the will, in connection with the writing relied on as constituting the ademption. The extrinsic evidence is only admissible in such cases for the purpose of showing what the testator meant by the act other than the will.[89] Extrinsic evidence is not competent to prove that a statement in the will that testator had made an advancement was a mistake, for the purpose of avoiding its deduction.[90]

114. — as to Charging Legacies.

If the language of the will is doubtful as to whether or not legacies are charged on real property, extrinsic evidence of the situation of testator and his property, and the surrounding circumstances, is competent to aid in determining the question.[91]

part of the *res gestæ* and are admissible to show the intent of the testatrix. Hine *v.* Hine, 39 Barb. 507; Dilley *v.* Love, 61 Md. 603.

[89] Hall *v.* Hill, 1 Dru. & War. 94, 116.

[90] Painter *v.* Painter, 18 Ohio, 247.

When a testator clearly expresses the intention that his property shall pass to his children equally, subject to charges against them in his book of advancements, parol evidence is not competent to show that an advancement charged by him in such book was not made. Younce *v.* Flory, 77 Ohio St. 71, 83 N. E. Rep. 305.

[91] Hensman *v.* Freyer, L. R. 2 Eq. 627, 3 Ch. 420; Paxon *v.* Potts, 2 Green Ch. (N. J.) 321, and cases cited; Dey *v.* Dey, 19 N. J. Eq. (4 C. E. Green), 137. Such evidence was not competent at law. Tole *v.* Hardy, 6 Cow. 333.

Resort may be had to the circumstances attending the execution of the will to show that the testator contemplated that the legacies shall be a charge on the real estate, *e. g.*, if the testator's personal estate was woefully dificient for the payment of the legacies it must be inferred that he intended the application of his real estate toward their payment. But circumstances subsequent are not available as they cannot aid in the interpretation of the testator's intention. McManus *v.* McManus, 179 N. Y. 338, 72 N. E. Rep. 235.

Where legacies are pecuniary and general, and there is a resid-

115. — as to Execution of Power.

The question whether a bequest is in execution of a power, is one of intention, and the intention cannot be proved by direct evidence of testator's intention extrinsic to the will; but evidence of the situation of the testator, the surrounding circumstances, and the state and amount of testator's property at the time of making the will is competent, both in respect to realty (as was always allowed) and in respect to personalty (as formerly was not allowed), for the purpose of comparing the dispositions of the will with the property owned and with that subject to the power, and thence deducing an inference of the intention to dispose of the latter rather than the former.[92] Upon the whole evidence the intention must be apparent and clear; if it be doubtful, the act cannot be deemed an execution of the power.[93]

116. Time of Declarations Bearing on Intention.

Evidence of the language of the testator offered not as direct proof of intent, but to show his usages of speech, need not be confined to any particular time; it is enough that the declarations involve his use, in other ways, of the language

nary gift of both realty and personalty, it manifests an intention to charge the entire residue with the legacy. Pitkin *v.* Peet, 87 Ia. 268, 54 N. W. Rep. 215; Sloan's Appeal, 168 Pa. 422, 32 Atl. Rep. 42, 47 Am. St. Rep. 889; Lewis *v.* Darling, 16 How. (U. S.) 1, 14 L. Ed. 819.

General language in a will, giving legacies, followed by the usual residuary clause, is alone insufficient to charge the legacies on the realty. But it may be established by extrinsic evidence that it was the intention of the testator that the legacies should be charged on the land. Brill *v.* Wright, 112 N. Y. 129, 19 N. E. Rep. 628, 8 Am. St. Rep. 717.

Where the will does not provide that the legacy is to be charged upon the entire estate, it is payable only out of the personalty. Newsom *v.* Thornton, 82 Ala. 402, 8 So. Rep. 261, 60 Am. R. 743; Lacey *v.* Collins, 134 Ia. 583, 112 N. W. Rep. 101.

[92] White *v.* Hicks, 33 N. Y. 394; Ruding's Settlement, L. R. 14 Eq. 266.

[93] White *v.* Hicks (above). Otherwise by statute, as to real property. 1 N. Y. R. S. 732, § 126.

used in the will, and in the same relation as there used. But the weight to be given to such declarations may, of course, vary much with remoteness in point of time from the making of the will. Where such declarations are competent as direct proof of intention in the will, their weight depends more immediately upon their proximity to its execution; but if competent for this purpose, they are competent, whether made before, at, or after the act.[94]

XI. ADVANCEMENTS

117. The General Presumption.

The law recognizes the natural affection which prompts the parent (and in some degree any one standing in *loco parentis*) to make voluntary provision for children[95] by

[94] This is now regarded as the better rule. Doe *v.* Allen, 12 Ad. & El. 451; though there are many conflicting cases.

Declarations of the testatrix at the time of executing a codicil, that she did not intend to revoke the original will, are not admissible in a suit to set aside the probate of the will based upon the revocation of the codicil. Osburn *v.* Rochester Trust, etc., Co., 152 N. Y. App. Div. 235, 136 N. Y. Supp. 859.

Declarations made by a testator near enough to the time of the execution of the will to be regarded as part of the *res gestæ* of its execution are admissible in evidence to show his state of mind and his intention in the disposal of his property. Lane *v.* Moore, 151 Mass. 87, 23 N. E. Rep. 828, 21 Am. St. Rep. 430; Throckmorton *v.* Holt, 180 U. S. 553, 45 L. Ed. 663, 21 Sup. Ct. Rep. 474.

The declarations of a testator made subsequent to the execution are not admissible to prove fraud and collusion. Smith *v.* Keller, 205 N. Y. 39, 98 N. E. Rep. 214, rev'g 145 N. Y. App. Div. 908, 129 N. Y. S. 1146.

Declarations made after the execution of the will are incompetent. In re McVeigh, 181 Mo. App. 566, 164 S. W. Rep. 673.

Declarations of the testator during his lifetime as to the contents of his will are not admissible to prove its execution. Matter of Corcoran, 145 N. Y. App. Div. 129, 129 N. Y. Supp. 165.

The intent of the testator expressed in his will cannot be changed by his parol declarations *dehors* the will. Williams *v.* Freeman, 83 N. Y. 561.

[95] In many cases the language of the court extends the rule no farther than to provisions for *minors*, see Jackson *v.* Matsdorf, 11 Johns. 91;

anticipating in favor of one or another, the distribution of the patrimonial estate before death, and which at the same time intends that the ultimate division shall equalize the shares of all.[96] Hence it is a legal though not a conclusive presumption, applicable in case of total intestacy, or, to speak more closely, wherever (will or no will) the division of the entire estate is subjected to the statutes of descent and distributions,[97] that a substantial provision, beyond expenditures for maintenance or education,[98] and not characterized as a mere gift nor as creating a debt on the part of the child,[99] was intended as an earnest of the inheritance, and to be deducted from the recipient's share of the estate on the parent's death. The court looks to the substantial character of the provision.[1] But in all cases the question is one

but minority is not essential to the presumption, and indeed, where the expenditure is for maintenance during minority, may indicate that it was made in discharge of parental duty. See Vail *v.* Vail, 10 Barb. 69.

"An advancement is a gift in præsenti of money or property to a child by a parent to enable the donee to anticipate his inheritance *pro tanto* and applies to cases of intestacy." Ellard *v.* Ferris, 91 Ohio St. 339, 110 N. E. Rep. 476, L. R. A. 1916, C. 613.

[96] Parks *v.* Parks, 19 Md. 323.

[97] Camp *v.* Camp, 2 Redf. Surr. 141.

The doctrine of advancement applies only in a case of intestacy. Gilmore *v.* Jenkins, 129 Iowa, 686, 106 N. W. Rep. 193, 6 Ann. Cas. 1008; In re Hall, 132 Iowa, 664, 110 N. W. Rep. 148.

[98] 1 N. Y. R. S. 754, § 23, 4 Kent Com. 417. In States where the statute does not exclude it, extrinsic evidence that such expenditures were intended as advancements, is proper. Riddle's Estate, 19 Penn. St. 431.

[99] Law *v.* Smith, 2 R. I. 244.

[1] Thus, where the father conveys the fee to his son, who reconveys for life, the advancement amounts only to the value of the remainder. Cornings *v.* Wellman, 14 N. H. 287. But where the consideration of a deed was pecuniary, except as to a specified fraction, which was the grantee's "hereditary portion from" the grantor, *Held*—that as to the amount of that portion, it was an advancement. Miller's Appeal, 31 Penn. St. 337. So a conveyance for life, with remainder to the grantee's children, is presumptively an advancement only to the value of the life-estate. Cawthorn *v.* Coppedge, 1 Swan, 487.

"Where a legacy is given by the

of intent,[2] the main element being the intent of the donor; and very slight evidence suffices to sustain the inference that the donee accepted the transfer upon the understanding, express or implied, that it should serve on the death of the donor, in lieu of so much of any share to come from his estate to the donee.[3] The intent shown once to have existed is presumed to have continued; [4] and neither a transaction by which a legal debt has been constituted,[5] nor a benefit once conferred and accepted as a gift,[6] can be converted into an

testator to a child, or to one to whom he stands *in loco parentis*, a subsequent payment made to the child raises the presumption of an intention on the part of the testator to adeem the legacy in whole or in part. In case of a legacy to a person other than the child of the testator or to one to whom he does not stand *in loco parentis*, a subsequent gift to the legatee raises no presumption of an intention of the testator to satisfy the legacy unless the gift is for the same specific purpose for which the legacy was designed or is in terms made a substitute therefor." Ellard *v.* Ferris, 91 Ohio St. 339, 110 N. E. Rep. 476, L. R. A. 1916, C. 613.

[2] Weaver's Appeal, 63 Penn. St. 309, and other cases cited above and below.

When it is disclosed that the heir received from the ancestor money or property during the lifetime of the ancestor, there is a presumption that the same was an advancement. Boyer *v.* Boyer, 111 N. E. Rep. (Ind.) 952.

[3] See the contractual nature of advancements well explained in Bing. on Desc. 347.

Where the testator during his lifetime loans money to his niece and takes a promissory note, and subsequently makes his will containing a clause which states that whatever moneys his children have received are declared to be absolute gifts and in no sense advancements, the niece's note will not thereby be extinguished. Matter of Cramer, 43 N. Y. Misc. 494, 89 N. Y. Supp. 469.

[4] Oller *v.* Bonebrake, 65 Penn. St. 338.

[5] Yundt's Appeal, 13 Penn. St. 575.

While parol testimony may be introduced in reference to the intent of the testator in cases of advancements, the plaintiff will not be permitted to introduce evidence that he never received anything from the testator, where the will states that the plaintiff shall account for $500 before he receives his legacy. Dodson *v.* Fulk, 147 N. C. 530, 61 S. E. Rep. 383.

[6] Sherwood *v.* Smith, 23 Conn. 516.

An advancement must be given its character at the time the transfer is made. There must be evi-

advancement, by the act of the decedent, uncommunicated to the debtor or donee. The subject is usually regulated by statute, which should be carefully consulted; for a statute defining what shall be deemed to be or prove an advancement, may be construed to exclude other evidence in substitution for,[7] or in rebuttal of, the statutory evidence.[8] But if the statutory evidence is adduced, it is the better opinion that parol evidence in aid of its validity and interpretation is admissible upon the familiar principles generally applicable to statutory evidence.[9] To determine a question of advancement, attention should first be given to the statute definition; then, if the statute does not preclude such other tests, resort should next be had to the will, if any, to ascertain the testator's intent; next, to the terms of the gift or grant itself, if in writing, or to the written entries made in his accounts, etc., by the testator or the written evidence taken from the donee; next, to the *res gestæ* at the time of the transfer, and, on the failure of these tests, or in aid of them, to the declarations of the decedent and the admissions of the

dence that it was intended to be an advancement at the time of delivery. A testator cannot characterize certain gifts as advancements, when they were not designated such at the time they were made. Ludington *v.* Patton, 121 Wis. 649, 99 N. W. Rep. 614.

[7] Barton *v.* Rice, 22 Pick. 508.

Where an advancement is made with the idea that it is to be deducted in the event of the testatrix, dying intestate, and the testatrix subsequently makes her will, it shows an intention on her part to cancel any obligation arising from the advancement. Bowron *v.* Kent, 190 N. Y. 422, 83 N. E. Rep. 472.

According to the Kentucky statute (§ 4840, L. 1903) an advancement shall be deemed a satisfaction of a legacy where it appears from parol evidence that the testator intended it; and this is so whether the legatee was or was not a child of the testator. Nall *v.* Wright, 26 Ky. Law, Rep. 253, 80 S. W. Rep. 1120.

[8] S. P., as to revocation of will, paragraph 72, above.

A parent cannot by a mere declaration of his intention, verbal or in writing, either make that an advancement which is not such by law or exempt one of his children from liability to account for money or property he has given to him with which the statute makes him chargeable. McCray *v.* Corn, 168 Ky. 457, 182 S. W. Rep. 640.

[9] See Bing. on Desc. 397.

beneficiary; and lastly, to the character of the thing given, and the situation of the parties and their surrounding circumstances, from which a presumption may arise as to whether it was a gift, an advancement, or a loan.[10]

118. Advancement by Deed of Real Property.

If the language of a sealed instrument will without violence bear either construction, equity will receive parol evidence to show the actual intent,[11] unless the statute [12] prevents. A deed from parent to child, expressed to be in consideration of "love and affection," [13] or "good-will," [14] or the like,[15] raises a presumption of advancement; [16] and the fact that a nominal pecuniary consideration is also expressed, does not alone rebut the presumption,[17] but is enough to let in parol evidence to rebut it,[18] and parol evidence in support of the

[10] Such, for instance, as the amount as compared with the estate of the parent and the number of the children, and the purpose for which the advance was made. It is always a natural and reasonable presumption that a parent means to treat his children equally. If his estate is large, a comparatively small sum raises the presumption of a gift or present. So, if it be shown that the purpose was education, it will be presumed to have been in discharge of the parental duty, until rebutted by other evidence. Weaver's Appeal, 63 Penn. St. 309.

[11] Phillips *v.* Chappell, 16 Geo. 16. As the question is not between the parties to the original instrument, the general rule excluding parol is, perhaps, not strictly applicable. See Parks *v.* Parks, 19 Md. 322, and ch. I, paragraph 16, of this vol.

[12] As in Vermont, Adams *v.* Adams, 22 Vt. 50, 64.

[13] Hatch *v.* Straight, 3 Conn. 31.

[14] Sayles *v.* Baker, 5 R. I. 457.

[15] Miller's Appeal, 31 Penn. St. 337.

[16] Finch *v.* Garrett, 102 Iowa, 381, 71 N. W. Rep. 429. For the court presumes equal affection for the others. Parks *v.* Parks, 19 Md. 323. Proof that the son had rendered services under a contract, without anything to show that he had not received the contract compensation, will not disprove the intent of an advancement. And on the other hand, the statement in the deed, that the conveyance was partly in consideration of a contract for services or support, may be explained by parol testimony. Kingsbury's Appeal, 44 Penn. St. 460.

[17] Hatch *v.* Straight (above).

[18] Scott *v.* Scott, 1 Mass. 527.

presumption is then equally admissible.[19] If the deed expresses only a valuable consideration and acknowledges its payment, this by itself is presumed not to be an advancement,[20] but parol evidence is admissible to show that no such consideration was asked or received,[21] and such evidence raises the presumption that the gift was an advancement.[22]

119. Purchase in Name of Child.

Extrinsic evidence is competent to show that the decedent procured securities [23] or a conveyance to be made, by a third person, to a child who claims to share in his estate, under the statute,[24] and that the decedent [25] paid the consideration, even though the deed recites payment by the grantee;[26] and

[19] Kingsbury's Appeal, 44 Penn. St. 460.

[20] Newell *v.* Newell, 13 Vt. 24.

When a deed recites the consideration and it is sought to charge the property conveyed as an advancement, the burden of proof is on the person asking that it be charged as an advancement to show that it was, in fact, an advancement and not made for a valuable consideration. McCray *v.* Corn, 168 Ky. 457, 182 S. W. Rep. 640.

[21] Speer *v.* Speer, 14 N. J. Ch. (1 McCarter), 240; Meeker *v.* Meeker, 16 Conn. 383; Finch *v.* Garrett, 102 Iowa, 381, 71 N. W. Rep. 429.

[22] Sanford *v.* Sanford, 5 Lans. 486, s. c., 61 Barb. 293.

[23] 2 Story's Eq. J., § 1204.

[24] See paragraph 117.

[25] Whether the father. Proseus *v.* McIntyre, 5 Barb. 424, 432; Taylor *v.* Taylor, 4 Gilm. 303; Mumma *v.* Mumma, 2 Vern. 19; or the mother. Murphy *v.* Nathans, 46 Penn. St. 508. As to grandparent, see Shiver *v.* Brock, 2 Jones L. (N. C.) 137.

Where the purchase price of land is paid by a father or a husband and the title taken in the name of the child or of the wife, the *prima facie* presumption is, nought else appearing, that such land was intended as a gift or as an advancement. Hunnell *v.* Zinn, 184 S. W. Rep. (Mo.) 1154.

Where the purchase money is paid by a parent and a deed is made to a child, there is a presumption that it was intended as an advancement, but this is a presumption that may be rebutted. Clary *v.* Spain, 119 Va. 58, 89 S. E. Rep. 130.

[26] Dudley *v.* Bosworth, 10 Humph. (Tenn.) 9. So also where the child pays the consideration out of the parent's funds. Douglas *v.* Brice, 4 Rich. Eq. 322.

these facts shown, without more, raise a legal presumption that the purchase was an advancement.[27] Extrinsic evidence is admissible in this as in other classes of *prima facie* advancements, to rebut or support the presumption of intent to make an advancement.[28] Each case has to be determined by the reasonable presumption arising from the facts and circumstances connected with it. Lapse of time, connected with continued acts of recognition of the right of the donee, are always potent, and frequently controlling circumstances in determining the intention.[29] If it be shown that the object of the parent or husband was to defraud his existing or future creditors, they may avoid it; [30] but the fact that the grantor adopted that form of conveyance in the fear of creditors, is not alone enough to preclude giving it effect as between the heirs, etc., as an advancement.[31]

120. Other Transfers.

Unless the statutes of the State [32] impose a different rule, both the fact and the character of an advancement, even of real property, may be established by parol,[33] and no par-

[27] Same cases.

[28] Jackson ex dem. Benson *v.* Matsdorf, 11 Johns. 91; Proseus *v.* McIntyre, 5 Barb. 424; Creed *v.* Lancaster Bank, 1 Ohio St. 1.

[29] Creed *v.* Lancaster Bank, 1 Ohio St. 1. The fact that the parent took and retained possession until his death, was held, in early cases, not to rebut the presumption of advancement. Taylor *v.* Taylor, 1 Atk. 386; Dyer *v.* Dyer, 2 Cox Eq. 92; especially if the child were a minor. Mumma *v.* Mumma, 2 Vern. 19. Recently it has been held that taking and keeping the beneficial possession may rebut the presumption, and will sustain a finding of a trust, notwithstanding a parol declaration of intent to constitute an advancement. Stock *v.* McAvoy, L. R. 15 Eq. 55, s. c., 5 Moak's Eng. 711; and see Dudley *v.* Bosworth, 10 Humph. (Tenn.) 9.

[30] Bay *v.* Cook, 31 Ill. 336; Guthrie *v.* Gardner, 19 Wend. 414; Creed *v.* Lancaster Bank (above); compare Kingsbury's Appeal, 44 Penn. St. 460.

[31] Kingsbury's Appeal, 44 Penn. St. 460; Proseus *v.* McIntyre, 5 Barb. 424, 434.

[32] As in Barton *v.* Rice, 22 Pick. 508, and Porter *v.* Porter, 51 Me. 376.

[33] Parker *v.* McCluer, 3 Abb. Ct. App. Dec. 454; Dugan *v.* Gettings, 3 Gill, 138.

ticular form of words is required.[34] A sum of money given to enable the son to purchase a farm or the like, the amount being large and, perhaps equivalent to the apparent expectancy of the son, is presumptively an advancement if no security or promise is taken by the parent; [35] and if securities for repayment are taken by a parent on furnishing funds to the child, the subsequent surrender of them, or a part of them, may raise a presumption of advancement to that extent.[36] On the other hand, while a note given by a child to the parent is presumed to be not an advancement, but a debt, yet parol evidence is admissible to show that it was given as an admission of an advancement.[37] The mere delivery of money or chattels is not presumptively an advancement, but rather, in the absence of evidence tending to show it was intended as an advancement, is presumed to have been either a gift or loan; [38] or, if the parent was indebted to the child, it will be presumed to have been intended as payment.[39]

121. Entries in Account.

An account kept by the donor, in which he charges the sum in a manner indicating his intent that it is to take effect

[34] Bulkeley *v.* Noble, 2 Pick. 337; Bing. on Desc. 388; Brown *v.* Brown, 16 Vt. 197.

[35] Weaver's Appeal, 63 Penn. St. 309.

[36] Hanner *v.* Winburn, 7 Ired. Eq. 142. But a mere declaration uncommunicated may not be enough. See Bing on Desc. 392.

[37] Tillotson *v.* Race, 22 N. Y. 127; Brook *v.* Latimer, 44 Kans. 431, 21 Am. St. Rep. 292, 24 Pac. Rep. 946. Where the relation of parent and child exists, the burden of proof is on the plaintiff to prove undue influence in the making of a voluntary conveyance. Doherty *v.* Noble, 138 Mo. 25, 39 S. W. Rep. 458.

[38] Bing. on Desc. 394, etc. The fact that the conveyance was of real property enhances the presumption, because it is more suggestive of the purpose of permanent settlement. Parks *v.* Parks, 19 Md. 323. On the other hand, it would take stronger evidence to show that the gift of a saddle horse was an advancement, than that of a stallion kept for purpose of profit. Ison *v.* Ison, 5 Rich. Eq. 15.

[39] Hagler *v.* McCombs, 66 N. C. 345.

as an advancement, may be sufficient without evidence that the donee knew of the charge.[40] But where this is the only evidence of intent, it is the better opinion that the quality of advancement, that is to say, the liability of the donee to have the gift deducted from his share of the estate, may be released by a cancellation or corresponding credit evincing a discharge, although not communicated to the donee,[41] as well as by conduct of the parties treating it as such. If the entry or other memorandum be made in a form indicating a gift, or a loan, or bailment,[42] parol evidence is admissible to explain that it was intended as an advancement.

122. Declarations and Admissions as to Advancements.

Whether the advancement was by a conveyance made by the donor,[43] or made by a third person on a consideration moving from the donor,[44] or by transfers *in pais*, and by charges in account or other writings, or by parol,[45] the declarations of the donor made at the time are admissible as part of the *res gestæ*,[46] although not competent evidence as

[40] As to what form of charge has this effect, see Lawrence *v.* Lindsay, 68 N. Y. 108, rev'g 7 Hun, 641; Bigelow *v.* Pool, 10 Gray, 104, Bing. on Desc. 382, and cases cited. His credit of interest held competent evidence that it was a loan. Peck *v.* Peck, 21 L. T. N. S. 670.

Where the testator in his lifetime paid to his children of a former marriage a substantial sum of money in full settlement and extinguishment of all their rights as heirs to his estate, and took their receipts to that effect, they are estopped from ever making any claim to his estate. Callicott *v.* Callicott 43 So. Rep. 616 (Miss.).

[41] Compare Johnson *v.* Belden, 20 Conn. 322; Oller *v.* Bonebrake, 65 Penn. St. 338.

[42] Law *v.* Smith, 2 R. I. 244.

[43] Christy's Appeal, 1 Grant's Cas. 369; Parks *v.* Parks, 19 Md. 323; Speer *v.* Speer, 14 N. J. Eq. (1 McCarter) 240, 248.

[44] Compare Sayles *v.* Baker, 5 R. I. 457.

[45] Oller *v.* Bonebrake, 65 Penn. St. 338.

[46] Woolery *v.* Woolery, 29 Ind. 254; Wilson *v.* Beauchamp, 50 Miss. 24; Fellows *v.* Little, 46 N. H. 37, 38; Bragg *v.* Massie, 38 Ala. 89, 106. And very freely if fraud or undue influence appears. Cook *v.* Carr, 20 Md. 403.

to intent if the statute requires written evidence.[47] Subject to the same statutory qualification, the declarations of the donor, made before the transaction, are competent on the question of his intent.[48] Whether his declarations made after the transaction are competent, depends on how they are invoked in evidence.[49] For the purpose of showing that the transaction was a gift, the donor's declarations are competent against the representatives, heirs, and next of kin, claiming it to be an advancement; [50] and for the purpose of showing either that it was a gift or advancement, they are competent against those claiming it to have constituted a debt; for in either case they are his admissions against interest, and bind those claiming under him and in his right. But for the purpose of showing either that the transaction was an advancement, or that it was a debt, his declarations, made after he had parted with all power of revocation, are not competent against those who claim it as a gift; [51] and for the purpose of showing that it was a debt, they are not competent against those who claim it either as a gift or as an advancement; for in either case, they are the declarations

[47] Weatherhead *v.* Field, 26 Vt. 665; Bulkeley *v.* Noble, 2 Pick. 337.

[48] Powell *v.* Olds, 9 Ala. 861.

[49] The cases may not explain the distinction here stated, but the distinction explains the cases.

Where a parent takes a promissory note from his child his declarations at the time of the transaction, or subsequent thereto, are admissible for the purpose of showing that the note was taken as a mere receipt or memorandum of an advancement. Brook *v.* Latimer, 44 Kan. 431, 24 Pac. Rep. 946, 11 L. R. A. 805, 21 Am. St. Rep. 292; Peabody *v.* Peabody, 59 Ind. 556; Nelson *v.* Nelson, 90 Mo. 460, 2 S. W. Rep. 413; McDearman *v.* Hodnett, 83 Va. 281, 2 S. E. Rep. 643.

[50] Phillips *v.* Chappell, 16 Geo. 16; Johnson *v.* Belden, 20 Conn. 322; Note in 13 Moak's Eng. 700. *Contra*, Bing. on Desc. 404.

[51] Sanford *v.* Sanford, 5 Lans. 486, s. c., 61 Barb. 293; Hatch *v.* Straight, 3 Conn. 31. *Contra*, Rollins *v.* Strout, 4 Nev. 150. Compare Law *v.* Smith, 2 R. I. 244; Peck *v.* Peck, 21 L. T. N. S. 670. A debt barred by the statute of limitations cannot, by the decedent's declarations alone, be converted into an advancement. Bing. on Desc. 363.

in his own favor. The fact that such declarations were communicated to the donee, may, of course, render them competent; [52] and they may also be admissible on principles previously explained,[53] when necessary and proper to show his intent in a subsequent will referring to the advancements.[54] The donee's declarations or admissions, made as part of the *res gestæ*, or at any subsequent time, are competent against him and those claiming under him.[55]

123. Value.

The burden of proving value is on those who claim that the provision should be deducted as an advancement; [56] but evidence that the advancement was accepted in full of the donee's share throws on the donee the burden of proving that the value was less than his share.[57] The value may be

[52] Yundt's Appeal, 13 Penn. St. 575.

[53] Paragraphs 111 (above) and 124 (below).

[54] Tillotson *v.* Race, 22 N. Y. 126. A security which cannot, under the statute, be proved to represent an advancement, may be made such by a provision in the will. Bacon *v.* Gassett, 13 Allen, 337. Whether the decedent's transactions with the other heirs apparent are relevant on the question of his intention in the transaction with one claiming a gift, compare Bulkeley *v.* Noble, 2 Pick. 337; Weaver's Appeal, 63 Penn. St. 309.

[55] Christy's Appeal, 1 Grant's Cas. 369; Speer *v.* Speer, 14 N. J. Eq. (1 McCarter) 240, 248; Law *v.* Smith, 2 R. I. 244. Debts by the husband of the decedent's daughter cannot be changed into advancements as against her, merely by her admission that "this we owe to father honestly." Yundt's Appeal, 13 Penn. St. 575. A judgment or decree, in a suit for settlement of the estate, fixing the character and amount of advancements, is conclusive in a subsequent action between the same parties, or those in privity with them, as to realty. Torrey *v.* Pond, 102 Mass. 355.

[56] See Bell *v.* Champlain, 64 Barb. 396.

The value of the use and occupation of land by one child under no contract of renting, although holding at the will and pleasure of the father, must be accounted for by the child as an advancement in the settlement and distribution of the father's estate. McCray *v.* Corn, 168 Ky. 457, 1825 S. W. Rep. 640.

[57] Parker *v.* McCluer, 3 Abb. Ct. App. Dec. 454.

conclusively fixed by an acknowledgment in writing,[58] or it may be made immaterial by a conclusive release of all interest in the estate, given upon receiving the advancement.[59] If the advancement was made by a deed expressing a pecuniary consideration, that sum may, by extrinsic evidence, be shown to be the value.[60] If the donor put a value on the advancement, in the transaction itself, it excludes evidence of greater value,[61] but not evidence of less value.[62] If, however, a value was fixed by agreement with the donee (the acknowledgment being in writing if the statute so require), it excludes evidence of less value. Where actual value is to control, value at the time of the transfer is to be proved, and without interest.[63]

124. Testamentary Clauses as to Advancements.

Where the will refers to money bequeathed as being already in possession of the donee, the burden is upon those alleging satisfaction to show that the possession continued, at least if the beneficiary is one who might be presumed to have held possession as the testator's agent.[64] Where the will refers to entries or memoranda, or other unattested papers previously made or subsequently to be made, to ascertain the advancements, the documents so identified are competent evidence,[65] and so, also, if it releases securities taken from the beneficiaries.[66] If the entries or securities

[58] 1 N. Y. R. S. 754, § 25.

[59] Meeker *v.* Meeker, 16 Conn. 383.

[60] Meeker *v.* Meeker, 16 Conn. 383.

[61] Meeker *v.* Meeker, 16 Conn. 383.

[62] See Marsh *v.* Gilbert, 2 Redf. Surr. R. 465.

[63] Bing. on Desc. 407, 408, and cases cited.

[64] Enders *v.* Enders, 3 Barb. 362.

[65] Whateley *v.* Spooner, 3 Kay & J. 542; and see Langdon *v.* Astor, 16 N. Y. 9, rev'g 3 Duer, 477.

Where a testator keeps a book of advancements made to his children, and refers to it in his will, parol evidence may not be introduced to prove that certain advancements entered therein were never in fact made. Younce *v.* Flory, 77 Ohio St. 71, 83 N. E. Rep. 305.

[66] See Chase *v.* Ewing, 51 Barb. 597; Luqueer's Estate, 1 Tuck.

thus referred to do not bear evidence on their face that the sums were intended as advancements, extrinsic evidence is competent [67] and necessary,[68] to establish the donor's intent to make them such.

XII. TITLE, AND DECLARATIONS, OF ANCESTOR, HEIR, ETC.

125. Ancestor's Title, and Successor's Election.

At common law the heir must produce evidence that the ancestor was actually seized,[69] that is to say had legal title, and also actual possession or its equivalent [70] thereunder. If the title of the ancestor was acquired by "purchase" (including devise), proof of legal title raised a sufficient presumption of seizin in fact,[71] but if by descent some evidence of seizin in fact was required.[72] The present common-law rule generally is that seizin in law is sufficient to establish dower, but that seizin in fact is necessary to establish curtesy.[73] The subject is now generally regulated by statutes defining descendible and devisable property in a way to

236; Tillotson *v.* Race, 22 N. Y. 122.

[67] Tillotson *v.* Race (above).

[68] Lawrence *v.* Lindsay, 68 N. Y. 108, rev'g 7 Hun, 641.

[69] Jackson *v.* Hendricks, 2 Johns. Cas. 214; Whitney *v.* Whitney, 14 Mass. 88. In an action by an heir to recover possession of realty, the defendant is a competent witness in his own favor, notwithstanding the death of the plaintiff's ancestor, under whom both parties claim, as to any matter except such as transpired between defendant and such ancestor. Terry *v.* Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420, 5 S. E. Rep. 38.

[70] Such as possession by a tenant of less than a freehold. Bushby *v.* Dixon, 3 Barnw. & C. 305; or possession of one of several parcels. Green *v.* Liter, 8 Cranch, 245.

It is ordinarily required, in order to prove title to unoccupied lands, that the claimants trace back their title to the sovereign power. Wiechers *v.* McCormick, 122 N. Y. App. Div. 860, 107 N. Y. Supp. 835; Greenleaf *v.* Brooklyn, etc., Ry. Co., 141 N. Y. 395 36, N. E. Rep. 393.

[71] Wendell *v.* Crandall, 1 N. Y. 491.

[72] Id.

[73] 1 Bish. Man. W., § 496.

dispense with the necessity of actual seizin;[74] and possession in the ancestor is not now usually an essential part of the evidence to prove mere title by descent, except in those cases where possession under claim of title is relied on as constituting the right or the evidence of it. No evidence of acceptance by the heir, of title to lands descended, is necessary. The law casts it upon him without his consent.[75] A title by deed or devise, requires the assent of the successor in interest, express or implied, to effect the transfer.[76] But the law presumes the acceptance of a beneficial devise, and it is doubted whether a parol disclaimer is binding.[77] Where the right of one entitled by succession depends upon an election, and no express election is shown, nor any positive act or declaration manifesting such election, an election may be presumed from the circumstances of benefit and silence.[78] Under the statute declaring the widow to be deemed to have accepted a provision in lieu of dower, unless she proceeds for dower within a year after the husband's death, it is not necessary that the devisees and grantees should prove that she had notice of the will.[79]

126. Declarations and Admissions of the Ancestor as to Title, etc.

Declarations made while in possession of real estate, by an ancestor, since deceased, indicating the source of his title,

[74] 1 N. Y. R. S. 751, §§ 1, 27 (6th ed. vol. 2, p. 1136); 2 Id. 57, § 2 (6th ed. vol. 3, p. 57).

A daughter who inherits land from her intestate father need not enter to become seized, and if she dies before her mother, the land and seizin pass to the heirs of her mother. Weeks *v.* Quinn, 135 N. C. 425, 47 S. E. Rep. 596.

[75] 3 Washb. R. P. 4th ed. 6 (4); and see Mumford *v.* Bowman, 26 La. Ann. 413.

If one die intestate, seized in fact of land, that seizin in fact is cast by descent upon his heir, and the heir has seizin in fact without entry. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. Rep. 90.

[76] 3 Washb. R. P. 4th ed. 6 (4).

[77] Id. 542, citing Tole *v.* Hardy, 6 Cow. 340, 2 Pet. 655.

[78] Merrill *v.* Emery, 10 Pick. 507, Shaw, Ch. J.

[79] 1 N. Y. R. S. 742, § 14; Palmer *v.* Voorhis, 35 Barb. 479.

and the fact that the one under whom he claimed had been in possession, may be proved by witnesses who heard them, as evidence *against* his heirs and devisees.[80] Thus, admissions by a person, that the conditions upon the failure of which his

[80] Enders *v.* Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222. In an action where the plaintiffs' title is as heirs of their father, a letter written by him tending to show that he had made a sale and conveyance of the property to the defendant is competent evidence against such heirs. Terry *v.* Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420, 5 S. E. Rep. 38.

Declarations of a decedent holder of a title against his interest are competent evidence against his grantees or successors. Delmoe *v.* Long, 35 Mont. 139, 88 Pac. Rep. 778.

Declarations made while in possession of land, against his interest, are admissible against one claiming under him, but only when they are declarations against interest in regard to the nature, character or extent of the declarant's possession, the identity or location upon the face of the earth of boundaries and monuments called for in a deed, or in regard to any matter concerning the physical condition or use of the property, which must be, from the nature of things, proved by parol. Phillips *v.* Laughlin, 99 Me. 26, 58 Atl. Rep. 64, 105 Am. St. Rep. 253, 2 Ann. Cas. 1.

Declarations by the holder that she had made a deed which she had executed upon a meritorious consideration and substantially that she had executed it freely and voluntarily are in disparagement of her apparent title, and when made long prior to the beginning of any controversy—*ante litem motem*—are admissible. Smith *v.* Moore, 142 N. C. 277, 55 S. E. Rep. 275, 7 L. R. A. N. S. 684.

The declarations of a grantor made after he has parted with his title are not admissible in evidence to impeach the title of any one claiming under him. Jonas *v.* Hirshburg, 40 Ind. App. 88, 79 N. E. Rep. 1058; Higgins *v.* Spahr, 145 Ind. 167, 43 N. E. Rep. 11.

The admissions of one, since deceased, while he held title to certain lands are competent evidence against his heirs and all persons claiming title under or through him. Chadwick *v.* Fonner, 69 N. Y. 404; New York Water Co. *v.* Crow, 110 N. Y. App. Div. 32, 96 N. Y. Supp. 899, aff'd in 187 N. Y. 516, 79 N. E. Rep. 1112.

Declarations by one who conveys to his mother, who names him as devisee in her will, to the effect that the property conveyed belonged to his sister, are admissible after the death of the mother, they being against the interest of the devisee. Bucher *v.* Eaton, 151 N. Y. App. Div. 342, 135 N. Y. Supp. 838.

title and right of action depended have been performed, are admissible in evidence in an action prosecuted by the heirs of the person making the admissions, by reason of the privity between them.[81] But the declarations of the ancestor in *favor* of his title, are not admissible for any one claiming under him,[82] unless brought within the rule of the *res gestæ*,[83]

[81] Spaulding *v.* Hallenbeck, 35 N. Y. 204, affi'g 39 Barb. 79; compare Savage *v.* Murphy, 8 Bosw. 75, aff'd in 34 N. Y. 508.

Declarations made in casual conversation by the grantee named in the deed that the transfer of the property to him was only conditional and that it actually belonged to the grantor, are inadmissible. Hamlin *v.* Hamlin, 192 N. Y. 164, 84 N. E. Rep. 805.

[82] Smith *v.* Martin, 17 Conn. 399; Hurlburt *v.* Wheeler, 40 N. H. 73.

Self-serving declarations of a former owner of lands are not admissible in support of his successor's title. Jamison *v.* Dooley, 98 Tex. 206, 82 S. W. Rep. 780; Steltemeier *v.* Barrett, 115 Mo. App. 323, 91 S. W. Rep. 56.

The declarations of the decedent's husband in favor of her title are not competent. Storm *v.* McGrover, 70 N. Y. App. Div. 33, 74 N. Y. Supp. 1032.

Statements of one in possession of land explanatory of such possession are admissible even though they be self-serving in their tendency. Grayson *v.* Lofland, 21 Tex. Civ. App. 503, 52 S. W. Rep. 121.

While it is competent for a plaintiff to prove the declarations of the defendant's testatrix, it is not competent for the defendant to do so unless the declarations were a part of the same conversation or statement. Johnson *v.* Armfield, 130 N. C. 575, 41 S. E. Rep. 705.

Declarations and admissions made by the grantor subsequent to the grant are not admissible; but where the grantor, subsequent to the grant, settles with and releases a judgment creditor who had a lien on the property, the release showing the terms of settlement is admissible. Nicholas *v.* Lord, 118 N. Y. App. Div. 800, 103 N. Y. Supp. 681.

Declarations by the owner of a chattel as to its ownership while in possession of it and made before the sale, are not admissible against the purchaser. Bentley *v.* Ard, 69 N. Y. Misc. 562, 125 N. Y. Supp. 735.

Declarations made after a gift of the property are not admissible. Gick *v.* Stumpf, 204 N. Y. 413, 97 N. E. Rep. 865.

The declarations of a husband that funds deposited in bank in the joint names of husband and wife are the exclusive property of the husband, are self-serving and inadmissible. Armstrong *v.* Johnson, 93 Mo. App. 492, 67 S. W. Rep. 733.

[83] As to what are competent

or brought home to the other party. Upon these principles the declarations made by a person in possession of land, tending to show the character of his possession, and by what title he claimed,[84] if made while both holding possession and title,[85] although it may be after he had contracted to convey,[86] are competent. But parol declarations or admissions, since they cannot confer or divest title,[87] are not admissible as evidence of title, either to sustain the burden of proof of title, or to rebut *prima facie* evidence,[88] but only to show the

within the rule of *res gestæ*, compare Meek *v.* Perry, 36 Miss. 190, 259; Baker *v.* Haskell, 47 N. H. 479; Hood *v.* Hood, 2 Grant Penn. Cas. 229; Fellows *v.* Fellows, 37 N. H. 78, 85; Smith *v.* Batty, 11 Gratt. 752, 761.

[84] 3 Abb. N. Y. Digest, 2d ed. 123.

[85] Vrooman *v.* King, 36 N. Y. 477. There being two persons of the same name, the admissions of one made while he was occupying lands that they belonged to the other are competent against a person claiming under the declarant. Simpson *v.* Dix, 131 Mass. 179.

[86] Chadwick *v.* Fonner, 15 Alb. Law J. 431. Testator's declarations made after executing the will and adverse to his title, are held not admissible against those claiming under the will, upon this principle, because they do not affect his interest. Boylan ads. Meeker, 4 Dutch. 274; and see Jackson *v.* Kniffen, 2 Johns. 31; 1 Redf. on Wills, 3d ed. 539, note.

On the question whether a former owner had dedicated lands for a public square, the declarations of such former owner as to the purpose of laying out the public square are admissible. Scott *v.* Rockwall County, 49 S. W. Rep. (Tex. Civ. App.) 932.

Declarations or acts of a grantor, made subsequently to his grant cannot be received to the prejudice of his grantee's rights, or persons claiming under him. Williams *v.* Williams, 142 N. Y. 156, 36 N. E. Rep. 1053.

[87] Proof that an intestate stated in his life-time that he did not own any interest in certain land, that he had sold out, and that he allowed others to deal with the land as their own, is not evidence sufficient to sustain an allegation in a complaint against the administrator, that the intestate executed and delivered deeds of the land. *It seems* such evidence is inadmissible until it be shown that a conveyance of the land had been in fact executed and lost. Thompson *v.* Lynch, 29 Cal. 189.

Text quoted in People *v.* Holmes, 166 N. Y. 540, 60 N. E. Rep. 249; Gilmartin *v.* Buchanan, 134 N. Y. App. Div. 587, 119 N. Y. Supp. 489.

[88] See Jackson *v.* Cole, 4 Cow. 587; Walker *v.* Dunspaugh, 20 N. Y. 170.

nature and extent of the possession and the character and quality of the claim of title under which it was held,[89] or other material facts resting *in pais*, such as may affect the question of title,—for instance, the time, or the absolute or conditional character, of the delivery of a deed,[90] or a disclaimer of title made at a judicial sale under circumstances constituting an estoppel,[91] or that the deed to the declarant was fraudulent,[92] or the existence and loss of a will,[93] or other facts inconsistent with his claim of title.[94] So to prove the ancestor's parol agreement to convey (which has been executed on the part of the purchaser) his parol declarations, may be proved by a witness.[95] But evidence of admissions made by

[89] Jackson *v.* McVey, 15 Johns. 234.

The acts of the owner of the land when upon it, pointing out the monuments and location of his line, and his declarations made at the time in regard to them when no controversy exists, are competent after his death to prove the location of the line. Royal *v.* Chandler, 83 Me. 150, 21 Atl. Rep. 842; Wilson *v.* Rowe, 93 Me. 205, 44 Atl. Rep. 615.

Possession is *prima facie* evidence of seizin in fee, and the declarations of the possessor that he is tenant to another is against his own interest, and therefore is admissible. Lowman *v.* Sheets, 124 Ind. 416, 24 N. E. Rep. 351, 7 L. R. A. 784; Rutledge *v.* Hudson, 80 Ga. 266, 5 S. E. Rep. 93.

The declarations of one in possession of land that he is not the owner are good evidence against his successors. Kotz *v.* Belz, 178 Ill. 434, 53 N. E. Rep. 367.

[90] Keaton *v.* Dimmick, 46 Barb. 158; Varrick *v.* Briggs, 6 Paige, 323, 22 Wend. 543. Compare Baker *v.* Haskell, 47 N. H. 479.

[91] Mattoon *v.* Young, 45 N. Y. 696.

[92] Naughton *v.* Pettibone, 7 Conn. 319.

[93] Fetherly *v.* Waggoner, 11 Wend. (N. Y.) 599.

The declarations of a testator as to the contents of a lost will are admissible to prove its contents, the declarations being those of a person now deceased, having the means of knowledge without interest to misrepresent. Lane *v.* Hill, 68 N. H. 275, 44 At. Rep. 393, 73 Am. St. Rep. 591.

[94] Rogers *v.* Moore, 10 Conn. 13.

[95] Knapp *v.* Hungerford, 7 Hun, 588, and cases cited.

The declarations of a deceased person who was so situated as to have the means of knowledge, and had no interest to misrepresent, are competent evidence upon a question of boundary, whether the same pertains to public tracts or private rights. Keefe *v.* Sullivan County R. Co., 75 N. H. 116,

a person since deceased will be closely scrutinized and the circumstances under which they are alleged to have been made carefully considered.[96] A recital in the will, that the testator had executed a deed to the defendant, is evidence against his heirs, of a perfect execution of such deed, and of the title in the grantee.[97] But where a will is introduced in evidence as containing such an implied admission of title in a stranger, the declarations of the testator, at the time of its execution, in relation to it, are admissible as part of the *res gestæ*.[98]

127. Declarations of Third Persons.

Evidence of the acts and declarations of third persons, when in possession of the lands, are competent to prove the continued possession under the will.[99]

71 Am. Rep. 379; Nutter *v.* Tucker, 67 N. H. 185, 30 Am. Rep. 352, 68 Am. St. Rep. 647; Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. Rep. 543.

[96] Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. Rep. 1071.

Where one deposits money in bank in trust for another, and subsequently makes statements as to the purpose of the trust, such declarations will not be admissable as against the beneficiary in a suit by the latter against the executor of the depositor as to the title of the money. Tierney *v.* Fitzpatrick, 195 N. Y. 433, 88 N. E. Rep. 750.

[97] Smith *v.* Wait, 4 Barb. 28.

[98] Testator devised lands to defendant, and, in the same will, gave legacies to plaintiffs, on condition that they release all their right, etc., to the lands devised. *Held*, that defendants could give parol evidence of testator's contemporaneous declarations, that the condition was not an admission of such title, but only by way of caution against an unfounded claim. The devisees were not a party to the legacy, nor did they claim under it within the rule. Clark *v.* Wood, 34 N. H. 447, 452.

[99] Jackson *v.* Van Dusen, 5 Johns. 144. To raise a presumption that A. or his executors anciently conveyed away land, which his heirs sue to recover, from a mere possessor, after many years' neglect to claim, the defendant may prove deeds between third persons of adjoining land describing the land in question as the property of others than A., and may adduce the testimony of a witness that he had known the lands for upwards of 40 years, and the general repute as to their ownership, and that he never heard of any claim of title

128. Declarations of Successors, Representatives and Beneficiaries.

The admissions or acts of the executor or administrator, unless made so by statute,[1] are not competent evidence against the heir or devisee.[2] A mere common interest will not make the confessions of one person evidence against another,—a joint interest in possession is necessary.[3] Hence the declarations of the executors or administrators are not competent aganist any other parties who have not a joint interest, and do not stand in a relation of privity.[4] Conversely, the admission of an heir cannot prejudice the executor.[5] And in the case of several heirs,[6] and equally in the case of beneficiaries under the same will, if their interests are several, not joint,[7] evidence of the admissions and declarations of one is not competent against the other. The principle is that a common interest is not enough, but a joint interest,—as where both claim under a contract naming them as beneficiaries,—may be.[8] The declarations and

by or under A. Schauber *v.* Jackson, 2 Wend. 19, 20.

[1] Regan *v.* Grim, 13 Penn. St. 508, 513.

[2] Mooers *v.* White, 6 Johns. Ch. 360; Baker *v.* Kingsland, 10 Paige, 366.

The admissions of an administrator cannot bind the estate unless they were made while in the discharge of his duties. Scully *v.* McGrath, 201 N. Y. 61, 94 N. E. Rep. 195.

[3] Osgood *v.* Manhattan Co., 3 Cow. 612.

[4] Shailer *v.* Bumstead, 99 Mass. 112. The declarations and admissions of the sole executor, he being a party in interest and a party to the record, were held admissible against him and those represented by him, on the question of fraud or undue influence, in Davis *v.* Calvert, 5 Gill & J. 269.

[5] 2 Whart. Ev., § 1199, a. And it has been held that the declarations of the legatee against the validity of the will are not competent against the executor. Dillard *v.* Dillard, 2 Strobh. L. 89.

[6] Osgood *v.* Manhattan Co., 3 Cow. 612, rev'g 15 Johns. 162.

[7] 1 Bright. Penn. Dig. 962, and cases cited.

[8] P. 235. So. L. Ins. Co. *v.* Wilkinson, 53 Geo. 535. *Contra*, Milton *v.* Hunter, 4 Law & Eq. R. 336. The rule of exclusion stated in the text, while applicable unqualifiedly on probate where the issue is not as to the right of any one party, but as to the validity of the will, as an entirety, may be thought subject to qualification in

admissions of one of several *joint* legatees or devisees, showing fraud or undue influence by them, is competent against both.[9] In the case of a *combination* by several persons to procure the making of the will, the separate admissions of either are competent against the others,[10] unless made after they have ceased co-operation, in which case they are not.[11]

129. Judgments.

A judgment or verdict for [12] or against [13] the ancestor is competent evidence for or against the heir in controversies relating to the inheritance. A judgment or verdict for [14] or against [15] an executor or administrator is never conclusive

civil actions affecting only the parties to the record and specific property. In such cases it may be proper to admit the evidence against the declarant, if none of the others having an interest, who are parties to the record, are litigating the question, or if there is other evidence which, as matter of law, is sufficient to establish the fact as against them. This distinction may explain something of the conflict of the cases. Compare Nessar *v.* Arnold, 13 Serg. & Rawle, 323; Clark *v.* Morrison, 25 Penn. St. 452; Morris *v.* Stokes, 21 Geo. Rep. 552; Blakey's Heirs *v.* Blakey's Executors, 33 Ala. 611.

[9] Horn *v.* Pullman, 10 Hun, 471.

[10] Lewis *v.* Mason, 109 Mass. 169.

[11] Shailer *v.* Bumstead, 99 Mass. 112.

[12] Lock *v.* Norbone, 3 Mod. 142.

[13] Freeman on Judgments, § 168.

The heirs, being in privity with their ancestor, are bound equally with him by proceedings on a mortgage containing the pact *de non alienando*. Shields *v.* Shiff, 124 U. S. 351, 8 S. Ct. 510, 31 L. ed. 445.

Where the question whether a woman had a husband living at the time of her second marriage has been litigated, and then directly passed upon by a court of competent jurisdiction, it cannot thereafter be brought in question in any subsequent action between the same parties or their heirs or privies. Lythgoe *v.* Lythgoe, 75 Hun, 147, 26 N. Y. S. 1063; aff'd in 145 N. Y. 641, 41 N. E. Rep. 89.

[14] Dale *v.* Roosevelt, 1 Paige, 35.

[15] McCoy *v.* Nichols, 4 How. (Miss.) 31; Vernon *v.* Valk, 2 Hill. Ch. 257; Collinson *v.* Owens, 6 Gill & J. 4; Robertson *v.* Wright, 17 Gratt. 534; Early *v.* Garland, 13 Id. 1. Except, perhaps, where the executor is the sole devisee of the real estate. Stewart *v.* Montgomery, 23 Penn. St. 410; or where he represents him as trustee,

against the heirs or devisees; and a judgment or verdict against the heir or devisee is not conclusive against the executor or administrator.[16] A judgment or verdict against the executor or administrator is not even competent evidence against the heir or devisee, as evidence of the existence of the debt or other facts established thereby.[17] A judgment or

within the settled principles of the law of trusts.

The legatees cannot assail a judgment recovered against the legal representatives of the testator. Bell *v.* Bell, 25 S. C. 149.

There is no privity between the personal representative and the heir, and a judgment against the former is no evidence against the latter in proceedings to subject lands descended. Lehman *v.* Bradley, 62 Ala. 31.

The heir will not be bound by a judgment against the administrator affecting real estate, where the heir was not a party to the action. Clark *v.* Bettelheim, 144 Mo. 258, 46 S. W. Rep. 135.

There is no privity between the administrator and the heir so far as regards the decedent's real estate. Eayrs *v.* Nason, 54 Neb. 143, 74 W. N. Rep. 408.

A judgment in the probate court against an administrator bars the heirs from suing again in that court. Pearce *v.* Leitch, 43 Tex. Civ. A. 398, 96 S. W. Rep. 1094.

In Louisiana, where a succession, though apparently solvent, owes debts and is unsettled, and the heirs, though present, have not accepted the succession, the administrator may be sued in a real action and the judgment will be binding on the heirs. Texas, etc., Ry. Co. *v.* Smith, 33 C. C. A. 648, 91 Fed. Rep. 483.

An heir is not bound by a judgment against the administrator if the heir was not a party. Jones *v.* Wilkey, 78 Fed. Rep. 532.

Where an administrator sues on a covenant made by the decedent's lessee to pay rent, his recovery will bar the heirs from suing on the same covenant. Walsh *v.* Packard, 165 Mass. 189, 42 N. E. Rep. 577, 52 Am. St. Rep. 508, 40 L. R. A. 321.

A judgment against the administrator of the succession of a decedent is binding upon the heirs of the decedent, if the heirs tacitly assent to the judgment. Genella *v.* McMurray, 49 La. Ann. 988, 22 So. Rep. 198.

A judgment against the heirs of a decedent is not binding upon the administrator unless he was made a party to the action. Forbes *v.* Douglass, 175 Mass. 191, 55 N. E. Rep. 847.

[16] Dorr *v.* Stockdale, 19 Iowa, 269; Combs *v.* Tarlton's Adm'r, 2 Dana, 464.

[17] Kent *v.* Kent, 62 N. Y. 560, and cases cited; Robertson *v.* Wright, 17 Gratt. 534; Laidley *v.* Kline, 8 W. Va. 218, 230. *Contra*, Harvey *v.* Wilde, L. R. 14 Eq. *C.*

verdict for or against the heirs does not bind the devisees,[18] nor conversely. A judgment in an action under the statute to charge an heir with the debt of the ancestor necessarily determines the title of the ancestor, as against the parties to the action and those claiming under them, and is conclusive on them as to that question.[19] A judgment in a suit by

438, s. c., 3 Moak's Eng. 811. Compare Early *v.* Garland, 13 Gratt. 1; Garnet *v.* Macon, 6 Call, 308, 337.

A judgment rendered against the personal representative of a decedent is not even *prima facie* evidence against the heirs. Saddler *v.* Kennedy, 26 W. Va. 636.

A judgment against an administrator is not binding upon the next of kin who were not parties to the suit. Riley *v.* Ryan, 103 N. Y. App. Div. 176, 93 N. Y. Supp. 386.

Under § 2756, Code of Civ. Pro. (1900) in a proceeding before the surrogate to sell the real estate of the decedent to pay his debts, a judgment against the executor is presumptive evidence of the debt. This is the only change from the common-law rule in New York. Burnham *v.* Burnham, 46 N. Y. App. Div. 513, 62 N. Y. Supp. 120, aff'd in 165 N. Y. 659, 59 N. E. Rep. 1119.

A judgment against an executor is not evidence in an action against the devisees to recover the debt. Burnham *v.* Burnham, 46 N. Y. App. Div. 513, 62 N. Y. Supp. 120, aff'd in 165 N. Y. 659, 59 N. E. Rep. 1119.

[18] Cowart *v.* Williams, 34 Geo. 167.

Unless the devisees are made parties to the action, a judgment against the heirs is not binding upon them. Weeks *v.* Downing, 30 Mich. 4; Harper *v.* Baird, 18 Ky. L. Rep. 110, 35 S. W. Rep. 638.

A judgment against one of a number of heirs is no bar against action by any of the others. Farmer *v.* Farmer, 93 Ind. 435.

A judgment obtained by one residuary legatee is no bar to an action by another residuary legatee, based on the same facts, even though the latter legatee was made a party defendant in the former action but did not appear therein, and if he had appeared and litigated, his cause of action would have been no defense. Earle *v.* Earle, 173 N. Y. 480, 66 N. E. Rep. 398, affi'g 73 App. Div. 300, 76 N. Y. Supp. 851.

[19] Hudson *v.* Smith, 39 Super. Ct. (J. & S.) 452. A judgment for or against the heir not as such, but in his individual character, has been held not a bar against him when he appears "as heir." Jennings *v.* Jones, 2 Redf. Surr. 95. See, also, Rathbone *v.* Hooney, 58 N. Y. 463; Sharpe *v.* Freeman, 45 N. Y. 802, affi'g 2 Lans. 171.

In Missouri and North Carolina a judgment against an administrator in the absence of fraud or

a legatee on behalf of himself and all others who might come in, etc., is not conclusive on infant legatees who did not come in.[20]

XIII. ACTION TO CHARGE HEIR, NEXT OF KIN, ETC., WITH ANCESTOR'S DEBT

130. Material Facts.

In an action against heirs or next of kin, on a debt of the ancestor, the plaintiff must allege [21] and prove, affirmatively, a case within the provisions of the statute which creates the right of action.[22] His failure to prove everything that the statute demands, is sufficient to prevent a recovery.[23] He

collusion, is conclusive on the heirs as well as the administrator, as establishing the debt, and this being established, subsists in full force for subjecting all the estate of a debtor, real as well as personal, the former after the latter, to the payment of his liabilities. Speer *v.* James, 94 N. C. 417; Proctor *v.* Proctor, 105 N. C. 222, 10 S. E. Rep. 1036; Moody *v.* Peyton, 135 Mo. 482, 36 S. E. Rep. 621, 58 Am. St. Rep. 604.

[20] Brower *v.* Bowers, 1 Abb. Ct. App. Dec. 214; compare Kerr *v.* Blodgett, 48 N. Y. 62.

An adjudication in regard to the construction of a will does not bind the unborn children who take by purchase directly from the testator. Smith *v.* Secor, 157 N. Y. 402, 52 N. E. Rep. 179; Harrison *v.* McAdam, 38 N. Y. Misc. 18, 76 N. Y. Supp. 701.

[21] Renard *v.* West, 48 Ind. 159.

Where the petition does not allege a case within all the requirements of the statute a demurrer will lie. Fretwell *v.* Fretwell, 114 Ga. 303, 40 S. E. Rep. 298.

The statute being in derogation of the common law must be strictly complied with. Clevenger *v.* Matthews, 165 Ind. 689, 76 N. E. Rep. 542, rev'g 75 N. E. Rep. (Ind. App.) 23.

The property inherited by the heirs must be specifically described by the claimant in his petition before he can recover. Blinn *v.* McDonald, 92 Tex. 604, 46 S. W. Rep. 787, 48 S. W. Rep. 571, 50 S. W. Rep. 931, rev'g 83 S. W. Rep. (Tex. Civ. App.) 384.

[22] Mersereau *v.* Ryerss, 3 N. Y. 261.

[23] Selover *v.* Coe, 63 N. Y. 443.

Under § 3870, Ky. St. 1903, no recovery can be had on a claim against the estate of a decedent unless an affidavit verifying the claim is filed. Isom *v.* Holcomb, 33 Ky. Law Rep. 307, 110 S. W. Rep. 249.

Action against the heirs of a decedent under Code Civ. Pro.,

must show the granting of letters; [24] that his action is brought after three years from the grant of letters; [25] that defendant inherited real property by descent, or acquired real or personal property under the decedent's will, or the statute of distributions; and that the decedent left no personal property within the State, or that the same was insufficient to pay the debt, or that the debt could not be collected by due proceedings before the proper surrogate, and at law, from the personal representatives of the decedent, nor (if the action is against the heir) from the next of kin or legatees.[26]

§ 1843, is limited to the direct heirs and cannot be brought against the heirs of deceased heirs. Green *v.* Dunlop, 136 N. Y. App. Div. 116, 120 N. Y. Supp. 583.

The plaintiff can obtain a personal judgment against the devisees even though he does not demand a personal judgment in the complaint. Lawrence *v.* Grout, 140 N. Y. App. Div. 629, 125 N. Y. Supp. 982.

[24] Roe *v.* Sweezey, 10 Barb. 251.

In order to succeed in his action under § 1837, Code Civ. Pro., the plaintiff must show that letters of administration were issued, that the assets of the deceased were distributed, and that the defendant received a portion of them. Siegel *v.* Cohen, 23 N. Y. Misc. 365, 51 N. Y. Supp. 318.

[25] Now one year. See L. 1915, c. 636; Selover *v.* Coe (above).

Section 1844, Code Civ. Pro., now provides that action to enforce liability of heirs cannot be brought unless one year has elapsed since death of decedent and no letters have been issued within the state or unless eighteen months have elapsed since letters have been issued within the state.

[26] Armstrong *v.* Wing, 10 Hun, 520, 63 N. Y. 438; Roe *v.* Sweezey (above); Stuart *v.* Kissam, 11 Barb. 282.

An action cannot be maintained against the heir of the real estate where it is shown that there was ample personalty to pay the claim; but if the heir shared in the personalty, the action can be maintained against him. Glenn *v.* Sothoron, 4 App. D. C. 125.

The heirs are not bound to pay the debts or discharge the obligations of the ancestor unless they have received property from the estate, and, if they have received assets, they are responsible for such debts and obligations only to the extent of their inheritance. Bacon *v.* Thornton, 16 Utah, 138, 51 Pac. Rep. 153.

The liability of a devisee under § 101 of the Decedent Estate Law (L. 1909, c. 18) is limited to the value of the property devised. Richards *v.* Gill, 138 N. Y. App. Div. 75, 122 N. Y. Supp. 620.

The complaint must allege the

131. Mode of Proof.

The lapse of time since administration granted cannot create any presumption as to the statute conditions.[27] The acts or admissions of executors, etc., of insolvency of the decedent, are not evidence against heirs or devisees, even to bind the lands descended or devised.[28] A judgment against the executor or administrator is not evidence in the statutory action against the decedent's heir, next of kin, or legatee, to prove the existence of the claim or demand;[29] but the claim being established by evidence *aliunde*, the record is evidence that an action has been brought within the time allowed by law, and a judgment recovered thereon, and is conclusive evidence that there is no bar, under the statute, of the claim as against the personal representatives, available to the defendant.[30] And if the judgment is less than the debt claimed, and there is evidence of the identity of the debt with the cause of action in judgment, the judgment is conclusive against the plaintiff as a limit of the amount of his recovery.[31] The return, unsatisfied, of execu-

value of the property inherited, and the amounts of mortgages and liens existing against it so that the court can determine how large the inheritance was and to what amount the heir is liable. Green *v.* Dunlop, 136 N. Y. App. Div. 116, 120 N. Y. Supp. 583.

[27] Armstrong *v.* Wing (above).

[28] Osgood *v.* Manhattan Co., 3 Cow. 612, rev'g 15 Johns. 162.

[29] Sharpe *v.* Freeman, 45 N. Y. 802. *Contra*, Steele *v.* Lineberger, 59 Penn. St. 308; Stone *v.* Wood, 16 Ill. 177, 182.

Where the probate court has allowed a claim which will subject the lands of the decedent to the payment of his debts, the heir or devisee or those claiming under them may contest the legality of such allowance, it not being binding upon the heir or devisee. Black *v.* Elliott, 63 Kan. 211, 65 Pac. Rep. 215, 88 Am. St. Rep. 239.

A judgment against the executrix, who is also sole devisee, does not bind her personally, which can only be done by proving all the facts on which the prior judgment was obtained. Richards *v.* Gill, 138 N. Y. App. Div. 75, 122 N. Y. Supp. 620.

[30] Kent *v.* Kent, 62 Id. 560, rev'g 3 Supm. Ct. (T. & C.) 630.

[31] Rockwell *v.* Geery, 4 Hun, 611, s. c., 6 Supm. Ct. (T. & C.) 687.

The amount to be recovered by the plaintiff is limited to the amount which was received by the

tion against the executor or administrator, is not sufficient proof of want of assets, for there may have been a misappropriation of assets, for which the remedy is by accounting.[32] But if it be shown that an accounting has been prosecuted, the fact that there are unrealized assets, or that assets have come to the hands of the representative since the commencement of the present action, is not a bar, nor does it necessarily reduce the recovery,[33] but may restrain enforcement of the judgment.

devisees. Lawrence *v.* Grout, 140 N. Y. App. Div. 629, 125 N. Y. Supp. 982.

[32] Wambaugh *v.* Gates, 11 Paige, 515; Stuart *v.* Kissam, 11 Barb. 282.

[33] Rockwell *v.* Geery (above).

CHAPTER VI

ACTIONS BY OR AGAINST HUSBAND OR WIFE

I. GENERAL PRINCIPLES [34]

1. Marriage.

In all civil actions and proceedings affecting only ques-

[34] The statutes of the State should be carefully consulted in connection with the statements in this chapter. Unless such a stat-

tions of property or torts, not involving any question of marital infidelity, marriage may be proved either by direct evidence, or by evidence of cohabitation and repute, or cohabitation and declarations, in the manner stated in the last chapter.[35]

2. Foreign Law.

The generally received rule is that the original title of husband or wife to movables is controlled by the law of place which was their domicile at the time of the acquisition; the

ute imposes a different rule, the general principle may be followed, that, except in divorce and criminal conversation, and in certain cases of confidential communication, the marital relation does not affect the competency of evidence, but it does often affect its weight, because it gives rise to certain presumptions as to matters within the sphere of marital influence; and, in consequence, affirmative evidence is in some cases necessary, when in the case of single persons, a presumption would be allowed without evidence; and, in some cases, evidence is inadequate which would be adequate in the case of single persons. In other words, to the extent in which modern statutes have removed civil disabilities of the wife, the same rules of competency apply to the transactions and the testimony of husband and wife, as apply to those of other persons. But the marital relation remains, and to the extent in which the conduct of either is had within its sphere, the influence of that relation is recognized by the law as an element of great importance, in estimating the just weight of facts as evidence, and the natural presumptions resulting. Thus the law recognizes and draws presumptions from the natural disposition of a husband to make provision for his wife; her disposition to be silent, or even acquiescent, for the sake of peace, in the face of his wrongful conduct toward others, or toward herself or her separate property rights; the natural disposition of each, without claim or admission of transfer or compensation, to hold and allow the holding of the exclusive property of one, in the use or safe-keeping of the other; and the peculiar facility which the relation affords for undue influence, particularly over the wife, and for the transfer to her of property in fraud of the husband's creditors. The rules stated in the text are founded chiefly on these principles, which are almost universally recognized, although in their application some disagreement of authority still exists in the several States.

[35] Chap. V, paragraphs 14–23.

validity of their transactions, except as to realty, may be sustained by the law, either of the place of the transaction, or of the place fixed on by the contract for its performance, or of their domicile at the time of the transaction, unless the act was forbidden by positive law of either place; and the title to realty and the validity of transactions affecting it, are controlled by the law of the place where the realty is situated. Domicile is to be proved in the mode stated in the last chapter.[36] The courts of a State do not take judicial notice of the law of husband and wife in other States; and a party who desires to rely on such law should be prepared to prove it as matter of fact. In the absence of such proof, if the question turns on the law of a State deriving its jurisprudence from England, the court may apply the rules of the old common law; [37] if on the law of any other State, the court will apply the law of the forum.[38] By whatever law the right is determined, the form of the remedy and the competency of evidence, are governed by the law of the forum.[39]

3. Competency of Husband or Wife as Witness.

The New York statute provides that no person shall be

[36] Chap. V, paragraphs 51–57.

[37] For these rules, see 1 Bish. Mar. W.; Ewell's Cas. The traditional rule is that the courts must do so. See Waldron *v.* Ritchings, 9 Abb. Pr. N. S. 359, s. c. 3 Daly, 288. But the changes in the law on this subject are so general and so nearly uniform in substance in the States deriving their jurisprudence from England, that the courts sometimes hesitate to declare void transactions that are valid by the law of the forum, and naturally presumable to be so by the law of the sister State, but for this rule. See Worthington *v.* Hanna, 23 Mich. 530; Adams *v.* Honness, 62 Barb. 326.

Where a wife transfers real estate in New York to her husband as a gift, and later obtains a divorce in Switzerland, the Swiss laws requiring the husband to return all property procured by reason of the marriage will not be enforced in New York. Van Cortlandt *v.* De Graffenried, 147 N. Y. App. Div. 825, 132 N. Y. Supp. 1107.

[38] Savage *v.* O'Neil, 44 N. Y. 298, rev'g 42 Barb. 374.

[39] Stoneman *v.* Erie Ry. Co., 52 N. Y. 429, affi'g Buff. Super. Ct. (1 Sheld.) 286.

excluded or excused [40] from being a witness because he or she is the husband or wife of a party, or of a person in whose behalf the action or special proceeding is brought, prosecuted, opposed, or defended.[41] The following exceptions, however, are made:[42] "A husband or a wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage, or dis-

[40] The common-law entire disqualification could not be legally waived by consent. 2 Kent's Com. 178; Parker *v.* Sir Woolston Dixie, C. T. Hardw. 264, 49 N. Y. 510; Dwelley *v.* Dwelley, 46 Me. 377; Bevins *v.* Cline, 21 Ind. 37; Barbat *v.* Allen, 16 Jur. 338, s. c., 10 Eng. L. & Eq. 596; Pedley *v.* Wellesley, 3 Car. & P. 558. But was frequently waived in practice. And in some later cases a waiver was held legal; and the persons competent to waive it were the husband and wife—not the parties to the suit. Russ *v.* The War Eagle, 14 Iowa, 363; Blake *v.* Graves, 18 Id. 317, DILLON, J., dissented; Jordan *v.* Anderson, 19 Id. 565. Objection to wife's competency was not waived by permitting examination-in-chief. Schmidt *v.* Herfurth, 5 Robt. 124. But see Tappan *v.* Butler, 7 Bosw. 480; Boardman *v.* Boardman, L. R. 1 P. & M. 233.

[41] N. Y. Code Civ. Pro., § 828. General provisions of statute removing disqualification by reason of interest, and enabling parties to testify, do not abrogate the common-law exclusion of husband and wife on grounds of public policy. Kelly *v.* Drew, 12 Allen, 107, 109.

In an action to recover on a bond for a violation of a Liquor Tax Law, the defendant's wife, as such, is not an interested witness. Green *v.* Altenkirch, 176 App. Div. (N. Y.) 320, 162 N. Y. Supp. 447.

[42] 2 N. Y. Code Civ. Pro., § 831.

An application for an order for the publication of a summons in an action for a divorce was denied where such application was based upon the plaintiff's affidavit. Perweiler *v.* Perweiller, 160 N. Y. Supp. 785.

Where the only statement in support of a wife's application for alimony *pendente lite* was her allegation, as of her own knowledge, that the defendant committed the act which was the basis of the action, her application was refused. Capes *v.* Capes, 173 App. Div. (N. Y.) 142, 159 N. Y. Supp. 367.

N. Y. Code Civ. Pro., § 831, does not render a husband incompetent to testify in an action for divorce in favor of the wife, if he waive his personal privilege. Bailey *v.* Bailey, 41 Hun, 424.

prove the allegation of adultery. A husband or wife [43] shall not be compelled [44] or, without consent of the other, if living, allowed to disclose a confidential communication,[45] made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff." Business transactions between them are not confidential communications within the policy of the statute,[46] nor are communications made in the presence and

[43] The marital privilege does not apply in the case of a void marriage. Bloomer *v.* Barrett, 37 N. Y. 434; Kelly *v.* Drew, 12 Allen, 107, 110.

[44] In Hebblethwaite *v.* Hebblethwaite, L. R. 2 Pr. & D. 29, holds the corresponding English statute, giving a privilege to the witness, to be secured by the judge; and that it is not competent to counsel to object to the testimony.

[45] At common law, for reasons of public policy, neither husband nor wife could testify to a communication of whatever nature, confidential or otherwise, which passed between them. O'Connor *v.* Majoribanks, 3 M. & Gr. 435, S. C. J. 6 Jur. 509; and even death or divorce did not break the seal. Monroe *v.* Twistleton, Peake's Add. Cas. 210; Southwick *v.* Southwick, 49 N. Y. 510, 518, affi'g 9 Abb. Pr. N. S. 109; Dexter *v.* Booth, 2 Allen (Mass.), 559. On the same ground neither was allowed to testify to matters to the detriment of the other, or of the character of the other. Southwick *v.* Southwick (above); Hasbrouck *v.* Vandervoort, 9 N. Y. 153, 158, 160, affi'g 4 Sandf. 596; People *v.* Mercein, 8 Paige, 47, 50; Burrell *v.* Bull, 3 Sandf. Ch. 15; Barnes *v.* Camack, 1 Barb. 392; Marsh *v.* Potter, 30 Barb. 506; Stein *v.* Borman, 13 Pet. 209, 221; Scroggin *v.* Holland, 16 Mo. 419. These rules were not mere rules of evidence, but part of the law of husband and wife.

At common law neither spouse was competent to testify for or against the other in actions of any kind. Biers *v.* Biers, 156 App. Div. 409, 142 N. Y. Supp. 128.

[46] Southwick *v.* Southwick (above); Schaffner *v.* Reuter, 37 Barb. 44. Otherwise under the Massachusetts statute protecting "private conversations." Bliss *v.* Franklin, 13 Allen, 244; Drew *v.* Tarbell, 117 Mass. 90. Wife acting as messenger, not an "agent," within a statute rule allowing wife to testify for or against her husband only within the limits

hearing of third persons.[47] But written as well as verbal

of her agency for him. Hale *v.* Danforth, 40 Wis. 385.

N. Y. Code Civ. Pro., § 831, excludes only such communications as are expressly made confidential, or such as are of a confidential nature or induced by the marital relation. Ordinary conversations relating to matters of business which the husband would not be unwilling to hold in the presence of any person, cannot be excluded. Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. Rep. 123, 6 Am. St. Rep. 384.

A contract between husband and wife is not a confidential communication and may be proved by either. Sedgwick *v.* Tucker, 90 Ind. 271.

The negotiations between husband and wife prior to a conveyance from one to the other are not confidential communications. Beitman *v.* Hopkins, 109 Ind. 177, 9 N. E. Rep. 720.

Where the husband acts as the agent for the wife in keeping an establishment for the illegal sale of liquor, the wife in defending proceedings brought against her cannot testify as to instructions which she gave the husband in regard to the conduct of the place. Com. *v.* Hayes, 145 Mass. 289, 14 N. E. Rep. 151.

The rule of privilege does not apply to communications between husband and wife with regard to a business matter in which he is acting as her agent. Lurty *v.* Lurty, 107 Va. 466, 59 S. E. Rep. 405.

[47] See Allison *v.* Barrow, 3 Coldw. (Tenn.) 414; State *v.* Center, 35 Vt. 378. Conversations between husband and wife, in the presence of third persons, are confidential communications within the meaning of the statute. Reynolds *v.* State, 147 Ind. 3, 46 N. E. Rep. 31. The fact that the husband was the agent of his wife in respect to the transaction sought to be inquired about does not make him competent to testify against her as to his relation to her as such agent; Code, § 3642, providing that neither spouse can be examined as to any communication between them. Kelley *v.* Andrews, 102 Iowa, 119, 71 N. W. Rep. 251.

Statements made by husband to wife in presence of a third person are admissible. People *v.* Lewis, 62 Hun, 622, 16 N. Y. Supp. 881, aff'd in 136 N. Y. 633, 32 N. E. Rep. 1014.

Conversations between husband and wife in the presence of their fourteen year old daughter will be admitted. Lyon *v.* Prouty, 154 Mass. 488, 28 N. E. Rep. 908.

Communications between husband and wife had in the presence of a child not capable of comprehending what was being said, are not communications in the presence of a third party. Schierstein *v.* Schierstein, 68 Mo. App. 205.

A husband in contesting his wife's will may be permitted to testify to a conversation in the presence of third persons, in which she admitted and agreed that cer-

communications, if confidential, are within the policy of the rule.[48]

4. Their Admissions and Declarations.

When either husband or wife is strictly incompetent as a witness, either generally or as to a particular fact, evidence

tain real estate of which the title stood in her name was their joint property. In re Buckman, 64 Vt. 313, 24 Atl. Rep. 252, 33 Am. St. Rep. 930.

In a suit by the husband for alienation of his wife's affections he may testify as to conversations between her and him had in the presence of the defendant. Rudd *v.* Dewey, 139 Iowa, 528, 116 N. W. Rep. 1062.

Where the wife defends a suit on a note executed by her husband and herself, on the theory that it was given for the benefit of the husband alone, she cannot introduce conversations between her and her husband which were not had in the presence of a third party. National Lumbermans' Bk. *v.* Miller, 131 Mich. 564, 91 N. W. Rep. 1024, 100 Am. St. Rep. 623.

[48] See Williamson *v.* Morton, 2 Md. Ch. Dec. 94; Bradford *v.* Williams, Id. 1; Nelius *v.* Wrickell, Hayw. N. C. 19.

Letters which passed between husband and wife are confidential communications in regard to which neither of them can be questioned. State *v.* Bell, 212 Mo. 111, 111 S. W. Rep. 24.

A letter written by the husband to the wife is a confidential communication and cannot be introduced in evidence to show his attitude toward the defendant on trial for the husband's homicide. Wilkerson *v.* State, 91 Ga. 729, 17 S. E. Rep. 990, 44 Am. St. Rep. 63.

In a suit for criminal conversation a letter to the defendant written by the wife in the presence of the husband but never sent to the defendant is a confidential communication and not admissible. Smith *v.* Merrill, 75 Wis. 461, 44 N. W. Rep. 759.

A letter written by a husband to his wife while he was in jail on a charge of murder is not admissible against him, it being a confidential communication. Scott *v.* Commonwealth, 94 Ky. 511, 23 S. W. Rep. 219, 42 Am. St. Rep. 371.

A woman who joins with her husband in the execution of a deed for the purpose of raising money on notes is estopped from denying the validity of her act against an innocent purchaser of the notes. Cooper *v.* Ford, 29 Tex. Civ. App. 253, 69 S. W. Rep. 487.

Massachusetts Pub. Sts., c. 169, § 18, cl. 1, excludes private conversations between husband and wife, but not letters or written communications. Commonwealth *v.* Caponi, 155 Mass. 534, 30 N. E. Rep. 82.

of his or her declaration of the fact is incompetent,[49] except in the following cases: The declarations of either are competent; 1. When the making of such declarations is the material fact.[50] 2. When the declaration is part of the *res gestæ* involved in an act properly in evidence.[51] 3. When it is merely matter of inducement or introduction to the language or conduct of another person, which the declaration offered called forth.[52] 4. When it is one which the declarant made, when authorized, expressly or impliedly, to speak as the other's agent, or as one to whom the other referred a third person.[53]

[49] Dawson *v.* Hall, 2 Mich. (Gibbs) 390; Gardner *v.* Klutts, 8 Jones L. (N. C.) 375; Karney *v.* Paisley, 13 Iowa (5 Withrow), 89. The incompetency of the witness enhances the reason for the exclusion of the declaration. Churchill *v.* Smith, 16 Vt. 560; Nelius *v.* Wrickell, Hayw. (N. C.) 19.

The declarations and admissions of a wife made during her husband's lifetime to impeach her husband's title to certain lands are not admissible. Hoyt *v.* Zumwalt, 149 Cal. 381, 86 Pac. Rep. 600.

A statement made by a husband to a third party that his entire business belongs to his wife, is not admissible in evidence in an action by the wife against creditors of the husband for damages for levying on the goods and stock of the business. Tharp *v.* Page, 66 Ark. 229, 50 S. W. Rep. 454.

[50] Of this class of cases are proofs of demeanor as showing affection.

In an action by a husband for the alienation of his wife's affections, private communucations between his wife and himself were held admissible to show the state of her affections where they did not include statements of what the defendant did or said. McGinnis *v.* McGlothlan, 192 Mo. App. 141, 180 S. W. Rep. 405.

[51] Williamson *v.* Morton, 2 Md. Ch. 94.

Declarations against their own interest of husband and wife made at the time of executing a deed to their property, in presence of all parties interested in the transaction, are admissible as part of the *res gestæ*. Corporation of Members of the Church of Jesus Christ of Latter-Day Saints *v.* Watson, 25 Utah, 45, 69 Pac. Rep. 531.

Where a third party is told of the communication by the husband and repeats it to the wife and she admits the substance of it, it is admissible. McIntire *v.* Schiffler, 31 Colo. 246, 72 Pac. Rep. 1056.

[52] Boules *v.* McEowen, Penningt. (N. J.) 499.

[53] Lay Grae *v.* Patterson, 2 Sandf. 338.

The statements of the wife while acting as agent of her

The privilege from testifying to confidential communications is personal, and does not preclude a stranger from testifying to them.[54] But, of course, all the rules excluding hearsay apply.

When a husband or wife is a competent witness, or would be if living, his or her admissions and declarations are competent *against the maker* of them, for the same purposes and within the same limits that they would be if the maker were unmarried,[55] with this exception, that those of the wife cannot be received to prove an act by her which the law does not authorize a married woman to perform. The existence of the marital relation is not enough to make admissions or

husband are competent evidence. Burlington Ins. Co. *v.* Wzieck, 16 Ill. App. 295.

[54] Cook *v.* Burton, 5 Bush, 67.

When a third person hears a conversation between the husband and wife, such person can testify to what was said, if the testimony is material to the case on trial. Hampton *v.* State, 183 S. W. Rep. (Tex. Civ. App.) 887.

An employee of the husband of the plaintiff who sued the administrator of her spouse's estate is competent to testify to communications between the plaintiff and the decedent. Ginn *v.* Carithers, 14 Ga. A. 298, 80 S. E. Rep. 698.

[55] The Pennsylvania rule excludes the declarations of either, when offered against creditors, to prove title out of the declarant and in the other; if they might have the effect to bolster up a fraudulent conveyance (Parvin *v.* Capewell, 45 Penn. St. 89); but the better opinion is that they are competent, though not alone sufficient on such an issue. Compare Townsend *v.* Maynard, 45 Id. 200; Musser *v.* Gardner, 66 Id. 246.

The declarations of the wife acting as agent for her husband are admissible against her. Leyner *v.* Leyner, 123 Ia. 185, 98 N. W. Rep. 628.

Where an action is brought against both husband and wife, the declarations of the husband are admissible against himself but not against his wife. Carpenter *v.* Carpenter, 126 Mich. 217, 85 N. W. Rep. 576.

Where the husband is sued for the wife's tort, his statements made out of her presence and after the accident are admissible against him. Bruce *v.* Bombeck, 79 Mo. App. 231.

In an action against husband and wife for fraudulent transfer of property, the declarations of each made out of the presence of the other are admissible to prove fraudulent purpose of each. Coburn *v.* Storer, 67 N. H. 86, 36 Atl. Rep. 607.

declarations made by either competent *against the other*,[56] but some special ground for admitting them must be shown, as in the case of other persons. For this purpose it is enough to show that the declarant was the agent of the other in the matter involved, and acting as such when the declaration was made; [57] or that the other claims as the representative

[56] Owen *v.* Cawley, 36 N. Y. 600; Thomas *v.* Maddan, 50 Penn. St. 261, 265, S. P., Hanson *v.* Millett, 55 Me. 190; Livesley *v.* Lasalette, 28 Wisc. 41. The wife's declarations in her husband's absence, tending to charge the husband with a liability, are not evidence against him. Rideout *v.* Knox, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. Rep. 390. And declarations of a husband, make in the absence of his wife, tending to show that they were partners, are not competent, as against the wife, to establish that relation; nor can a witness be permitted to testify that he understood that the husband, in making such declarations, used the word "we" as including his wife. Lawrence *v.* Thompson, 26 App. Div. (N. Y.) 308.

Where the wife acquires title to land by adverse possession any declaration of the husband made after such title is perfected will not be admissible to divest the wife thereof. Lemmons *v.* McKinney, 162 Mo. 525, 63 S. W. Rep. 92.

Where real estate is owned by the wife, statements made by the husband to a real estate broker to the effect that the latter is to receive certain commissions are not binding upon the wife unless the husband was specially authorized to act as his wife's agent. Winans *v.* Demarest, 84 N. Y. Supp. 504.

The declarations of a husband while in possession of personal property to the effect that he is the owner of it are self-serving declarations and not admissible against the wife who lays claim to the property. Vermillion *v.* Parsons, 101 Mo. App. 602, 73 S. W. Rep. 994.

Where a husband is sued for necessaries delivered to his wife living apart from her husband, delivery cannot be proved by statements of the wife. Meyer *v.* Jewell, 88 N. Y. Supp. 972.

Notice to the husband of a defect in a title which his wife many years later purchases, is not notice to the wife. Pearce *v.* Smith, 126 Ala. 116, 28 So. Rep. 37.

A promise made to a husband by a third person for the benefit of the wife can be enforced by the latter, and the husband can be called to testify. Buchanan *v.* Tilden, 158 N. Y. 109, 52 N. E. Rep. 724, 70 Am. St. Rep. 454, 44 L. R. A. 170; Bouton *v.* Welch, 170 N. Y. 554, 63 N. E. Rep. 539.

[57] Riley *v.* Suydam, 4 Barb. 222; Kelly *v.* Kelly, 2 E. D. Smith, 250; Rosc. N. P. 75.

Where the authority of the hus-

or successor of the declarant.[58] In the case of silence or acquiescing admissions by the wife, in the face of her husband's conduct or declarations, the influence of the marital relation must be presumed, so far as to require very clear proof of her free assent,[59] or of estoppel in favor of an innocent third person,[60] in order to give any weight to them; and the weight

band to act as agent for the wife is established, his declarations will be admitted. Minard *v.* Stillman, 35 Ore. 259, 57 Pac. Rep. 1022.

Statements made by the wife to her husband's attorney are not privileged where the husband waives the privilege. Leyner *v.* Leyner, 123 Ia. 185, 98 N. W. Rep. 628.

Statements by the husband acting as agent for the wife made to third persons are not admissible to prove her insolvency in involuntary bankruptcy proceedings. Duncan *v.* Landis, 45 Cir. Ct. App. 666, 106 Fed. Rep. 839.

Where the husband acts as agent for his wife who is the tenant of certain premises, his statements to the landlord that the latter had not the right to collect rent are admissible to prove possession of the wife. Barker *v.* Mackay, 175 Mass. 485, 56 N. E. Rep. 614.

The statements of the husband acting as the agent of the wife in regard to her ownership of a certain lot are admissible against the wife. Pearson *v.* Adams, 129 Ala. 157, 29 So. Rep. 977.

The declarations of a husband in possession of lands as the agent of his wife as to the location of the boundaries are not admissible. Perkins *v.* Brinkley, 133 N. C. 348, 45 S. E. Rep. 652.

Where a husband authorizes his wife to answer a letter directed to him in any way she pleases, he stating that he will have nothing to do with the matter, her answer is admissible in evidence as against the husband. Harmon *v.* Leberman, 39 Tex. Civ. App. 251, 87 S. W. Rep. 203.

[58] Day *v.* Wilder, 47 Vt. 584, 593; Smith *v.* Sergent, 2 Hun, 107.

[59] Rowell *v.* Klein, 44 Ind. 293.

The fact that the wife does not deny the declarations of the husband made in her presence that he owns certain property will not estop her from proving her ownership of the property. Thomas *v.* Butler, 24 Pa. Super. Ct. 305.

[60] See Bodine *v.* Killeen, 53 N. Y. 96.

The silence of the wife, in the face of her husband's unauthorized act in accepting stock instead of money in payment for a machine which he had sold as her agent, was held to estop her where she derived benefit by reason of the fact that the innocent purchaser paid a chattel mortgage which she had previously placed upon the machine. Journal Pub. Co. *v.* Barber, 165 N. C. 478, 81 S. E. Rep. 694.

of her admissions or declarations is generally impaired where there is not ground of estoppel, if it appears that they may have been made by his influence or for his benefit.[61]

5. Agency of One for the Other.

To prove an agency for the wife in a matter where she had not power to act at common law, the facts,—such as separate estate,—on which her power under the statute depends, must be proved.[62] In other respects, the fact of agency, whether of one for the other, or of a third person for either, is to be proved in the same manner as in the case of other persons.[63] The marital relation alone raises no presumption of agency between them; but its existence may aid or impair the significance of other evidence tending to show agency. Thus, when the agency of the wife is alleged against the husband, in matters of a domestic nature, slight evidence of actual authority is enough; [64] while if his agency is alleged

[61] Hollinshead *v.* Allen, 17 Penn. St. 275.

A wife suing her husband's parents for alienation of her husband's affections cannot prove the hostile attitude of the defendants by declarations made by her husband. Cochran *v.* Cochran, 196 N. Y. 86, 89 N. E. Rep. 470, 24 L. R. A. N. S. 160, 17 Ann. Cas. 782.

[62] Nash *v.* Mitchell, 3 Abb. N. Cas. 171.

[63] See Bodine *v.* Killeen, 53 N. Y. 96; Dillaye *v.* Beer, 3 N. Y. Supm. Ct. (T. & C.) 218.

Agency resting in parol can generally be proved by the testimony of either the principal or the person who claims to be the agent, and the foregoing rule is not changed when the purported agent is either the husband or wife of the principal. State Nat. Bank *v.* Scales, 159 Pac. Rep. (Okl.) 925.

It cannot be presumed from the marital relation that the husband is the wife's agent. Bryan *v.* Orient Lumber & Coal Co., 156 Pac. Rep. (Okl.) 897.

[64] Paragraph 21 below.

The mere relation of husband and wife does not establish the agency of one for the other. McNemar *v.* Cohn, 115 Ill. App. 31.

Owing to the intimate relation of husband and wife, their interests and duties are in many cases common, and where these exist, the act of one may be presumed to be the act of the other upon slight evidence, and this is particularly the case where a moral or legal duty is imposed upon the husband to do what his wife has done.

against her to divest her of her estate without consideration, the existence of the relation is a reason for requiring unusually strict proof of authority.[65] The agency cannot be proved

French *v.* Spencer, 23 Pa. Super. Ct. 428.

In order to prove agency it is competent to show that the alleged agent is the wife of the principal, which, while not conclusive, is evidence for the jury to consider. Brown *v.* Woodward, 75 Conn. 254, 53 Atl. Rep. 112.

When husband and wife are living together and the wife purchases articles for domestic use, the law imputes to her the character of agent of her husband. Feiner v. Boynton, 73 N. J. Law, 136, 62 Atl. Rep. 420.

The presumption is that a married woman who purchases groceries for the use of the family, does so as the agent of her husband. Bradt *v.* Shull, 46 N. Y. App. Div. 347, 61 N. Y. Supp. 484; Lindholm *v.* Kane, 92 Hun, 369, 36 N. Y. Supp. 665; Edwards *v.* Woods, 131 N. Y. 350, 30 N. E. Rep. 237.

Where it is sought to hold the husband liable for goods which are not necessaries purchased by the wife, an express authority to pledge his credit must be proved. McBride *v.* Adams, 84 N. Y. Supp. 1060.

Where a wife deserts her husband there is no presumption that she has any authority to bind his credit for the purchase of necessaries; the burden of proof is on the one supplying her to show that the husband and wife were separated either by mutual consent or through fault or misconduct of the husband before any recovery can be had. Peaks *v.* Mayhew, 94 Me. 571, 48 Atl. Rep. 172.

[65] Hoffman *v.* Treadwell, 2 Supm. Ct. (T. & C.) 57. See also Schouler Dom. Rel. 99, 2 Bish. Mar. W., §§ 396, 407, 411; Bank of Albion *v.* Burns, 46 N. Y. 170.

Something more than the mere marriage relation must be shown in order to establish the authority of the husband to manage his wife's separate property. Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. Rep. 433.

The mere fact that the husband cultivates and farms upon lands belonging to his wife is no evidence that he is her agent. Wagner *v.* Robinson, 56 Ga. 147.

The burden of proof is upon the plaintiff in an action against husband and wife to show the agency of the husband. Sanders *v.* Brown, 145 Ala. 665, 39 So. Rep. 732.

No presumption arises by reason of the marriage relation that the husband is agent for his wife. Francis *v.* Reeves, 137 N. C. 269, 49 S. E. Rep. 213.

A husband is competent to testify ot establish his agency for his wife. Long *v.* Martin, 152 Mo. 668, 54 S. W. Rep. 473.

Earlier decisions in Missouri hold to the contrary: Williams *v.* Williams, 67 Mo. 661; Wheeler,

by the admissions or declarations of the one alleged to be agent.[66] In respect to the effect of notice to either, as binding the other, the fact that the one was agent for the other must first be shown; and then the rule well settled in the law of agency, applies.[67]

6. Estoppel.

In respect to all matters within the limits and to the extent to which the law has conferred capacity on the married woman, she will be held, in favor of third persons, to be liable to the same equitable estoppels, and the same presumptions, and chargeable by the same indirect evidence of authority conferred on her husband or other agents, or by the same apparent holding out of him or them as authorized, as a *feme sole*.[68] But her silence or concessions, apparently

etc., Mfg. Co. *v.* Tinsley, 75 Mo. 458.

In order to establish the husband's agency for the wife it is not enough to show that she owned the land and that she knew that the work was in progress and did not object to it. A husband is not prohibited from improving the lands of his wife upon his own credit or with his own money; the relationship would afford just reason for her belief that he is conferring a benefit upon his own charge. Jones *v.* Walker, 63 N. Y. 612; Snyder *v.* Sloane, 65 N. Y. App. Div. 543, 72 N. Y. Supp. 981.

[66] Deck *v.* Johnson, 1 Abb. Ct. App. Dec. 497.

The agency of the husband for the wife cannot be proved by the marital relation nor by the declarations of the husband. McNemar *v.* Cohn, 115 Ill. App. 31; Shessler *v.* Patton, 114 N. Y. App. Div. 846, 100 N. Y. Supp. 286.

[67] Adams *v.* Mills, 60 N. Y. 539; R. R. Co. *v.* Brooks, 81 Ill. 293; Pringle *v.* Dunn, 37 Wisc. 468.

Where the husband is the dual agent between his wife and a business concern, each principal knowing he was the agent of the other, notice to him is notice to both principals and both are bound by it. Graham Paper Co. *v.* St. Joseph Times Printing, etc., Co., 79 Mo. App. 504.

Where the husband acts as agent for his wife in purchasing lands and he knows of a fraud in connection with the transaction, she will be charged with notice of the fraud. Tate *v.* Tate, 10 Ohio Cir. Dec. 321, 19 Ohio Civ. Ct. Rep. 532.

[68] Bodine *v.* Killeen, 53 N. Y. 96; Anderson *v.* Mather, 44 N. Y. 249, 262. Compare McGregor *v.* Sib-

prompted by the spirit of forbearance and acquiescence which a wife should foster toward her husband, and thus explained by her marital duty, do not bind her as an estoppel in his favor or in favor of his creditors, unless fraud or bad faith on her part is shown.[69] On the other hand, her conduct or

ley, 69 Penn. St. 388; Morris *v.* Ziegler, 71 Penn. St. 450. And see 2 Bish. Mar. W., § 488; Carpenter *v.* Carpenter, 25 N. J. Eq. 194.

The disabilities of married women having been removed by statute they are subject to the rule of estoppel. Brusha *v.* Board of Education, 41 Okl. 595, 139 Pac. Rep. 298, L. R. A. 1916, C. 233.

The statutes emancipating married women from the disabilities of coverture impose the burden of estoppel. Brooks *v.* Laurent, 39 Cir. Ct. App. 201, 98 Fed. Rep. 647.

Where the husband uses his wife's money to pay his own debts and subsequently she ratifies his act in so doing, she is estopped from recovering the money from his creditors. Hollingsworth *v.* Hill, 116 Ala. 184, 22 So. Rep. 460.

While the wife may not become the husband's surety, and may not pledge her property to secure his indebtedness, and her property cannot be taken for his debts, nevertheless she may, of her own volition apply it to the absolute payment of his debts and having done so is estopped from recovering the money. Gadsden First National Bk. *v.* Moragne, 128 Ala. 157, 30 So. Rep. 628.

Where husband and wife execute a mortgage on land belonging to the wife, she will be estopped from denying the validity of the mortgage. Till *v.* Collier, 27 Ind. App. 333, 61 N. E. Rep. 203.

Where a married woman borrows money to be used in a partnership business of which she and her husband are members she will be estopped from setting up the defense of suretyship. Anderson *v.* Citizens' National Bk., 38 Ind. App. 190, 76 N. E. Rep. 811.

Inasmuch as the wife can contract as a *feme sole* only with respect to personalty, the doctrine of estoppel applies only to personalty and not to lands owned by her, her sole deed to lands being void. Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. Rep. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891.

[69] Bank of U. S. *v.* Lee, 13 Pet. 118; Sexton *v.* Wheaton, 8 Wheat. 238.

The wife may be estopped, as to others than her husband, by her conduct in letting him handle her property as though his own. Stone *v.* Gilliam Exchange Bk., 81 Mo. App. 9.

A wife, whose property is bound for the note of the husband, will not be estopped by his representations to an innocent purchaser that the notes were good and valid and that there was no defense to them. Henry *v.* Sneed, 99 Mo.

silence under incapacity, without actual fraud, cannot raise an estoppel which will avail in the place of capacity when it did not exist by the law.[70]

7. Judgments.

At common law, and apart from the statutes conferring capacity upon married women, a judgment at law against a married woman whose husband was not a party with her, is not, in general, binding upon her;[71] and a decree in equity in a suit brought by both as to her separate estate,[72] or in which their interests were in conflict,[73] is not conclusive

407, 12 S. W. Rep. 663, 17 Am. St. Rep. 580.

A wife's separate estate will not be charged with her husband's debt merely because she stood by in silence while her husband represented himself to be the owner of such estate as an inducement to the creditor to give the credit, and by such representation deceived the creditor. Carpenter *v.* Carpenter's Ex'rs, 27 N. J. Eq. 502.

[70] Big. on Estop. 444–446, 4 Central L. J. 507, 579.

A married woman cannot lose her land, separate or not separate estate, by estoppel by conduct (*in pais*) without actual fraud, if even by it. Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. Rep. 603, 102 Am. St. Rep. 959; Yock *v.* Mann, 57 W. Va. 187, 49 S. E. Rep. 1019.

A married woman is not estopped by the acts or representations of her husband; nor can she be estopped unless she is guilty of some act of fraud. Cauble *v.* Worsham, 96 Tex. 86, 70 S. W. Rep. 737, 97 Am. St. Rep. 871; Harle *v.* Texas Southern Ry. Co., 39 Tex. Civ. App. 43, 86 S. W. Rep. 1048.

The active participation of a married woman in the perpetration of a fraud may operate, by way of estoppel, to divest her of interest in real estate. Floyd *v.* Mackey, 112 Ky. 646, 23 Ky. Law Rep. 2030, 66 S. W. Rep. 518.

Where a wife is aware that her husband is negotiating to sell her property without her authority, it is her duty to disavow his acts. Journal Pub. Co. *v.* Barber, 165 N. C. 478, 81 S. E. Rep. 694.

[71] Bigelow on Estop. 48; Freem. on Judg., § 150, and cases cited.

If plaintiff wants to reach the separate estate of a married woman he must designate such estate in the proceedings. Flanagan *v.* Oliver Finnie Grocery Co., 98 Tenn. 599, 40 S. W. Rep. 1079.

[72] Stuart *v.* Kissam, 2 Barb. 493; Michan *v.* Wyatt, 21 Ala. N. S. 813, 833.

[73] Alston *v.* Jones, 3 Barb. Ch. 397.

against her. Under the modern statutes, a judgment against a married woman is competent and conclusive against her and those claiming under her, in the same cases and to the same extent that it would be against a *feme sole*, provided the case be one in which she might have capacity under the statute.[74]

8. Evidence of Husband's Title.

Evidence that the husband,[75] or husband and wife together,[76] or the wife,[77] were in possession of property, with-

[74] Freem. on Judg., § 150. *Contra*, Swayne *v.* Lyon, 67 Penn. St. 439.

It is not necessary that a judgment against the wife should state in specific terms that her separate property is subject to the payment of the same. Smith *v.* Ridley, 30 Tex. Civ. App. 158, 70 S. W. Rep. 235.

A personal judgment can be recovered against both husband and wife on a note given for a community debt, and on such judgment the community property of both, and the separate property of either can be taken in execution. Lumbermen's National Bk. *v.* Gross, 37 Wash. 18, 79 Pac. Rep. 470.

It is no defense for the wife in an action against her and her husband to set up that she signed merely to release her dower. Wood *v.* Dunham, 105 Iowa, 701, 75 N. W. Rep. 507.

[75] Keeney *v.* Good, 21 Penn. St. 354.

The rule of the text is not upheld in all states. 21 Cyc. 1403; and see also Dyment *v.* Nelson, 166 Cal. 38, 134 Pac. Rep. 988, holding that where a yacht was purchased with the wife's funds, although the husband had possession and the registry of the vessel was taken out in his name, it was nevertheless her separate property.

[76] Turner *v.* Brown, 6 Hun, 331.

If the husband invests his money in securities in the joint names of himself and his wife, they will belong to the wife on the death of the husband if there is no evidence to the contrary. Matter of Rapelje, 66 N. Y. Misc. 414, 123 N. Y. Supp. 287.

Conveyance to husband and wife makes them tenants by the entirety, and the whole fee passes to the survivor. Bertles *v.* Unnam, 92 N. Y. 152; Goodrich *v.* Otego, 160 N. Y. App. Div. 349, 145 N. Y. Supp. 497; McWhorter *v.* Green, 111 Ark. 1, 162 S. W. Rep. 1100; English *v.* English, 66 Fla. 427, 63 So. Rep. 822; Bartkowaik *v.* Sampson, 73 N. Y. Misc. 446, 133 N. Y. Supp. 401; Lerbs *v.* Lerbs, 71 N. Y. Misc. 51, 129 N. Y. Supp. 903.

[77] Black *v.* Nease, 37 Penn. St. 436.

"The general rule of law is that

out other indication of ownership, is presumptive, but not conclusive,[78] evidence of title in the husband. Evidence that the property in question was purchased by her on her own credit, when she had no separate estate or other capacity to contract, is evidence of title in him.[79] And her purchase of

the possession of personal property is *prima facie* evidence of ownership, but a like presumption is not indulged in favor of the possession of a married woman. At common law the possession of a wife was the possession of the husband." McClain *v.* Abshire, 63 Mo. App. 333, 339, cited in McKenzie Carpet Co. *v.* Leffler, 192 Mo. App. 608, 184 S. W. Rep. 905, in which latter case it was held that, conceding the above quotation to express good law, the presumption did not obtain in the case of a married woman living apart from her husband, though not divorced.

"The general rule must be held to be, that whether the possession be physically in the husband, or in the wife, the title is presumptively in the husband." Burns *v.* Bangert, 16 Mo. App. 22, 35, cited in McKenzie Carpet Co. *v.* Leffler, 192 Mo. App. 608, 184 S. W. Rep. 905.

[78] See paragraph 16 (below). See also Schouler's Dom. Rel. 214, 2 Bish. Mar. W., §§ 128–140, 1 Id., § 732.

Where a married woman turns all her funds over to her husband and never asks for an accounting, and he treats the money as his own, depositing it in a bank account together with money of his own, it must be regarded as to all intents and purposes as his own account. Green *v.* Griswold, 2 N. Y. Supp. 624.

Possession of land by both husband and wife raises a presumption of title in the husband. Coursey *v.* Coursey, 141 Ga. 65, 80 S. E. Rep. 462.

Under Civ. Code, § 164, there is a presumption that a conveyance to husband and wife makes them tenants in common which may be rebutted by other evidence. Volquards *v.* Myers, 23 Cal. App. 500, 138 Pac. Rep. 963.

There is a presumption that property acquired by either spouse during coverture is community property, which may be rebutted. In re Deschamp, 77 Wash. 514, 137 Pac. Rep. 1009; Gameson *v.* Gameson, 162 S. W. Rep. (Tex. Civ. App.) 1169; Lenninger *v.* Lenninger, 167 Cal. 297, 139 Pac. Rep. 679.

[79] Glann *v.* Younglove, 27 Barb. 480.

But it has been decided that little if any importance should attach to the presumption that property purchased by a wife during coverture was with the husband's funds. Regal Realty & Investment Co. *v.* Gallagher, 188 S. W. Rep. (Mo.) 151.

articles for family use, partly with her own money and partly with his, tends, in the absence of anything indicating a different intent, to prove title in him.[80] But after it has been shown either that he received property to his wife's use, or that she had title to property in the possession of either or both, or that it was in her possession in a separate business belonging to her under the statute,[81] the burden is on those who claim it to be his to show his title. If the fund is the proceeds of her estate, it is hers, even as against his creditors, although realized by his labor as her servant upon her farm,[82] or in her business,[83] or his skill or ability as her agent in the purchase and resale of her property.[84]

[80] Kelly *v.* Drew, 12 Allen, 107.

[81] Peters *v.* Fowler, 41 Barb. 467.

[82] Vrooman *v.* Griffiths, 4 Abb. Ct. App. Dec. 505. As to what proves him a tenant under her, and what her servant, compare Albin *v.* Lord, 39 N. H. 205, and Hill *v.* Chambers, 30 Mich. 422.

Where the debt of a creditor against the husband arose subsequent to the purchase of land in the name of the wife, the burden of proof is upon the creditor to show that the husband paid the consideration of the deed to such land. Jones *v.* Nolen, 133 Ala. 567, 31 So. Rep. 945.

[83] Kleunder *v.* Lynch, 2 Id. 538.

The proceeds of a wife's estate obtained by the husband's business acumen and industry in managing the property was held subject to his debts in Patton *v.* Smith, 130 Ky. 819, 114 S. W. Rep. 315, 23 L. R. A. N. S. 1124. However in the notes under this case in 23 L. R. A. N. S. 1124, it is stated that "the preponderance of authority is against Patton & Smith," citing among other cases Magerstadt *v.* Schaefer, 213 Ill. 351, 72 N. E. Rep. 1063, wherein it was stated—"We have frequently held under our Married Woman's Act a wife may own property and allow her husband to act as her agent in transacting business growing out of such property, (in this case holding stock in a corporation receiving the dividends therefrom and participating in the management of the corporation as a director), such as procuring and transferring the same, without subjecting it to the payment of his debts."

[84] Merchant *v.* Bunnell, 3 Id. 280.

"A debtor may rightfully give his services, however valuable, to his wife, and his creditors cannot complain of his so doing. . . . Starting with her own money, the wife might rightfully avail herself of the services of her husband and his business acumen in the management of her property to the betterment of her holdings."

It being shown that title to property was in either the wife or the husband, no presumption of a transfer of the title to the other can be drawn from the mere fact of possession by the other; the burden of proof is on the one who asserts a change, to give some evidence beyond the mere possession.[85] The intimacy of the relation is such, and acting as agent for each other so habitual, that the possession by one of the movables of another is very slight, if any, evidence of a gift or transfer, and not enough to transfer the burden of proof.[86]

The fact that they joined in conveying does not raise a presumption that he was the sole owner, but rather that they were equal owners in common.[87]

9. Evidence of Wife's Title.

The wife's separate property rights are still regarded as exceptional,—that is to say, the law requires her in each case to rebut the presumption that whatever she acquires belongs to her husband, or is subject to his control;[88] and this is

Heckinger *v.* Swank, 78 Or. 526, 153 Pac. Rep. 784.

[85] Wells Sep. Prop. of M. W. 224–226, and cases cited.

"Thus he who claims property as a gift from another must show clearly and satisfactorily that the donor intended to give, that the intention existed at the time the gift was made, and that it was consummated by an actual delivery. Mere possession will not suffice. . . . On the claimant devolves the burden of establishing by competent proof these essential elements of a valid gift." McKimmie *v.* Postlethwait, 88 S. E. Rep. (W. Va.) 833.

[86] Bachman *v.* Killinger, 55 Penn. St. 418, 1 Bish. Mar. W., § 732.

When a husband and wife together rented a safe deposit box in which, on her death, were found bonds which originally belonged to the husband, it was held that the fact that they were contained in an envelope indorsed in the husband's handwriting as her property was insufficient evidence of itself to show a gift from him to his wife. Matter of Squibb, 95 Misc. (N. Y.) 475, 160 N. Y. Supp. 826.

[87] Cox *v.* James, 45 N. Y. 557, affi'g 59 Barb. 144.

[88] Schouler Dom. R., 2d ed. 16, 2 Bish. Mar. W., § 82, &c.

Unless a wife can show that lands owned by her were a gift or that they were paid for out of her separate estate, it will be presumed that any interest which she has in them is the interest of the husband and subject to seizure and

to be done by establishing the facts necessary, to bring her case either within the enabling statutes, or within the common law or equity rules recognizing a married woman's right. She must give some evidence of her title, besides possession under the marital relation; for the mere fact of the wife's possession and control of property, if consistent with their common interest in and enjoyment of it as the husband's property, is no evidence of title in her, but is presumptive evidence of his possession.[89] This presumption,

sale by his creditors. Jack *v.* Kintz, 177 Pa. 571, 35 A. Rep. 867; Hunter *v.* Baxter, 210 Pa. St. 72, 59 Atl. Rep. 429.

In the absence of any pleading or proof that the wife paid for the land out of her own means it is presumed in law that having been purchased during coverture it was paid for with the money of her husband. Seitz *v.* Mitchell, 94 U. S. 580, 24 L. ed. 179; Halstead *v.* Mustion, 166 Mo. 488, 66 S. W. Rep. 258.

Where the wife acquires property by virtue of a conveyance executed after the death of the husband and purporting to be made upon an onerous consideration paid by her, there is no presumption that it was purchased with her separate means. Clark *v.* Clark, 21 Tex. Civ. App. 371, 51 S. W. Rep. 337.

Where board is furnished in a household it will be presumed, in the absence of any agreement or understanding to the contary, that the head of the household—the husband—furnished it and is entitled to compensation therefor. Cory *v.* Cook, 24 R. I. 421, 53 Atl. Rep. 315.

The presumption that property obtained by the wife during coverture was paid for with the means of the husband is fully rebutted when the transaction consists as well with honesty as with fraud, for then it will be presumed honest. Gruner *v.* Scholz, 154 Mo. 415, 55 S. W. Rep. 441.

Under the enabling statutes (Laws of 1860, c. 90, § 2 and Laws of 1884, c. 381, § 1) enlarging the rights of married women, a woman who works as a nurse for a third person is entitled to the money earned on her sole and separate account. Stevens *v.* Cunningham, 181 N. Y. 454, 74 N. E. Rep. 434, rev'g 75 App. Div. 125, 77 N. Y. Supp. 364.

In Louisiana the fact that the title to land is taken in the wife's name, and that it was paid for out of her earnings for personal services rendered after marriage, does not take it out of the category of community property, there being no separation of property. Knight *v.* Kaufman, 105 La. Ann, 35, 29 So. Rep. 711.

[89] Farrell *v.* Patterson, 43 Ill. 52, 59; Johnson *v.* Johnson, 72 Id. 491.

however, may be rebutted by his admissions that it belonged to her, or by his silence in the presence of her declarations of ownership.[90] She may even prove title by adverse possession, against a third person, although her husband lived with her, if he claimed no independent exclusive occupation in himself.[91] A *deed* containing the maiden name as that of the grantee may be shown to be to her, by parol evidence that she was the person to whom the grant was made, and was known to the grantor by that name, and that no other person claiming the name claims title under

Where both are domiciled on her estate, it has been held that he is not presumptively responsible for the control of the premises in respect to negligent condition. Fiske *v.* Bailey, 51 N. Y. 150; but is in respect to illegal use. Commonwealth *v.* Carroll, 5 Reporter, 699.

Where a materialman furnishes lumber to improve land the record title of which is in the community, the burden of proof is on the wife in an action by the materialman, to establish that the land was her separate property and that the plaintiff had notice of it. Hord *v.* Owens, 20 Tex. Civ. App. 21, 48 S. W. Rep. 200.

The law does not presume the existence of a separate estate in the wife. The onus of establishing it is on her when the contest is between herself and her husband's creditors, and he is in apparent possession of the property. Eavenson *v.* Pownall, 182 Pa. St. 587, 38 Atl. Rep. 470.

In a contest between a wife and a creditor of her husband as to the ownership of property found in the possession of the husband, it is competent to show the circumstances and income of the husband. The burden is upon the wife to show title in herself. Quigley *v.* Swank, 11 Pa. Super. Ct. 602.

In a contest between a wife and the creditors of her husband she must show by clear proof that she paid for the property out of her separate estate, and if such proof is wanting, the presumption is that her husband furnished the money to pay for it. Harr *v.* Shaffer, 52 W. Va. 207, 43 S. E. Rep. 89.

[90] Turner *v.* Brown, 6 Hun, 331.

[91] Clark *v.* Gilbert, 39 Conn. 94. In an action by a widow, who had joined with her husband in a deed of his real estate, brought against the grantee to amend the deed on the ground of fraud, so far as it affected her right of dower, it was held that the defendant derived his title "through, from and under," the husband within the meaning of section 829 of the Code of Civil Procedure; and that plaintiff was not a competent witness as to per-

the deed.[92] If a deed to a married woman fails to express that it is to her separate use, extrinsic evidence of the intent is competent,[93] unless the statute of the State requires directions in the instrument, or only extends to property conveyed to her separate use.[94] Evidence that the property came to her from a third person, or a bill of sale running to her individually, is *prima facie* sufficient to go to the jury.[95] On the question whether a purchase made in her name was upon a consideration paid by her, evidence of her lack of means is competent against her;[96] but evidence that he had means is not sufficient, as against his creditors at least, without evidence tending to show that the purchase was

sonal transactions with the decedent." Witthaus *v.* Schack, 105 N. Y. 332, 11 N. E. Rep. 649.

In Hitt *v.* Carr, 109 N. E. Rep. (Ind. App.) 456, the court decided that a married woman was not precluded from acquiring land by adverse possession, and her marital relation could only be considered on the question of her claim of ownership.

[92] Scanlan *v.* Wright, 13 Pick. 523, 530.

[93] But not necessary if the conveyance was by a stranger. McVey *v.* Green Bay, etc., R. R. Co., 42 Wisc. 532.

Under the California Code it was held that a deed to a wife raised the presumption that title was thereby vested in her as her separate estate, though such presumption could be overthrown by proof that the property conveyed was in fact intended to be held as community property. Thompson *v.* Davis, 172 Cal. 491, 157 Pac. Rep. 595.

[94] 2 Bish. Mar. W., § 92, and unless she is estopped. Id., § 104. Compare Hayt *v.* Parks, 39 Ct. 357.

In California all presumptions are in favor of conveyances to the wife. They are presumed to have been made for a consideration paid by the wife, or if it is conceded that the consideration was paid by the husband, it will be presumed that the property was intended as a gift to the wife as her separate property. The law will not allow idle presumptions to be indulged in as against a deed delivered and recorded. Alferitz *v.* Arrivillaga, 143 Cal. 646, 77 Pac. Rep. 657.

[95] Wasserman *v.* Willett, 10 Abb. Pr. 63.

[96] Block *v.* Melville, 10 La. Ann. 784.

Where a husband buys real estate and takes title in his wife's name, with no agreement of any kind from her in regard to it, it will be held to be a gift to the wife. Weigert *v.* Schlesinger, 150 N. Y. App. Div. 765, 135 N. Y. Supp. 335.

made with her means.[97] Evidence that she had a separate estate or business before purchasing is not, however, essential, for she may commence such an estate or business [98] by a purchase on credit.[99] Evidence that the thing was a gift accompanied by delivery to both at about the time of marriage, raises a question of intent as to whether it was a gift to one or the other.

The declarations of the husband, at the time of his transaction, that the property delivered belonged to, and was delivered for the benefit of the wife, is competent, not only against him, but against the other party to the transaction.[1] In tracing the source of her title, the rule of *res gestæ* applies, not alone to the immediate transfer of the thing in question, but to the transactions by which she came to have a separate property. Hence, on the question of the title to property bought by her, the declarations of the third person who gave her the money with which she purchased the property, showing that the money was a gift to her,[2] or her correspondence with her business agent, showing the source of the fund,[3] is competent as part of the *res gestæ*. Her own declarations, if part of the *res gestæ*, are competent in support of her title.[4]

Parol evidence is competent to show that the husband paid the consideration for an estate conveyed to the wife; but this raises a presumption that he intended it as a provision for her,[5] and, in the absence of other evidence, establishes her

[97] Seitz *v.* Mitchell, 94 U. S. (Otto) 583.

[98] Harrington *v.* Robertson, N. Y. Ct. App. Nov. 1877; Frecking *v.* Rolland, 53 N. Y. 422, rev'g 33 Super. Ct. (J. & S.) 499; Dingens *v.* Clancey, 67 Barb. 566.

[99] *Contra*, Carpenter *v.* Tatro, 36 Wisc. 297; and see Huff *v.* Wright, 39 Geo. 41. The mere fact that he helped her with his credit, in making her purchase, does not render the property liable to his creditors. There should be evidence of fraud. 2 Bish. Mar. W., § 87.

[1] Crain *v.* Wright, 46 Ill. 107.

[2] Hall *v.* Young, 37 N. H. 134, 144.

[3] Hannis *v.* Hazlett, 54 Penn. St. 139, s. p., Bank *v.* Kennedy, 17 Wall. 19.

[4] Claussen *v.* La Franz, 1 Iowa, 226.

[5] So of a house built by him on

title, except as against his creditors.[6] The fact that he caused or consented to the deed being taken in her name is very cogent evidence that he intended her to have absolute title.[7]

her land. Caswell *v.* Hill, 47 N. H. 407; and see Tappan *v.* Butler, 7 Bosw. 480. The presumption is one of fact which can be overthrown by proof of the real intent of the parties. Smithsonian Institution *v.* Meech, 169 U. S. 398. The mere fact that the husband takes possession of property conveyed to his wife at his instance, improves it, pays taxes thereon and occupies the same with his wife as a homestead, are not sufficient to overcome the presumption that the conveyance was a gift. Pool *v.* Phillips, 167 Ill. 432, 47 N. E. Rep. 758.

Where a husband buys property and has the title placed in the name of his wife, the presumption is that it was intended as a provision for her. Siling *v.* Hendrickson, 193 Mo. 365, 92 S. W. Rep. 105.

[6] Guthrie *v.* Gardner, 19 Wend. 414; chap. V of this vol. paragraph 119; and cases cited in 13 Moak's Eng. 833.

The rule that fraud will not be presumed but must be proved by the party alleging it, has no application in a suit between a wife and a creditor of her husband concerning property transferred to her by him after contracting an indebtedness. In such case the burden is upon the wife to establish by a preponderance of evidence the *bona fides* of the sale or transfer of the property to her. Carson *v.* Stevens, 40 Neb. 112, 58 N. W. Rep. 845, 42 Am. St. Rep. 661.

Where there is absence of evidence that the wife purchased the property with her own separate means, the presumption is that the husband furnished the means of payment. Ryan *v.* Bradbury, 89 Mo. App. 665.

[7] Smith *v.* Smith, 50 Mo. 262. Statements of the deceased husband concerning the title to the property made after the execution of the conveyance to his wife are inadmissible against the wife; and the fact that the husband was in possession of the real property conveyed at the time of the subsequent declarations does not change the rule. Emmons *v.* Barton, 109 Cal. 662, 42 Pac. Rep. 303.

Even where land was purchased with community funds, it was held that when deeded to the wife the presumption arose that the husband intended a gift to his wife and clear and convincing evidence was required to rebut it. Hitchcock *v.* Rooney, 171 Cal. 285, 152 Pac. Rep. 913.

Section 164, Civil Code, provides that "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." This presumption is indulged in whether the purchase money be the separ-

He may rebut the presumption that he intended it as a provision for her, by proof of undue influence,[8] or of fraud effected by a misrepresentation as to a material fact, not equally ascertainable by both, as distinguished from mere statement of opinion;[9] or by proof that at the time of the transaction it was mutually understood and designed that she should hold for him.[10] And the amount itself may be so

ate funds of the husband or funds belonging to the marital relation. Carle *v.* Heller, 18 Cal. App. 577, 123 Pac. Rep. 815.

Where a husband pays for real estate with his own money but has the deed made out to his wife, the presumption is that the transaction was an advancement or gift. Hubbard *v.* McMahon, 117 Ark. 563, 176 S. W. Rep. 122.

[8] As to the mode of proof of this, see paragraphs 67 and 68 of the preceding chapter. Compare Orr *v.* Orr, 8 Bush, 159.

Where a wife, contesting the claim of the administrator of her husband's estate, asserted that an automobile was a gift to her, the court agreed that undue influence of a wife over her husband would not be presumed merely from the marital relation. Crofford *v.* Crofford, 29 Cal. App. 662, 157 Pac. Rep. 560.

[9] Jagers *v.* Jagers, 49 Ind. 428.

Where a man married a woman who falsely represented that she was capacitated for remarriage by reason of the absence of a former husband for a period of five years, and, believing himself to be legally married, had his real estate conveyed, through a third party, to himself and the woman as husband and wife, it was held that he was entitled to have her divested of her interest therein because of her misrepresentations. Butler *v.* Butler, 93 Misc. (N. Y.) 258, 157 N. Y. Supp. 188.

[10] Bent *v.* Bent, 44 Vt. 555; Whelton *v.* Divine, 20 Barb. 10; and see Foote *v.* Foote, 58 Id. 258.

The presumption that where land is purchased by a husband in the name of his wife it will *prima facie* be an advancement or settlement, and not a trust, may be overcome by evidence that such was not the intention of the parties, nor the nature of the transaction relied upon. Parrish *v.* Parrish, 33 Oreg. 486, 54 Pac. Rep. 352.

The mere fact that a deed to property acquired during the marriage relation was taken in the name of the wife, does not give rise to a presumption that it was intended as a gift to her. Caffey *v.* Cooksey, 19 Tex. Civ. App. 145, 47 S. W. Rep. 65.

The presumption of an advancement or gift was said to be rebuttable by antecedent or contemporaneous declarations or circumstances showing an intention to create a trust estate, in Hubbard *v.* McMahon, 117 Ark. 563, 176 S. W. Rep. 122.

large, in relation to the circumstances of the parties, as itself to rebut the presumption of a provision exclusively for her benefit.[11] The fact that she afterward joined with him in a deed or mortgage of the land does not estop her from proving the intent, and that all his dealing with the property was as her agent.[12] If there be satisfactory evidence [13] that it was by her procurement and without his consent that the deed was made to her, or if it was the mutual understanding and purpose at the time, that she was to hold the land as his, and not as her own, the law raises a resulting trust in his favor, or in favor of his creditors.[14]

Parol evidence is also admissible to show that the consideration of a deed to him proceeded from her separate property at the time of the purchase,[15] and that, by fraud, duress, mistake, abuse of confidence, or other undue means, he procured or accepted the title.[16] Evidence that he permitted her to carry on *a farm or other business* on her own account, shows, as against him, her title to property purchased in course of the business, although he advanced money to her in aid of the purchase;[17] and to enable his creditors to reach the property so held by her, or property acquired by her through his skill and labor, the burden is on them to show her possession fraudulent.[18] If she shows title

[11] Adlard *v.* Adlard, 65 Ill. 212.

[12] Tappan *v.* Butler, 7 Bosw. 480.

[13] Sandford *v.* Weeden, 2 Heisk. 74, 76.

[14] Id.; 2 Bish. Mar. W., §§ 118–124. But see the statute as to resulting trusts, 1 N. Y. R. S. 728, §§ 51–53, and 48 N. Y. 218, and cases cited; Gilbert *v.* Gilbert, 2 Abb. Ct. App. Dec. 256.

It was held competent to prove by oral evidence, dependent upon the recollection of the witnesses, when clear and positive, that property purchased with the husband's funds but deeded to the wife was in fact intended by them to be held in trust for both. Waggy *v.* Waggy, 87 S. E. Rep. (W. Va.) 178.

[15] Robison *v.* Robison, 44 Ala. 227.

[16] Bancroft *v.* Curtis, 108 Mass. 47, 2 Bish. Mar. W., § 119; Methodist Church *v.* Jaques, 1 Johns. Ch. 450.

[17] Sammis *v.* McLaughlin, 35 N. Y. 647.

[18] Kluender *v.* Lynch, 2 Abb. Ct. App. Dec. 538; Merchant *v.* Bunnell, 3 Id. 280.

Where the wife has title to lands and is in possession, the burden is

to a separate property or capital, not derived from him, the fact that she employs him,[19] or their minor son,[20] upon it, and supports him, does not raise a presumption of fraud; on the contrary, if she shows title to the main property, and that he was destitute of means, the current purchases will be presumed, in the absence of evidence to the contrary, to be made by her funds.[21] But his conduct in the business may be given in evidence on the question of fraud.[22]

The presumption of her ownership of property being once established, continues until alienation is shown; and though the property be kept in his house, the possession is presumptively hers [23] during cohabitation.

10. Evidence of Transfer by One to the Other.

A gift by husband to wife may be proved by parol, unless other grounds than the relation require written evidence; [24] and it is enough to prove an executed intention to make the gift; and declarations made by him, at the time of giving his wife money, as to the purpose for which he gave it, and declarations as to the person for whom he was acting, made when he received a security in her favor, are competent in favor of her title.[25] So his express declaration may consti-

on the creditors of the husband to prove that the lands did not belong to her. Foreman *v.* Citizens' State Bk., 128 Iowa, 661, 105 N. W. Rep. 163.

[19] Buckley *v.* Wells, 33 N. Y. 518, rev'g 42 Barb. 569.

A husband may contribute his services to his wife, and if in fact he does so and the business really belongs to his wife, the judgment creditor has no remedy. Pierson *v.* Garrison, 83 N. J. Eq. 334, 91 Atl. Rep. 824.

[20] Van Etten *v.* Currier, 4 Abb. Ct. App. Dec. 475.

[21] Vrooman *v.* Griffiths, 4 Abb. Ct. App. Dec. 505. Compare 2 Bish. Mar. W., § 301, etc. Presumptively the avails of the husband's labor are his own; and to make them hers, there must be some understanding that they are not to be paid for. Id., § 456.

[22] O'Leary *v.* Walter, 10 Abb. Pr. N. S. 439.

[23] Hanson *v.* Millett, 45 Me. 189, 1 Bish. Mar. W., § 732.

[24] Mack *v.* Mack, 3 Hun, 325.

[25] Kelly *v.* Campbell, 2 Abb. Ct. App. Dec. 492.

Where a husband rented a safe deposit box in his wife's name, his declarations about that time that

tute him trustee for her,—as where he credits her in account with moneys given by him to her, but not actually delivered.[26] If her title was derived from him, his declarations made after the transfer are not competent in favor of creditors and against her title, to establish fraud in the transfer.[27] To prove a gift by him to her, the evidence must be clear.[28] The mere fact that a husband allows his wife to deal with, as if her own property, that which is, or might be, his by marital right, does not convert it or its proceeds into her separate property.[29] But if, while having such marital right, whether to property in possession or in action, he borrows it of her, agreeing to repay it, the agreement is valid [30] (unless perhaps, if made on the mistaken idea that by law it is her

bonds which he placed therein were a gift to his wife were held clearly competent in her favor. Leitch *v.* Diamond Nat. Bank, 234 Pa. St. 557, 83 A. Rep. 416.

[26] Crawford's Appeal, 61 Penn. St. 55.

When a husband rented a safe deposit box in his wife's name, placing bonds therein as a gift to her and turning the key over to her, his subsequent access to the box and reinvestment of funds derived from the sale of the securities did not alter her status as owner. Leitch *v.* Diamond Nat. Bank, 234 Pa. St. 557, 83 A. Rep. 416.

[27] Gillespie *v.* Walker, 56 Barb. 185, S. P., Lormore *v.* Campbell, 60 Id. 62. Whether they are competent, to negative fraud, is disputed, see paragraph 5, above.

[28] Shuttleworth *v.* Winter, 55 N. Y. 629, 1 Bish. Mar. W., § 732. Savings from house-keeping, allowance, etc., not readily presumed gifts. Schouler's Dom. Rel. 242. Compare Wells' Sep. Prop. M. W. 142.

A conveyance by deed for nominal consideration establishes a transfer by him to her. Bird *v.* Lester, 166 S. W. Rep. (Tex. Civ. App.) 112.

[29] Ryder *v.* Hulse, 24 N. Y. 372, Schouler's Dom. Rel. 236. So held also where he permitted it under the mistaken idea that the law entitled her to it. Sharp *v.* Maxwell, 30 Miss. 589.

The mere depositing of money in his wife's name is not sufficient proof of a gift by the husband to the wife. Hagin *v.* Shoaf, 9 Ala. App. 300, 63 So. Rep. 764, 186 Ala. 394, 64 So. Rep. 615.

Where the husband directs moneys payable to him to be made payable to his wife, it is evidence of a gift to her in the absence of other proof. Adams *v.* Button, 156 Ky. 693, 161 S. W. Rep. 1100.

[30] Jaycox *v.* Caldwell, 51 N. Y. 395, affi'g 37 How. Pr. 240.

separate property),[31] and his payment to her is valid, even against his creditors.[32] So evidence of his declarations made in view of marriage, and after it,[33] or made at the time of receiving the property or afterward, are competent to disprove the intent;[34] and if they clearly evince an intent to receive it for her, are sufficient to repel the presumption of an effectual reduction to possession, and to charge him as trustee for her.[35] The fact that he received her property as a loan, so as to entitle her to payment among other creditors, may be proved by indirect or circumstantial evidence, without proving an express promise at or before the transaction.[36]

A mere preponderance of proof is not sufficient to show title derived by her from him, as against his creditors, especially to invoke the interposition of a court of equity; but, on the other hand, proof beyond all doubt is not necessary. Evidence which satisfies the conscience of the court beyond reasonable doubt is enough.[37]

11. Tacit Transfers.

Where one is tacitly permitted to deal with the property of the other, the question, as between them or between either and those claiming as assignees or successors of the other, is one of intent. Their express agreement, or their tacit understanding or usage, may determine whether the trans-

[31] King *v.* O'Brien, 33 Super. Ct. (J. & S.) 49.

[32] Savage *v.* O'Neill, 44 N. Y. 298, rev'g 42 Barb. 374.

[33] Gackenbach *v.* Brouse, 4 Watts & S. 546.

[34] Such as his promise to give her his note for it. Moyer's Appeal, 77 Penn. St. 482, 485; and see Jaycox *v.* Caldwell, 51 N. Y. 395.

[35] Moyer's Appeal (above).

[36] Steadman *v.* Wilbur, 7 R. I. 481.

[37] Wells' Sep. Prop. of M. W. 287–293, 317, and cases cited; Flick *v.* Devries, 14 Wright, Penn. St. 267; Tipner *v.* Abrahams, 11 Wright, 228; Earl *v.* Champion, 65 Id. 194; Sandford *v.* Weeden, 2 Heisk. 76; Crissman *v.* Crissman, 23 Mich. 217. But compare, for the notion that preponderance of proof is enough in all civil cases, 10 Am. Law. Rev. 642.

The burden of proof is upon the wife who makes claim to property deeded to her by her husband. Patterson *v.* Bowes, 78 Wash. 476, 139 Pac. Rep. 225.

fer of personalty by wife to husband, was a gift or a loan, or only a change of possession, under an agency,[38] or without authority. In the application of this test two rules contend for control.

12. The Old Rule: Presumption in Favor of Husband.

The rule applied in jurisdictions where the legal identity of husband and wife is still favored, is that upon the mere fact that she allows him to receive and keep her funds, the presumption is that he is authorized to use them as his own or for their common benefit;[39] and he is not to be required to account except from the time of her avowed revocation of permission,[40] or for the last year; and that the fact that she consents to his using her funds in purchasing land and taking title to himself, without insisting on any agreement to repay or convey, is sufficient evidence of her gift to him.[41] But

[38] 2 Bish. Mar. W., § 446. As to confusion by commingling, see 1 Id., §§ 611, 612, 2 Id. 125, 126, 446, 466; Schouler's Dom. Rel. 213, 214; Chambovet *v.* Cagney, 35 Super. Ct. (J. & S.) 486; Hall *v.* Young, 37 N. H. 134, 149.

[39] Jacobs *v.* Hessler, 113 Mass. 161; Kleine's Appeal, 39 Penn. St. 463.

A wife's separate property may become subject to the debts of her husband in case he be permitted to deal with it and obtain credit upon it as his own, with her knowledge and consent. Wood *v.* Yant, 27 Col. App. 189, 197, 149 Pac. Rep. 854.

[40] Lyons *v.* Green Bay, etc., R. R. Co., 42 Wisc. 548, 553, and cases cited.

A husband who, without exercising undue influence, received the rents and income from his wife's estate and applied them to his own or his family's use was declared to have acquired a separate estate therein, where his acts were either expressly authorized or tacitly agreed to by his wife. Ferguaon *v.* Anderson, 4 Tenn. Cir. App. 54. To the same effect is Crowley *v.* Crowley, 167 Mo. App. 414, 151 S. W. Rep. 512, where it was held that the rule was the same whether the wife had an equitable or statutory separate estate.

[41] Campbell *v.* Campbell, 21 Mich. 438, 443; and see Wells' Sep. Prop., M. W. 258.

Land which a husband bought with income from his wife's separate estate was held to belong to the husband free of his wife's claims, where it appeared that she allowed him to use such income without a promise to repay.

the presumption in either case may be rebutted by proof that he received the property in trust for her.[42] Evidence of his declarations is enough to establish such a trust, as against him and his personal representatives,[43] though not as against his creditors.[44]

13. The New Rule: Presumption in Favor of Title.

The rule laid down by some courts as more in consonance with the modern doctrine, is that where she has a right to her property under the statute, as if sole, his dealing with her funds will be presumed, in the absence of proof to the contrary, to be in the character of agent for her, and they will not be deemed to have become his property, unless he affirmatively establishes a gift or other legal transfer.[45]

14. Evidence of His Application of Her Funds.

When called to account for the proceeds of her funds, evidence of written authority to him to apply them is not necessary; he may prove by his own testimony that she authorized him to pay them out, and that he did so.[46]

Nihiser *v.* Nihiser, 127 Md. 451, 96 Atl. Rep. 611.

[42] Jacobs *v.* Hessler (above).

[43] Moyer's Appeal, 77 Penn. St. 486.

[44] Alston *v.* Rowles, 13 Fla. 128. But see paragraph 5 (above).

[45] Patten *v.* Patten, 75 Ill. 446, 449; Houston *v.* Clark, 50 N. H. 482.

Proof of his authority as agent must be shown before a husband can release his wife's claim. Clarke *v.* Wells, 83 N. Y. Misc. 93, 144 N. Y. Supp. 629.

[46] Southwick *v.* Southwick, 9 Abb. Pr. N. S. 109, aff'd in 49 N. Y. 510. When the husband, with her consent, has been in the habit of receiving the income of her separate estate, equity has heretofore usually regarded this as showing her voluntary choice thus to dispose of it for the benefit of the family; and while they regard him as holding as her tenant, and receiving as her trustee, they will not ordinarily require him to account beyond the income of the last year, presuming that everything previous has been settled by mutual agreement (2 Story Eq. Jur., § 1396); Albin *v.* Lord, 39 N. H. 204, or expended by her authority. Methodist Episcopal Church *v.* Jaques, 1 Johns. Ch. 450.

15. Evidence of the Wife's Conveyance.

Where the statute requires the husband's written consent to her conveyance, oral consent is not enough.[47] Where the statute requires [48] a private acknowledgment by a married woman conveying, she passes no estate unless she makes the proper acknowledgment; and the officer's certificate is the only evidence permitted of the fact. Its absence cannot be supplied by parol; [49] and a substantial defect [50] in the certificate cannot be cured by parol, nor reformed in equity.[51]

16. Impeaching Her Conveyance.

Equity does not require evidence of such actual fraud and duress in order to enable her to set aside her convey-

[47] Schouler's Dom. Rel. 235, n.; Townsley *v.* Chapin, 12 Allen, 476. But see to the contrary, Wing *v.* Schramm, 13 Hun, 377, holding that a conveyance without the assent is valid, except against him; and subsequent assent makes it valid against him.

A married woman can be bound only by her deed duly executed with the written assent of her husband and with her privy examination, or by the judgment or decree of a court of competent jurisdiction. Smith *v.* Bruton, 137 N. C. 79, 49 S. E. Rep. 64.

It is a sufficient compliance with the statute if the wife executes a power of attorney to a third person to sell and convey her land, and the attorney then gives gives a deed in which the husband joins. Nolan *v.* Moore, 96 Tex. 341, 72 S. W. Rep. 583, 97 Am. St. Rep. 911.

A deed by a married woman in which the husband does not join is a nullity. Ellis *v.* Pearson, 104 Tenn. 591, 58 S. W. Rep. 318; Montoursville *v.* Fairfield, 112 Pa. St. 99, 3 Atl. Rep. 862.

[48] By the New York statute, Real Property Law, § 302, the acknowledgment of a married woman may be taken as if she were sole.

[49] Elwood *v.* Klock, 13 Barb. 50; but see Richardson *v.* Pulver, 63 Id. 67, and cases cited. But it need not be alleged in pleading. Williams *v.* Soutler, 55 Ill. 130.

[50] The objection must specify the defect.

[51] Willis *v.* Gattman, 53 Miss. 721. As to what defects are "substantial," see Deery *v.* Cray, 5 Wall. 806; Carpenter *v.* Dexter, 8 Id. 513; Secrist *v.* Green, 3 Id. 750; Angier *v.* Schieffelin, 72 Penn. St. 106, s. c., 13 Am. Rep. 659; Wright *v.* Taylor, 2 Dill. C. Ct. 23, and note p. 26; Merritt *v.* Yates, 22 Am. R. 128, s. c., 71 Ill. 636.

ance procured by the husband as is required against a stranger,[52] and may relieve her against a voluntary conveyance to him, under mistake or fraud, though intended by her in fraud of creditors.[53] Evidence of the state of her mind and of her health at the time, and that her acknowledgment had been preceded by threats and menaces of her husband, in case she should refuse it, is competent,[54] though it may not be sufficient against a *bona fide* purchaser for value.[55] A proper certificate of acknowledgment to the deed is *prima facie* evidence, not only of the facts certified, but of the freedom of her execution; but it is not conclusive.[56] It may be rebutted, and the testimony of a party to it is sufficient

[52] Witbeck *v.* Witbeck, 25 Mich. 439. Compare Block *v.* Melville, 10 La. Ann. 785. See also note to paragraph 1 (above), and 2 Bish. Mar. W., § 480. Ratification by wife, of deed forged by husband, not inferred from long silence after being in formed. Ladd *v.* Hildebrant, 27 Wis. 135.

[53] Boyd *v.* De La Montaignie, 4 Supm. Ct. (T. & C.) 152.

[54] Central Bank *v.* Copeland, 18 Md. 305, 318.

The duress must be proved with clearness and emphasis. Mere proof that the husband was a violent, turbulent man, of intemperate habits, and when intoxicated prone to quarrels and violence, and dogmatic and domineering toward his wife, and that she was habituated to comply implicitly with his commands and wishes is insufficient. There must be proof of persuasion or compulsion by her husband to induce execution of the deed. Freeman *v.* Wilson, 51 Miss. 329.

[55] Rexford *v.* Rexford, 7 Lans. 6.

False promises made by the husband to the wife as to the use which will be made of the purchase money will not support an action for the cancellation of a deed on the ground of duress. Pratt Land, etc., Co. *v.* McClain, 135 Ala. 452, 33 So. Rep. 185, 93 Am. St. Rep. 35.

[56] 1 N. Y. R. S. 759, § 17; Jackson *v.* Schoonmaker, 4 Johns. 161; Williams *v.* Woodard, 2 Wend. 486.

When a deed or mortgage, regular in appearance and bearing the genuine signature of the grantor and his wife and a duly certified acknowledgment, is attacked, the evidence to impeach it must be clear and convincing. A deliberate deed or writing is of too much solemnity to be brushed away by loose and inconclusive testimony. Howland *v.* Blake, 97 U. S. 624, 24 L. ed. 1027; Northwestern Mutual Life Ins. Co. *v.* Nelson, 103 U. S. 544, 26 L. ed. 436.

to raise a question for the jury.[57] Her voluntary signatures for her husband cannot be avoided by mere proof of her neglect to read the instrument.[58]

17. Evidence of Wife's Separate Business.

To prove that she had a separate business, within the statute, it is not enough to show an isolated transaction, nor several disconnected acts,[59] nor the rendering of domestic service, such as the nursing of one person;[60] without evi-

[57] Williams *v.* Woodard (above). The New York rule, stated in the text, is embodied in the statute; but whether the idea of estoppel can suffice to preclude the wife from denying the truth of her acknowledgment, as held in Kerr *v.* Russell, 69 Ill. 666, s. c., 18 Am. Rep. 634, or its freedom, as held in White *v.* Graves, 107 Mass. 325, s. c., 9 Am. R. 38; or the absence of her husband, as held in Johnston *v.* Wallace, 53 Miss. 335, remains to be determined. The notion that the certificate has the force of a judicial determination is not tenable, for the examination is *ex parte*. Moreover, the officer does not certify that her execution *is* free; he has not adequate power to investigate that question. He certifies that, under due precautions of privacy, taken by him, she *acknowledged* that it was free. Even on the theory of a judicial determination, the certificate may be impeached by evidence that she did not appear before the officer, as held in Allen *v.* Lenoir, cited in Johnston *v.* Wallace, 53 Miss. 335, for this is the jurisdictional fact; or by evidence that, at the time of acknowledgment, the deed was lacking in any part essential to an effective grant,—such as having a blank for the grantee's name, as held in Drury *v.* Foster, 2 Wall. 34, and Burns *v.* Lynde, 6 Allen, 305, and her unacknowledged power to fill such blanks is void (Id.); or by evidence of fraud or imposition in obtaining the acknowledgment, coupled with notice to the grantee, as held in Hill *v.* Patterson, 51 Penn. St. 289. If it is to be held conclusive, notwithstanding these and similar infirmities, it must be on grounds of an estoppel allowed for reasons of public policy, peculiar to the security of titles. For other cases see 14 Moak's Eng. 500.

[58] Fowler *v.* Trull, 1 Hun, 411.

[59] 2 Bish. Mar. W., § 441; but compare Hart *v.* Young, 1 Lans. 417; and note to paragraph 9 (above).

[60] Cuck *v.* Quackenbush, 13 Hun, 107, and cases cited.

Under the Iowa Code it was held that a wife could maintain an action in her own name for compensation for nursing a third person, where she had received the husband's consent to perform such

dence that it was intended by her and her husband as a separate business; but the management of real[61] or personal[62] property for profit, is a business, as distinguished from the rental of it, which is not.[63] The fact that she commenced to carry on the business before her marriage, is presumptive evidence of a separate business and stock;[64] all the stronger if it was continued in her maiden name after marriage.[65] Where a regular place of business is kept, the fact that the shop was hired, and notes for goods bought were given, by the husband, in his own name, is not always conclusive evidence that the wife is not the owner.[66]

II. ACTIONS BY OR AGAINST HUSBAND

18. Actions by Him Founded on Marital Right.

In his sole action for rents and profits of her land, he must prove that they accrued since marriage.[67] In respect to her choses in action, evidence that he received them, as husband, raises a presumption of intent to reduce them to possession, only to be rebutted by clear proof of a contrary intent.[68]

services and retain the proceeds therefrom as her own property. Tucker *v.* Anderson, 1915, 154 N. W. Rep. (Iowa) 477. And in Matter of Grogan, 82 Misc. 555, 145 N. Y. Supp. 1913, 285, it was said, "it is always competent for the husband to emancipate his wife in regard to the performance of any particular kind of services, (nursing), so as to enable her to collect for the same in her own right." See also Badger *v.* Orr, 1 Ohio App. 293.

[61] Such as carrying on a farm. Smith *v.* Kennedy, 13 Hun, 9.

[62] Such as employing the husband to run a canal boat. Whedon *v.* Champlin, 59 Barb. 61.

[63] Nash *v.* Mitchell, 3 Abb. New Cas. 171.

[64] Peters *v.* Fowler, 41 Barb. 467.

[65] Askworth *v.* Outran, 37 Law Times, N. S. 85.

[66] Mason *v.* Bowles, 117 Mass. 86.

[67] Decker *v.* Livingston, 15 Johns. 479.

The rents of the wife's real estate accruing during coverture belong to the husband. Clapp *v.* Stoughton, 10 Pick. (Mass.) 463.

[68] Moyer's Appeal, 77 Penn. St. 482. See paragraphs 8–13 (above).

By the common law the husband was entitled during coverture to receive and to reduce to his possession and ownership all choses in

But evidence that he collected interest or dividends on her stock or choses in action, does not necessarily show reduction of the principal to his possession, but only of the income so received.[69]

19. Defenses.

To defeat his sole action for moneys due to her, it should affirmatively appear that the legal or beneficial interest is her separate property, or is otherwise within the statute or rules of equity, enabling her to sue alone.[70] Where they sue together on a chose in action, not her separate property or right, a release or other extinguishment of the claim, by him, will bar her equally.[71] And if, after her death, he sues in his marital right, as her survivor, her admissions are competent against him, because he claims in a representative capacity.[72] When he sues alone,[73] or they sue jointly,[74] for her services rendered during coverture, evidence of her admissions of payment is not competent, without evidence of her authority to receive money for him.[75] But where there is a division of the labors of husband and wife, and she is employed at service, it is presumed to be with his consent,

action belonging to the wife at the time of marriage, or which may accrue to her while the coverture continues. The husband may during the coverture in the assertion of his marital rights and for a valuable consideration assign the choses in action of the wife which are capable of being immediately reduced to possession so as to vest at least the beneficial ownership in the purchaser. Birmingham Waterworks Co. *v.* Hume, 121 Ala. 168, 25 So. Rep. 806, 77 Am. St. Rep. 43.

[69] Hunter *v.* Hallett, 1 Edw. 388; Burr *v.* Sherwood, 3 Bradf. 85.

[70] Crolius *v.* Roqualina, 3 Abb. Pr. 114.

A husband cannot recover for damage done to his wife's wearing apparel through the explosion of a gas meter, as under the Domestic Relations Law the wife may sue. Gilligan *v.* Consolidated Gas Co., 47 N. Y. Misc. Rep. 658, 94 N. Y. Supp. 273.

[71] Dewall *v.* Covenhoven, 5 Paige, 581; Beach *v.* Beach, 2 Hill, 260.

[72] Smith *v.* Sergent, 2 Hun, 107.

[73] Hall *v.* Hill, 2 Str. 1094.

[74] Jordan *v.* Hubbard, 26 Ala. 433, 439.

[75] Schouler's Dom. Rel. 112.

and the presumption would only be rebutted by his objection. Hence, declarations by her in the course of such service, and before any objection by him as to the terms of her employment, are competent against him as part of the *res gestæ*, when he sues for her wages.[76]

20. Actions Against Him Founded on Marital Obligation.

Evidence that he knew of and assented to purchases by her, which she had not legal capacity to make, renders him liable therefor.[77] Her post-nuptial admissions are not competent evidence in an action against him,[78] or against both,[79] for her ante-nuptial debt.

21. Actions Founded on Her Agency.

In applying the presumptions drawn from the marital relation, the agency of the wife, to order, on her husband's credit, articles reasonably suitable,[80] may be inferred from her being permitted to receive the articles in his house.[81] The housewife is presumed to be authorized to order domestic articles bought for their family.[82] If there is sufficient

[76] Hachman *v.* Flory, 16 Penn. St. 196.

The husband may agree with the wife by oral contract that she shall be entitled to her own earnings for service rendered to others. Gage *v.* Gage, 78 Wash. 262, 138 Pac. Rep. 886.

[77] Ogden *v.* Prentice, 33 Barb. 160, 2 Bish. Mar. W., § 82.

A husband is not liable for the torts of his wife. Hageman *v.* Vanderdoes, 15 Ariz. 312, 138 Pac. Rep. 1053, L. R. A. 1915, A. 491, Ann. Cas. 1915, D. 1197; Fadden *v.* McKinney, 87 Vt. 316, 89 Atl. Rep. 351; Tanzer *v.* Read, 160 N. Y. App. Div. 584, 145 N. Y. Supp. 708.

See New York Domestic Relations Law, § 57, and statutory provisions of the several states.

[78] Ross *v.* Winners, 1 Halst. (N. J.) 366; Churchill *v.* Smith, 16 Vt. 560.

[79] Lay Grae *v.* Peterson, 2 Sandf. 338.

[80] Lane *v.* Ironmonger, 1 New Pr. Cas. 105, s. c., 13 Mees. & W. 368.

[81] Rosc. N. P. 382 (13th ed. 535).

[82] 2 Whart. Ev., § 1256.

Where a wife ordered a dress which was deemed necessary, it was held that there was a presumption that she contracted as the husband's agent, in the absence of any contract on her part

other evidence tending to show authority, to go to the jury, there need not be evidence that the things were necessaries.[83] The extravagant character of the order may be considered by the jury as tending to rebut a presumption of agency.[84] No such presumption arises as to transactions had after she has left him voluntarily and causelessly.[85]

Where a wife is allowed by the husband to act for him,—as in the case of a wife receiving and caring for boarders in the household,[86] or the wife of a tradesman or mechanic occupying the shop premises, or shown to have been seen there on more than one occasion, appearing to conduct the business in his absence,—she is presumed to have authority to answer for him in matters of the like nature there.[87]

that she alone would be responsible, or proof that her husband had already supplied her with a similar article or cash to pay for it, or that he had given notice that he would not be responsible. May *v.* Josias, 159 N. Y. Supp. 820.

[83] Reid *v.* Teakle, 13 C. B. 627, s. c., 22 L. J. C. P. 161.

[84] Lane *v.* Ironmonger, 1 New Pr. Cas. 105, s. c., 13 Mees. & W. 368.

A complaint for articles sold as necessaries was held not to be demurrable on the ground that the articles in question were not strictly necessaries, that being a matter of defense, it was for the jury to decide whether or not the articles were suitable to the wife's station in life and as to the husband's ability to pay therefor. Wickstrom *v.* Peck, 155 App. Div. (N. Y.) 523, 140 N. Y. Supp. 570.

[85] Johnston *v.* Sumner, 3 H. & N. 261; Biffin *v.* Bignell, 7 H. & N. 877.

"When a wife takes up necessaries for the family her husband and herself, the primary presumption is that she is acting as his messenger or agent; the primary duty of furnishing necessaries being upon him. This presumption disappears when she separates from him unless the separation is shown to be justifiable." Marshall *v.* Hill, 59 Pa. Super. Ct. 481.

It seems that where a wife abandons the husband's home and refuses to live or cohabit with him, he is not responsible for her necessaries, unless expressly requested by him. Johnson *v.* Coleman, 13 Ala. A. 520, 69 So. Rep. 318.

[86] Riley *v.* Suydam, 4 Barb. 222. Hence her admission that nothing is due from the boarder, is competent against the husband. Ib.

[87] Such as to offer to settle a bill for goods delivered there. Clifford *v.* Burton, 1 Bing. 199.

When the husband pays an account for goods purchased by his

22. Defenses.

The presumption of his liability may be rebutted by evidence that the credit was given to her personally,[88] if she had capacity as a married woman to make such a contract.[89] Evidence that she said the articles were for herself,[90] and that she gave a note signed by herself,[91] or that the charge in plaintiff's books was against her only,[92] is not conclusive that the credit was given to her alone.

23. Action for Necessaries.

To hold the husband liable for necessaries furnished to his wife, unless the facts indicate her agency for him, his neglect or default must be shown.[93] The marriage is sufficiently

wife it amounts to a ratification upon which he can be held liable for future purchases. Bonwit, Teller & Co. *v.* Lovett, 102 N. Y. Supp. 800.

[88] Bentley *v.* Griffin, 5 Taunt. 356.

The fact that the bill for the goods sold was sent to the wife is not conclusive that the husband was not liable. Nagler *v.* L'Esperance, 126 N. Y. Supp. 655.

If at the time the goods were furnished to the wife, it was known to the seller that she was living apart from her husband the presumption that they were furnished on his credit is rebutted. Pickhardt *v.* Pratt, 55 N. Y. Misc. 231, 105 N. Y. Supp. 236.

Where the goods are supplied on the credit of the wife the husband cannot be held liable. Jones *v.* Gutman, 88 Md. 355, 41 Atl. Rep. 792.

Where it is shown that the business for which the husband ordered goods was his wife's business and it was so understood by the seller, the husband will not be liable. Griffith *v.* Hall, 70 Ill. App. 500.

[89] See Ogden *v.* Prentice, 33 Barb. 160; Cropsey *v.* McKinney, 30 Id. 47.

[90] Gates *v.* Brower, 9 N. Y. 205.

[91] Id.

[92] Jewsbury *v.* Newbold, 26 L. J. Exch. 247.

[93] Supervisors of Monroe *v.* Budlong, 51 Barb. 493; McGahey *v.* Williams, 12 Johns. 293, and cases cited. The legal theory of the action, however, is not negligence, but an implied promise to pay. See Cromwell *v.* Benjamin, 41 Barb. 558; Kelly *v.* Davis, 49 N. H. 176, s. c., 6 Am. R. 499. But see Mozen *v.* Pick, 3 Mees. & W. 481.

It must appear that the goods were sold on the husband's credit. Rosenfeld *v.* Peck, 149 N. Y. App. Div. 663, 134 N. Y. Supp. 392.

The husband is liable to an attorney for professional services

proved by evidence of cohabitation, and holding out, or repute.[94] Agency is inferable from the nature of articles such as are suitable and necessary for the wife of one in his station, and from their delivery at his abode without his objection.[95] But if he shows that the credit was given against his express dissent and notice thereof to plaintiff, the burden is on plaintiff to show not only that the things furnished were, in their nature, suitable and necessary, but also that the husband neglected his duty to provide supplies, and therefore they were needed in the particular case.[96]

rendered his wife in obtaining for her an increase in alimony allowed her by a decree of separation. Horn *v.* Schmalholz, 150 N. Y. App. Div. 333, 134 N. Y. Supp. 652.

An attorney suing for services rendered a wife in the matter of a separation suit by her, must show that the suit was either necessary or reasonable and proper. Hendrick *v.* Silver, 115 N. Y. Supp. 1093.

[94] See Ch. V, paragraphs 18 and 19. Cohabitation and holding out to plaintiff is conclusive (Johnstone *v.* Allen, 6 Abb. Pr. N. S. 306, 1 Greel. Ev., § 27), and the fact that plaintiff knew there had been no formal marriage, is irrelevant. Watson *v.* Threlkeld, 2 Esp. 637.

[95] Rosc. N. P. 382 (13th ed. 535).

When goods for which a wife has ordinarily authority to contract on the part of her husband, such as articles of dress, are ordered by her and delivered at his residence, where she also resides, *prima facie* the husband is liable. Jewsbury *v.* Newbold, 40 E. L. & Eq. 518, 26 L. J. Exch. 247. Followed in Noel *v.* O'Neill, 128 Md. 202, 97 Atl. Rep. 513.

Where the husband was sued for necessaries furnished his wife, a letter from the husband's attorney to the defendant's wife wherein it was stated that the husband had promised to supply the wife with necessaries was held admissible to establish the marital relation. Marshall *v.* Hill, 59 Pa. Super. Ct. 481.

[96] Keller *v.* Phillips, 39 N. Y. 351, affi'g 40 Barb. 391.

Where there is no evidence that the husband has supplied sufficient necessaries or that he has notified shop keepers not to extent credit, the presumption is that the wife acted as agent of the husband in purchasing the goods, and he is liable. Baccaria *v.* Landers, 84 N. Y. Misc. 396, 146 N. Y. Supp. 158.

Where a wife spends funds out of her separate estate to provide necessaries for herself and infant children she can recover from the husband. De Brauwere *v.* De Brauwere, 203 N. Y. 460, 96

The appropriate character of the articles cannot be proved by the opinion of a witness;[97] nor by what the defendant had been accustomed to purchase of a particular dealer;[98] but the facts as to her condition, and his station in life, and the character of the articles supplied by plaintiff, must be laid before the jury.[99] His leaving the State without making provision for her, is sufficient evidence of desertion; and plaintiff is not bound to prove that a demand was made on the husband to provide for her; but his refusal to do so may be inferred from the fact of desertion.[1] If it appear that he actually provided an allowance

N. E. Rep. 722, 38 L. R. A. N. S. 508.

No recovery can be had for medical services rendered a wife living apart from her husband, or for necessaries furnished to her, unless proof of the reason for the separation is given or proof that the husband is not providing sufficient means for her support. Robinson *v.* Litz, 123 N. Y. Supp. 362; Quinlan *v.* Westervelt, 65 N. Y. Misc. 547, 120 N. Y. Supp. 879; Farquharson *v.* Brokaw, 67 N. Y. Misc. 277, 124 N. Y. Supp. 476.

A husband may show in defense to an action for necessaries supplied to the wife that she was well and sufficiently supplied with similar articles. Lichtenstein Millinery Co. *v.* Peck, 59 N. Y. Misc. 193, 110 N. Y. Supp. 410; Oatman *v.* Watrous, 120 N. Y. App. Div. 66, 105 N. Y. Supp. 174.

[97] Merritt *v.* Seaman, 6 N. Y. 168.

But one who married a divorcee within the period in which the latter's remarriage was by statute prohibited and therefore void was held not to be liable for her dentist's bill. Rand *v.* Bogle, 197 Ill. App. 476.

[98] Scott *v.* Coxe, 20 Ala. 294.

[99] Lockwood *v.* Thomas, 12 Johns. 248.

The husband's pecuniary circumstances must be considered in deciding whether the amounts expended were reasonable. De Brauwere *v.* De Brauwere, 203 N. Y. 460, 96 N. E. Rep. 722, 38 L. R. A. N. S. 508.

Where the question of whether the goods were necessary or suitable to the wife's station of life is raised, it must go to the jury. Rosenfeld *v.* Peck, 149 N. Y. App. Div. 663, 134 N. Y. Supp. 392.

Necessaries are to be measured by a husband's pecuniary ability or resources which are an element to be considered on the trial where the character of the wife's expenditures is in question. De Brauwere *v.* De Brauwere, 203 N. Y. 460, 96 N. E. Rep. 722, 38 L. R. A. N. S. 508.

[1] Usher *v.* Holleman, 5 N. Y.

to her, plaintiff must show that the allowance was insufficient. A decree of divorce on the ground of her husband's cruelty is not admissible to show that the wife was justified in living apart from him, and therefore carried his credit with her.[2]

24. Defenses.

The marriage and appropriate character of the articles supplied having been shown, the burden is on defendant to rebut the presumption of agency of the wife;[3] general reputation is competent evidence[4] that they were living separate under articles providing for her support. But the receipts of third persons are not admissible in favor of defendant to show that he and his wife lived separate, and that he allowed her a separate maintenance, which was punctually paid. The persons who gave the receipts should be called.[5]

25. Causes of Separation.

On the question whether a separation of husband and wife was due to the wife's fault or the husband's, the declarations of the wife to any person, made in sufficiently immediate connection with the act of leaving to constitute a part of the *res gestæ* are admissible.[6] If the husband's previous cruelty

Leg. Obs. 99; Johnson *v.* Sumner, 3 Hurls. & N. 261, s. c., 27 L. J. Exch. 341.

[2] Belknap *v.* Stewart, 38 Neb. 304, 41 Am. St. Rep. 729, 56 N. W. Rep. 881.

[3] Keller *v.* Phillips, 39 N. Y. 351, affi'g 40 Barb. 391.

[4] Baker *v.* Barney, 8 Johns. 72.

[5] Cutbush *v.* Gilbert, 4 S. & R. 551.

Where husband and wife are living apart, the husband in defending an action against him for necessaries supplied to her is not required to prove that he gave notice to the plaintiffs not to supply the goods. Meyer *v.* Jewell, 88 N. Y. Supp. 972.

The fact that the husband kept the wife amply supplied with money to enable her to pay cash is a matter of defense. Rosenfeld *v.* Peck, 149 N. Y. App. Div. 663, 134 N. Y. Supp. 392.

[6] Thus the reasons she gave to her father the day of her return to him on leaving her husband, are competent. Johnson *v.* Sherwin, 3 Gray (Mass.), 374. See, also, Snover *v.* Blair, 25 N. J. L. (1 Dutch.) 94; Aveson *v.* Lord Kin-

is relied on as the case of separation, the contemporaneous expressions of affection and regard used by either toward the other in the other's presence,[7] or to a third person, in the absence of the other,[8]—and, on the same principle, the wife's complaint to her physician of the effects of her husband's violent treatment, and his advice thereupon that she should leave him,[9]—are competent; and so are her letters manifesting an affection inconsistent with such cruel treatment.[10] But in such, case, there must be independent evidence, beside the apparent date of the letter, showing that it was actually written at a period that would make the declaration relevant.[11] Where her infidelity is relied on as explaining the separation, her admissions of guilt have been held competent.[12] If a divorce is relied on, the decree itself is the best evidence; [13] and a decree dismissing the suit for divorce for want of proof is competent but not conclusive evidence that the cause alleged did not exist.[14]

On the question whether the provision he had made for her was sufficient, her declarations made while she was in the enjoyment of it, are competent in his favor.[15]

nard, 9 East, 188, Ellenborough, J.; Cattison *v.* Cattison, 22 Penn. St. 275. As to letters written during the absence, see Rawson *v.* Haigh, 2 Bing. 99.

The declarations of the husband made to third persons as to the reason for abandoning his wife are not admissible. Brison *v.* McKellop, 41 Okl. 374, 138 Pac. Rep. 154.

[7] See Edwards *v.* Crock, 4 Esp. 39.

The declarations of a wife to her husband tending to prove her adultery, are not admissible in evidence in an action by the husband for alienation of his wife's affections, as being of the *res gestæ*. Hanor *v.* Housel, 128 N. Y. App. Div. 801, 113 N. Y. Supp. 163.

[8] See Winter *v.* Wroot, 1 Moody & R. 404.

[9] See Gilchrist *v.* Bale, 8 Watts, 355.

[10] Houliston *v.* Smyth, 2 Carr. & P. 22.

[11] Id.

[12] Walton *v.* Greene, 1 Carr. & P. 621, disapproved in 1 Tayl. Ev. 673, § 695.

[13] Tice *v.* Reeves, 30 N. J. L. 314.

[14] Burlen *v.* Shannon, 3 Gray, 387.

[15] Jacobs *v.* Whitcomb, 10 Cush. 255. The introduction of declarations by one party may

III. ACTIONS BY A MARRIED WOMAN

26. Pleading in Her Action on Contract.

In her action on contract, an allegation of her coverture is not necessary in her complaint.[16] especially if the statute provides that she may sue and be sued as if sole.[17] And if her complaint does allege coverture, the contract will be presumed to have been within her capacity if it may have been so, without allegation of the facts on which her capacity depends.[18] Defendant's denial of the contract does not avail to raise the defense of her coverture when she made it.[19] But if her coverture is pleaded in defense or in abatement, and proved, then she must prove the facts showing her capacity to make the contract,[20] or to sue, as the case may require,—such as separate estate [21] or business,[22]—unless the contract itself raises a presumption that it was made by her husband's assent in a case where it would be valid at common law.[23] Where defendant sets up a contract made by her, as a counterclaim against her, she must allege

justify the admission of declarations of the other in the same conversation. See Sherwood *v.* Titman, 55 Penn. St. 77.

[16] Peters *v.* Fowler, 41 Barb. 467.

It is not necessary for a married woman to allege in her declaration that the subject-matter of the suit relates to her separate estate and that she is a married woman. Fiske *v.* Bigelow, 9 D. C. 427; Hubert *v.* Fera, 99 Mass. 198, 96 Am. Dec. 732; Young *v.* Hart, 101 Va. 480, 44 S. E. Rep. 703; Smith *v.* Dunning, 61 N. Y. 249.

[17] N. Y. Code Civ. Pro., § 450; Hier *v.* Staples, 51 N. Y. 136; Frecking *v.* Rolland, 53 Id. 422.

[18] Nininger *v.* Commissioners of Carver, 10 Minn. 133.

[19] Westervelt *v.* Ackley, 62 N. Y. 505, affi'g 2 Hun, 258, s. c., 4 Supm. Ct. (T. & C.) 444.

[20] See Nash *v.* Mitchell, 3 Abb. New Cas. 171. And, on the same principle, if a wife sues alone, not by authority of the statute, but by virtue of the common-law rule, where her husband has left the State and so utterly deserted her and renounced his marital rights as to enable her to contract as if sole, the burden of proof is upon the one alleging the validity of the contract to establish that she is within the exception. See Gregory *v.* Pierce, 4 Metc. 478.

[21] Paragraph 9.

[22] Paragraph 16.

[23] Borst *v.* Spelman, 4 N. Y. 284.

coverture, for coverture as a defense, even if proved, is not available unless pleaded.[24]

27. Evidence of the Contract.

The making of a note,[25] mortgage,[26] bill of lading,[27] or other security,[28] to a married woman, is *prima facie* evidence against the contracting party [29] of her title and right to sue thereon.

The husband's receipt for his wife's separate property will not discharge a third person from liability to the wife, unless upon the ground of agency.[30]

28. Her Action for Tort.

In a married woman's action for injuries to her person, to enable her to recover for disqualification to labor, etc.,

[24] Westervelt *v.* Ackley, 62 N. Y. 505.

If the defense of coverture is not pleaded it cannot be considered. Chadron Banking Co. *v.* Mahoney, 43 Neb. 214, 61 N. W. Rep. 594.

If resort is had to the defense of coverture notice in writing must be filed at the time of pleading. Monson *v.* Beecher, 45 Conn. 299.

Where a tradesman sells and delivers goods to a married woman, and then sues her for non-payment, she will not be allowed to prove that she is a married woman and that she bought the goods for her husband and family unless she pleads such defense in her answer. Minners *v.* Smith, 40 N. Y. Misc. 648, 83 N. Y. Supp. 117.

[25] Borst *v.* Spelman, 4 N. Y. 284. And the fact that the money was loaned by her husband does not rebut this presumption. Tooke *v.* Newman, 75 Ill. 215, 217.

[26] Wolfe *v.* Scroggs, 4 Abb. Ct. App. Dec. 634.

[27] Thus a carrier who gives receipt to a married woman is held estopped from denying her title. Chicago, &c., R. R. Co. *v.* Shea, 66 Ill. 471, 480.

[28] Compare Rouillier *v.* Wernicki, 3 E. D. Smith, 310.

[29] And against her husband if he assented to her so doing. The fact that the plaintiff, a *feme covert*, had for some years lived apart from her husband, who did nothing for her support, is evidence from which a jury may infer that the contract sued upon was made by her on her separate account. Burke *v.* Cole, 97 Mass. 113. Whether evidence of other transactions between her and the defendant is competent to show that she dealt on her separate account, see Fowle *v.* Tidd, 15 Gray (Mass.), 94.

[30] Schouler's Dom. Rel. 233.

she must show the existence of a separate business; otherwise the damages for inability to labor belong to her husband.[31]

[31] Filer *v.* N. Y. Central R. R. Co., 49 N. Y. 47, 56. "Presumptively, damages for negligently diminishing the earning capacity of a married woman belong to her husband, and, when she seeks to recover such damages, the complaint must contain an allegation that for some reason she is entitled to the fruits of her own labor; or, if she seeks to recover damages for an injury to her business, she must allege that she was engaged in business on her own account, and by reason of the injury was injured therein as specifically set forth." Uransky *v.* Dry Dock, &c., R. Co., 118 N. Y. 304, 308, 23 N. E. Rep. 451.

Where a married woman receives personal injuries in consequence of the negligence of another, two causes of action arise: one to her for the pain and suffering to which she is thereby subjected, and the other to the husband for the loss to him of her service and society and the expense incurred by him in the treatment of her injuries. Wallis *v.* Westport, 82 Mo. App. 522; Gross *v.* Gross, 70 W. Va. 317, 73 S. E. Rep. 961; Jaynes *v.* Jaynes, 39 Hun, 40.

In a suit by a married woman for personal injuries no recovery can be had by her for the diminution of her physical ability to perform the ordinary duties of the household. Norfolk Ry., etc., Co. *v.* Williar, 104 Va. 679, 52 S. E. Rep. 380.

A married woman may recover for her disqualification to attend to her business affairs or transactions. Normile *v.* Wheeling Traction Co., 57 W. Va. 132, 49 S. E. Rep. 1030, 68 L. R. A. 901.

The husband is allowed to recover for the loss of the wife's services, and she cannot include in her damages any loss of time wherein she might have rendered him service. But that will not prevent her from recovering for all those things which injure her, apart from a mere loss of service and society to which her husband is entitled. Physical disability is a personal loss apart from being a deprivation of a money-earning power. Cullar *v.* Missouri, etc., R. Co., 84 Mo. App. 340; Jordan *v.* Middlesex R. Co., 138 Mass. 425.

Where a married woman has a business of her own, the impairment of her ability to work in the business is a proper element of her damages for the injury which caused it. Perrigo *v.* St. Louis, 185 Mo. 274, 84 S. W. Rep. 30.

In a suit by a married woman for personal injuries she cannot recover for her loss of time unless it be shown that she has a business or employment apart from her husband. Denton *v.* Ordway, 108 Iowa, 487, 79 N. W. Rep. 271.

Where a married woman who followed no separate or independent employment, sues for personal injuries, her husband, and not she, is entitled to recover for med-

So to enable her to recover expenses of medical attendance, etc., she must show that they were paid from or charged upon her separate property.[32] Where she is living apart

ical services not previously paid for by her, and the value of the time lost by reason of the injuries received. Elenz *v.* Conrad, 115 Iowa, 183, 88 N. W. Rep. 337.

Damages resulting from personal injuries to the wife, do not fall into the community, but inure to her separate benefit, and the action for their recovery should be brought by the wife, with the usual authorization of the husband or court. Martin *v.* Derenbecker, 116 La. Ann. 495, 40 So. Rep. 849.

In an action by husband and wife to recover damages for injuries received by the wife, the jury cannot bring in a verdict in favor of the wife alone, but must make it run to both husband and wife. Giffen *v.* Lewiston, 6 Idaho, 231, 55 Pac. Rep. 545.

[32] Moody *v.* Osgood, 50 Barb. 628.

Charges for medical services whether paid or not are a legitimate constituent of the damage sustained by a married woman in a suit for personal injuries and she may recover whether her husband might have been liable for such charges or not. Adams Express Co. *v.* Aldridge, 20 Colo. App. 74, 77 Pac. Rep. 6.

A married woman may recover the expenses of medical attendance in an action for personal injuries. West Chicago St. Ry. Co. *v.* Carr, 170 Ill. 478, 48 N. E. Rep. 992.

A married woman, who is living with her husband, cannot recover for medical services and nursing made necessary for personal injuries sustained by her. State *v.* Detroit, 113 Mich. 643, 72 N. E. Rep. 8.

In the absence of an express contract on the part of a married woman to pay for medical treatment of her personal injuries, her husband alone can recover for such expense. McLean *v.* Kansas City, 81 Mo. App. 72.

A married woman cannot recover the costs of her cure of personal injuries unless it be averred and proved that she paid such costs out of her separate estate. Atlantic, etc., R. Co. *v.* Ironmonger, 95 Va. 625, 29 S. E. Rep. 319.

An instruction to the jury authorizing the assessment of damages on account of medical treatment in an action by a married woman is erroneous. Efroymson *v.* Smith, 29 Ind. App. 451, 63 N. E. Rep. 328.

A married woman who lives with her husband cannot recover for medical services rendered to her for injuries sustained through negligence of defendant railway. Kimmel *v.* Interurban St. Ry. Co., 87 N. Y. Supp. 466.

A married woman, living with her husband, and not possessed of

from her husband, it is not permissible to show that he contributes nothing towards her support.[33]

IV. ACTIONS AGAINST HER

29. Pleading in Action Against Her on Contract.

The complaint in an action upon a contract executed by a married woman, whether against her alone, or her husband with her,[34] need not allege her coverture, nor that the contract was executed in her business, or for the benefit of her separate estate,[35] even if it appear by the contract that she was married; [36] nor need the complaint ask judgment charging her separate estate, but the complaint may be framed as if defendant was a *feme sole*.[37] Her coverture is matter of

any private means or engaged in any separate business cannot recover expenses for medical attendance necessitated as the result of injuries received through the negligence of a street railroad company. Sweeny *v.* Union Ry. Co., 31 N. Y. Misc. 472, 64 N. Y. Supp. 453.

[33] Burleson *v.* Village of Reading, 110 Mich. 512, 68 N. W. Rep. 294.

[34] Broome *v.* Taylor, 13 Hun, 341.

[35] Hier *v.* Staples, 51 N. Y. 136; Frecking *v.* Rolland, 53 Id. 422, rev'g 33 Super. Ct. (J. & S.) 499.

In an action against a married woman coverture need not be pleaded. Dickey *v.* Kalfsbeck, 20 Ind. App. 290, 50 N. E. Rep. 590.

A declaration against a married woman which does not aver that she owns a separate estate is demurrable. Hirth *v.* Hirth, 98 Va. 121, 34 S. E. Rep. 964.

A complaint which fails to allege that the agricultural supplies furnished to a married woman were for the benefit of her separate estate is demurrable. Compare Simon *v.* Sabb, 56 S. C. 38, 33 S. E. Rep. 799.

[36] Schofield *v.* Hustis, 9 Hun, 157.

In an action against a married woman it is not necessary to allege in the complaint that she is such. Smoot *v.* Judd, 184 Mo. 508, 83 S. W. Rep. 481.

[37] This is the rule under the N. Y. statute, allowing her to sue and be sued as if sole. It has elsewhere been held that if coverture appear by the pleadings, it must appear that she has a separate property or business, such that she had power to contract; Jonz *v.* Gugel, 26 Ohio St. 529; and that the consideration of the contract was such as to sustain it; Pollen *v.* James, 45 Miss. 132; Griffin *v.* Ragan, 52 Id. 81; and see Melcher *v.* Kuhland, 22 Cal. 522; and her intent

defense to be pleaded by defendant if available; [38] and evidence that she was a married woman and could not contract, is not admissible under a denial of the contract.[39] The plaintiff may prove the contract as alleged, and rest,[40] unless defendant has pleaded coverture and the fact appears by plaintiff's case. If so, or if defendant thereupon proves coverture under his answer, the burden is cast upon the plaintiff to prove a case within the statute.[41]

30. Evidence of the Contract.

If coverture is pleaded as a defense, the proof of the contract involves two elements,—1, the fact that it was made; and 2, her power to make it; and the facts showing her power must be affirmatively proved on the trial,[42] as well as the making of the contract itself, although they need not be alleged in the complaint.

31. The Making of the Contract.

The rules of proof, elsewhere stated as applicable to the contracts of other persons, generally apply to the fact of contract by a married woman, whether in respect to implied contracts,[43] parol agreements,[44] or to parol evidence to vary a writing.[45] To establish a contract made through the agency of the husband, it may, as in the case of other persons, be shown to be within his express power,[46] or within the authority implied from her having held him out,[47] or suf-

to charge separate property. Shannon *v.* Bartholomew, 53 Ind. 54.

[38] Smith *v.* Dunning, 61 N. Y. 249; Freckling *v.* Rolland (above).

[39] Westervelt *v.* Ackley, 62 N. Y. 505, affi'g 2 Hun, 258, s. c., 4 Supm. Ct. (T. & C.) 444.

[40] Downing *v.* O'Brien, 67 Barb. 582.

[41] Id.; Nash *v.* Mitchell, 3 Abb. New Cas. 171; Tracy *v.* Keith, 11 Allen (Mass.), 214.

[42] Nash *v.* Mitchell, 3 Abb. New Cas. 171.

[43] See Bodine *v.* Killeen, 53 N. Y. 93; and paragraph 6 (above).

[44] See Fowler *v.* Seaman, 40 N. Y. 592.

[45] Galusha *v.* Hitchcock, 29 Barb. 193.

[46] Nash *v.* Mitchell (above).

[47] Bodine *v.* Killeen (above).

fered him to assume the power, or from her having recognized his acts.[48] The presumption of agency derived from his possession of an instrument executed by her is limited by the terms of the instrument.[49] On the question whether the other party gave credit to her or to him, entries by such other party in account charging or crediting sums to either, are not evidence in his own favor, unless part of the *res gestæ* of an act properly in evidence.[50] They are competent as against him; but are not conclusive that the credit was given to the one charged.[51]

The appropriate evidence of her power to contract,—viz., the existence of separate business or estate,—has already been explained.[52] Whether anything more need be shown is disputed.

32. The English Rule as to Charging Separate Estate.

The rule now applied by the English courts, and in several of our States,[53] is, that the separate estate of a married

[48] Wilcox & Gibbs Co. *v.* Elliott, 14 Hun, 16.

[49] Thus a power to sign and indorse checks, etc., does not authorize him to charge her separate estate by a postdated check, when she has not the funds in bank. Nash *v.* Mitchell (above). And her deed expressing a pecuniary consideration, he is not impliedly authorized to deliver, without payment of the consideration, and for his own benefit. Bank of Albion *v.* Burns, 46 N. Y. 170.

[50] Peters *v.* Fowler, 41 Barb. 467. But see pp. 297, 302 of this vol.

[51] Allen *v.* Fuller, 118 Mass. 402. On the question whether goods were bought by the husband, deceased, or the wife, who had a separate business, the executor cannot give in evidence that the wife, after the death, appropriated the goods to her own use. Johnson *v.* Hawkins, 5 Reporter, 184. So the fact that plaintiff had brought a prior suit for the same against the defendant and her husband jointly, which has been discontinued, is competent; but the plaintiffs may explain this by showing that the husband was joined through an error of their attorney. Andrews *v.* Matthews, 6 Cent. L. J. 156.

[52] Paragraphs 9 to 17.

[53] This rule has been to a greator or less extent, or with some qualification, recognized in *Kansas* (Deering *v.* Boyle, 8 Kan. 529; Wicks *v.* Mitchell, 9 Id. 80); *Maryland* (Hall *v.* Eccleston, 37 Md. 510; and see Conn *v.* Conn, 1 Md. Ch. Decis. 212); *Missouri* (Metro-

woman is answerable for all her debts and engagements, to the full extent to which it is subject to her own disposal; [54] and this rule, formerly regarded as matter of presumption, resting on the idea that the act of contracting is *prima facie* evidence of intent to charge her estate,[55] is now applied inflexibly to written obligations, as a rule of law; in other words, the making of a written contract by a married woman having power to charge a separate estate is deemed conclusive evidence of intent to charge it.[56]

33. The American Rule.

But the general rule, which in the absence of a statute prevails in the United States,[57] is, that to charge the separate estate of a married woman with a debt not contracted for its benefit,—as, for instance, where she contracts as

politan Bank *v.* Taylor, 62 Mo. 338); *Ohio* (Phillips *v.* Graves, 20 Ohio St. 390); *Wisconsin* (Todd *v.* Lee, 15 Wisc. 365, 16 Id. 480).

In *Mississippi*, it has been held that the intent must appear, but need not be expressed (Boarman *v.* Groves, 23 Miss. 280). In *Alabama* (Brame *v.* McGee, 46 Ala. 170); *Arkansas* (Dobbin *v.* Hubbard, 17 Ark. 189, 196); and *Kentucky* (Lillard *v.* Turner, 16 B. Mon. 374; Burch *v.* Breckinridge, 16 Id. 482), the English rule has been applied in the case of bills in equity to charge a separate estate held under the rules of equity; and not under the statute.

[54] As stated by HOAR, J., in Willard *v.* Eastham, 15 Gray, 328, approved by REDFIELD, J., in 1 Am. L. Reg. N. S. 665, note.

[55] Johnson *v.* Gallagher, 7 Jur. N. S. 273; Schouler's Dom. Rel. 228.

[56] Metropolitan Bank *v.* Taylor, 62 Mo. 338; Wicks *v.* Mitchell, 9 Kan. 80.

[57] This rule has been recognized in *California* (Maclay *v.* Love, 25 Cal. 367); *Connecticut* (Platt *v.* Hawkins, 43 Conn. 139); *Illinois* (Williams *v.* Hugunin, 69 Ill. 214; Furness *v.* McGovern, 78 Id. 337); *Indiana* (Kantrowitz *v.* Prather, 31 Ind. 92; Smith *v.* Howe, 31 Id. 233; Hodson *v.* Davis, 43 Id. 258); *Massachusetts* (Willard *v.* Eastham, 15 Gray, 328); *New Jersey* (Armstrong *v.* Ross, 20 N. J. Eq. 109); *Tennessee* (Letton *v.* Baldwin, 8 Humph. 209, 10 Id. 552). In *Missouri*, where it was once approved (Miller *v.* Brown, 47 Mo. 504, s. c., 4 Am. R. 345), it has since been abandoned. In *Alabama*, the English rule has been held not applicable where the consideration was purely for the benefit of the husband (Nunn *v.* Givhan, 45 Id. 370, 375).

surety,—there must be direct evidence of an intention to charge it. Her mere making of a note or other obligation is not enough; and if such obligation be made, the intent to charge must be expressed therein, or in a connected instrument; [58] and if not so expressed, parol evidence is not competent to prove the intent to charge.[59] Evidence that the husband received the consideration of the obligation, and used it in managing his and the wife's property, is not enough.[60] Where the contract is by parol, the intent to charge may be proved by parol, if no specific lien is claimed;[61] and it may be shown by such circumstances as her having an estate, on the faith of which she was trusted, and by her promise to pay as soon as she received income therefrom.[62] But in the absence of other evidence of an intent to charge, it will not be inferred from her subsequent admissions of liability.[63]

34. —Direct Benefit to Separate Estate.

If it appears that she had a separate business, and the contract was made in the course and pursuit of it, this is

[58] Sherwood *v.* Archer, 10 Hun, 73.

A promissory note made by a married woman does not raise a presumption either of consideration or of her intention to bind her separate estate; the burden of proof is upon the holder of the note to show that she intended to bind her separate estate. Farmers' Bk. *v.* Boyd, 67 Neb. 497, 93 N. W. Rep. 676.

[59] Yale *v.* Dederer, 18 N. Y. 265, 22 N. Y. 450; Willard *v.* Eastman, 15 Gray, 328; Manhattan Brass, &c., Co. *v.* Thompson, 58 N. Y. 80. It has been held elsewhere, that if there is a written contract by the married woman, parol evidence of her declarations at the time of its execution that it was not to bind her separate property is inadmissible (7 B. Mon. 293); and so of her testimony that she did not intend it to, and equally of that of the creditor that at the time he was ignorant that she had a separate estate. Kimm *v.* Weippert, 46 Mo. 532, s. c., 2 Am. R. 541.

[60] Yale *v.* Dederer, 68 N. Y. 329.

[61] Maxon *v.* Scott, 55 N. Y. 247; Baker *v.* Lamb, 11 Hun, 519. *Contra*, Shorter *v.* Nelson, 4 Lans. 114.

[62] Conlin *v.* Cantrell, 64 N. Y. 217.

[63] Hansee *v.* De Witt, 63 Barb. 53.

enough. If it appears that she had a separate property, and the contract was made for its direct benefit, in the legal sense, this is enough. The fact that such kind of contracts may in the ordinary course of affairs be made for the benefit of an estate, is not enough, for the court cannot presume that a simple contract, with nothing on its face to indicate the fact, was made for the benefit of her separate estate;[64] but it must appear either that the consideration was actually applied to her estate,[65] or came actually to her hands, or to those of an agent authorized to receive it on her behalf.[66] The fact that the consideration came to her hands is presumptive evidence that the contract was for the benefit of the estate; and the production of her personal receipt,[67] or of her order to pay a third person, with proof of payment to him,[68] is presumptive evidence of this; and proof of payment to her husband, if he were shown to be her general financial agent, might also be *prima facie* enough.[69] Such

[64] Nash *v.* Mitchell (above).

An endorsement on a promissory note by a married woman to the effect that it is made for the benefit of her separate estate, will not sustain a recovery against her unless it be shown that the transaction was necessary and convenient for the use and enjoyment of her separate estate, or the carrying on of her separate business, or in relation to her personal services. Ritter *v.* Bruss, 116 Wis. 55, 92 N. W. Rep. 361.

[65] As, for instance, by exonerating it from an incumbrance, or by a purchase.

The words: "I hereby bind my separate estate" endorsed and signed by a married woman upon a promissory note are sufficient to make the note a charge upon her estate, whether her liability on the note is that of a surety or not. National Exchange Bk. *v.* Cumberland Lumber Co., 100 Tenn. 479, 47 S. W. Rep. 85.

In order to recover on a contract against a married woman, it must be shown that it was made for her separate estate. Darwin *v.* Moore, 58 S. C. 164, 36 S. E. Rep. 539.

[66] See Williamson *v.* Dodge, 5 Hun, 497, 499; White *v.* McNett, 33 N. Y. 371.

[67] Treadwell *v.* Hoffman, 5 Daly, 210.

[68] Prendergast *v.* Borst, 7 Lans. 489.

[69] White *v.* McNett, 33 N. Y. 371. But a husband's declarations that she received it for the use of her separate estate, are not competent, in the absence of evidence that he was authorized to

evidence may be rebutted by her testimony, or other evidence, that the consideration neither came to her hands nor those of her authorized agent, nor was applied to the use of her estate.[70] But if once received by her, the fact that she handed it to her husband, who misappropriated it, does not impair her liability.[71] And, generally, the fact that in the particular case the contract proved the reverse of beneficial, in a business sense, is not material.[72] The circumstance that work was done or materials were used for the improvement of her estate, if shown to have been within her knowledge, does not raise a conclusive presumption against her,[73] but will sustain a verdict. Evidence that the land belonged to her and her husband as tenants in common, does not impair her liability.[74] If such a claim rests on an allegation of ratification, it must appear,—1. That credit was not given to the husband alone. 2. That she, with full knowledge that the materials, etc., were received unpaid for, and used for her property to the enhancement of its value, acquiesced in such use.[75]

35. Action Against Her for Necessaries.

To charge her or her separate estate for family necessaries purchased while residing with her husband, there must be evidence—1. Of her separate estate or business. 2. That the credit was given to her. 3. That she intended to

make such declarations. Deck *v.* Johnson, 1 Abb. Ct. App. Dec. 497.

[70] While *v.* McNett (above). Where the contract was her joint obligation with her husband, evidence that her authorized messenger received the money, but immediately delivered it to the husband, and that the wife never received it, is sufficient to rebut the presumption of benefit to her estate. Prendergast *v.* Borst, 7 Lans. 489.

[71] Smith *v.* Kennedy, 13 Hun, 9.

[72] Thus she is liable for her attorney's fees, though the litigation was unsuccessful. Owen *v.* Cawley, 36 N. Y. 600, affi'g 13 Abb. Pr. 13.

[73] Westgate *v.* Munroe, 100 Mass. 227, 2 Bish. Mar. W., § 218.

[74] Burr *v.* Swan, 118 Mass. 588. But both may be held jointly liable. Verill *v.* Parker, 65 Me. 578.

[75] Miller *v.* Hollingsworth, 36 Iowa, 165.

charge her estate. 4. That the goods were suitable and necessary.[76]

36. Action Against Her for Fraud.

The wife can take no advantage by a contract fraudulently made by her husband as her agent, in the use of her separate property;[77] and such a fraud by her agent may be imputed to her, by the rules of evidence applicable to transactions of principal and agent.[78]

[76] Wells' Sep. Prop. of M. W. 455; Demott *v.* McMullen, 8 Abb. Pr. N. S. 335; Smith *v.* Allen, 1 Lans. 101. And see Schouler's Dom. Rel. 79.

The law presumes that the husband supports the family, he being under a legal duty to do so, and consequently a wife's personal estate cannot be made liable for necessaries supplied to the family in the absence of any proof of an extension of credit given to her on account of her estate. Anderson *v.* Davis, 55 W. Va. 429, 47 S. E. Rep. 157.

In order to charge the wife for necessaries there must be evidence of her separate estate and that the goods were necessaries. Moran *v.* Montz, 175 Mo. App. 360, 162 S. W. Rep. 323.

A married woman may by express agreement charge herself personally for necessaries supplied. Valois *v.* Gardner, 122 N. Y. App. Div. 245, 106 N. Y. Supp. 808.

In order to recover against a married woman for necessaries furnished to her, it must be proved that the credit was given to her acting in her own behalf and not as agent for her husband. Blendermann *v.* Wray, 62 N. Y. Misc. 606, 115 N. Y. Supp. 1081.

When the liability of the wife's separate estate is claimed, the necessity for the transaction by which it is proposed to bind it must be found by the jury from all the evidence. Wright *v.* Merriwether, 51 Ala. 183.

[77] Adams *v.* Mills, 60 N. Y. 533, affi'g 38 Super. Ct. (J. & S.) 16.

[78] Vanneman *v.* Powers, 7 Lans. 181. Otherwise if the property was not her separate estate. Id. 56 N. Y. 42; Du Flon *v.* Powers, 14 Abb. Pr. N. S. 395.

Where money is loaned to a married woman on representations made by her husband in her presence, her separate estate will be bound to answer for it. McVey *v.* Cantrell, 70 N. Y. 295, 26 Am. Rep. 605.

If a married woman obtained money representing that it was for herself individually, and for her separate estate, she will not be heard to defend on the ground that her husband persuaded her to take this course, and to obtain the money for him. National

37. Husband's Coercion of Wife.

A married woman suing for the cancellation of a written agreement as procured by duress or coercion has the burden of establishing that it was so procured.[79] When sued for a tort she is exonerated if she proves that she committed it by coercion of her husband. Physical compulsion need not be shown, but moral coercion, the immediate pressure of authority, and intimidation; and in this two elements are involved,—1. His presence,[80] and 2, his direction.[81] His direction is not alone enough.[82] If his presence is shown, his

Lumberman's Bk. *v.* Miller, 131 Mich. 564, 91 N. W. Rep. 1024, 100 Am. St. Rep. 623.

[79] Stanley *v.* Dunn, 143 Ind. 495, 42 N. E. Rep. 908.

The burden of proving that an ante-nuptial contract was procured by undue influence of the husband is upon the wife. Oeseau *v.* Oeseau, 157 Wis. 255, 147 N. W. Rep. 62.

If the wife executes a note for the accommodation of her husband she cannot later have the transaction declared void against a *bona fide* holder for value, on the ground that the note was obtained by false misrepresentations of the husband. Burr *v.* Tobey, 182 Ill. App. 228.

A court of equity will entertain a suit by the wife to cancel a separation agreement alleged to have been signed by her under duress. Johnson *v.* Johnson, 150 N. Y. App. Div. 306, 134 N. Y. Supp. 1081.

[80] It must appear that he was present at the time or near enough to keep her under his immediate influence and control. Commonwealth *v.* Munsey, 112 Mass. 289, and cases cited. On the question of coercion in a particular act in his absence, evidence of similar acts done by her in his presence and for the same purpose, is competent. Handy *v.* Foley, 121 Mass. 259. If he was present at some, only, of a series of acts, the presumption that the influence extended to all may be negatived by the circumstances. State *v.* Cleaves, 59 N. H. 298; and see Schouler's Dom. Rel. 104.

[81] Both are necessary. Cassin *v.* Delaney, 38 N. Y. 178.

Coercion is presumed from the presence of the husband but such presumption is only *prima facie* and may be rebutted. Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. Rep. 518, 95 Am. St. Rep. 789.

The statement in 2 Kent Com. 149, that if the wife commits a tort "in his company or by his order," he alone is liable, is too general, and must be limited to the case of her acting by his coercion. Handy *v.* Foley, 121 Mass. 259, 23 Am. Rep. 270.

[82] Id. *Contra*, Reeve, Dom. Rel.

direction or command is presumed, but this presumption is not conclusive.[83] The presumption of coercion may be rebutted by proof that she instigated the tort, or by other circumstances showing her independent and free concurrence.[84]

150; and see 2 Bish. Mar. W., § 257.

To exempt the wife from liability for her tortious acts, the presence and the command of the husband must concur. O'Brien *v.* Walsh, 63 N. J. Law, 350, 43 Atl. Rep. 664.

[83] Cassin *v.* Delaney (above); Schouler's Dom. Rel. 101. It is now regarded as a slight presumption, and may be rebutted by slight circumstances. APPLETON, C. J., State *v.* Cleaves, 59 Me. 298, s. c., 8 Am. R. 422. Formerly it was held conclusive. 1 Greenl. Ev., § 28, 3 Id. 3.

It seems that it was formerly the rule that a wife acted under the compulsion of her husband when in his presence; but in some states, as for example, Kansas, Arkansas, Nebraska and Georgia this presumption has been abolished either by court decision or by statute. State *v.* Seahorn, 166 N. C. 373, 81 S. E. Rep. 687.

See also Commonwealth *v.* Dwyer, 29 Pa. Co. Ct. 73.

Until 1915 a husband in Missouri was liable for his wife's torts whether or not committed in his presence. Miller *v.* Busey et al., 186 S. W. Rep. (Mo.) 983.

"Whenever a woman acts in the presence of her husband or when her husband is so near as that his presence might be felt by her, the presumption is that she acts by his coercion. But that presumption is not a conclusive one; it may be rebutted by proof to the contrary." Commonwealth *v.* Dwyer, 29 Pa. Co. Ct. 73.

[84] 2 Whart. Ev., § 1267, citing Marshall *v.* Oakes, 51 Me. 308.

The wife is jointly liable with her husband for torts committed by her, and her separate property may be subjected to a judgment rendered against her for her torts. Magerstadt *v.* Lambert, 39 Tex. Civ. App. 472, 87 S. W. Rep. 1068.

The presumption of coercion is simply a presumption which may be rebutted by evidence, and a wife may be held responsible, either criminally or civilly, for assaults committed of her own free will and while actually under no coercion from her husband, even although he be present and join therein. Ferguson *v.* Brooks, 67 Me. 251; Shane *v.* Lyons, 172 Mass. 199, 51 N. E. Rep. 976, 70 Am. St. Rep. 261.

CHAPTER VII

ACTIONS AFFECTING PARTIES IN A JOINT OR COMMON INTEREST OR LIABILITY

1. The General Principle.

Where there are two or more plaintiffs, or two or more defendants, alleged to have a joint or common interest or liability, the general principle by which the admissibility of evidence affecting a part of them is to be tested is this: If the action or proceeding is one in which a separate judgment can be given against one irrespective of his fellows, evidence competent as against him is admissible, irrespective of the state of the evidence as against his fellows;[85] and the court should instruct the jury if necessary, that it is competent only as against him, and will not sustain a verdict against his fellows, unless connection is shown.[86] If the case

[85] Eaton *v.* Cates, 175 S. W. Rep. (Mo.) 950. Thus, if the action is against maker and indorser, or on a several bond, or a joint and several bond, or against two for a tort, the admissions and declarations of either defendant are competent against him, if a separate judgment against him is sought. But if the action is unalterably joint, or an action *in rem*, or a proceeding in the nature of such an action—as usually in case of probate of a will—other evidence to connect the other parties in interest with the declarant may be requisite.

[86] It has been held, however, that where the admission or declaration is admissible against one of the parties only, it is necessary for the other parties to ask for instructions, restricting the admis-

is one in which a separate judgment cannot be had,[87] evidence competent against any one is admissible in the following cases: 1. Where the others have been defaulted,[88] or their liability is conceded on the trial.[89] 2. Where there is other evidence against them on the same point, sufficient to go to the jury,[90] or counsel undertake to adduce such evidence in due course.[91] 3. Where evidence of the acts, admissions or declarations of one party is accompanied with other independent evidence that his relation to the others was such as to render it just to impute his conduct to them.[92]

sion or declaration to the party making it. Williams *v.* Taunton, 125 Mass. 34; Polly *v.* McCall, 37 Ala. 20.

[87] Under the new procedure, separate judgment may be had in favor of one of two plaintiffs, if he has a good cause of action, and against the other who has not. Simar *v.* Canaday, 53 N. Y. 298, and see Quinn *v.* Martin, 54 Id. 660; and so also against one of two defendants sued, even on an alleged joint obligation, if he is proved to be alone liable, and in favor of the other who is not. Brumskill *v.* James, 11 N. Y. 294. But in such cases the evidence may be excluded on the ground of substantial variance and surprise. "Judgment may be given for or against one or more plaintiffs, and for or against one or more defendants. It may determine the ultimate rights of the parties on the same side, as between themselves; and it may grant, to a defendant, any affirmative relief, to which he is entitled."

N. Y. Code Civ. Pro., § 1204. See also § 1205, as to when a several judgment may be taken.

[88] Paragraph 3 (below).

[89] If one defendant offers evidence charging the other with joint liability, the other must object if it is not competent against him. Hermanos *v.* Duvigneaud, 10 La. Ann. 114.

[90] The successive acts or declarations of each are equivalent to a joint declaration by all. Haughey *v.* Stricklen, 2 Watts & S. 411. So, for another instance, where notice to both of two owners must be proved, evidence of actual service on one having been given, the admission of the other that he had notice would be competent.

[91] Thompson *v.* Richards, 14 Mich. 172, 187; Forsyth *v.* Ganson, 5 Wend. 558.

[92] See paragraphs 5, &c. (below). These rules are subject to some qualification and peculiar applications in case of such distinctive classes of persons as Heirs and devisees, Husband and wife, Partners, &c., elsewhere treated; and

2. Joint Debtors.

Where plaintiff undertakes to prove a joint liability, if all the defendants are before the court, he must prove not only the contract, but the connection of each defendant in the tie which sanctions a joint liability; and this connection must be proved as to each defendant, by evidence competent as against him. The fact that they are co-defendants does not allow him to prove the connection of one, by the declarations of another. The declaration of one that he was a partner, or otherwise jointly connected with the others, is not to be excluded because it asserts the liability of the others; [93] but its only effect is as against him, and there must be other evidence with a similar effect against each of the others. When the complaint alleges that the contract was made by two defendants jointly, and the proof shows a contract by one of them only, there is a variance.[94]

in all cases, of course, admissions and declarations may be competent against another than the declarant, by the rule of *res gestæ*, or if made in his presence, or if made in the course of duty, or against interest by a person since deceased, or may be received to discredit the declarant as a witness, or on other such special grounds.

[93] Lenhart *v.* Allen, 32 Penn. St. 312.

"When *prima facie* evidence of the partnership has been given the declarations and acts of the several proven partners connected with the partnership business while it is being carried on are competent evidence against the others." Franklin *v.* Hoadley, 115 App. Div. 538, 101 N. Y. Supp. 374 (citing text).

[94] Garrison *v.* Hawkins Lumber Co., 111 Ala. 308, 311, 20 So. Rep. 427; Cobb *v.* Keith, 110 Ala. 614, 18 So. Rep. 325; McAnnally *v.* Hawkins Lumber Co., 109 Ala. 397, 19 So. Rep. 417; Whittemore *v.* Merrill, 87 Me. 456, 461, 32 Atl. Rep. 1008, 1 Green. Ev., § 66, and 2 Green. Ev., § 110.

The joinder of several defendants in a suit at common law, based upon contract, express or implied, can only be upheld on the theory of joint liability. Boogher *v.* Roach, 25 App. (D. C.) 324. In an action against two defendants upon a joint liability, it appeared that one of the defendants said to the plaintiff that he (the plaintiff) "ought to be paid when they had the money to pay with." *Held*, that this statement, alone, did not show that the defendant making it bound himself to pay, even though he used the materials prepared by the plaintiff. In this

3. Defendants, Absent or Defaulted.

Where some of the alleged joint debtors admit their individual and joint liability, either by pleading or otherwise, or are proceeded against as absentees so that no personal judgment can be rendered against them or their individual property, plaintiff is only obliged to produce evidence which will be sufficient, as against those who appear and defend the suit, to establish their joint liability with their co-defendants. In such cases, the acts and admissions of the parties who thus appear and defend are legal evidence against themselves, not only of their own indebtedness, but also of their joint indebtedness with their co-defendants.[95]

In an action for a tort, evidence of admissions or declarations by a defendant who has defaulted, if relevant to the measure of damages, is competent as against him, notwithstanding it may refer to the others; [96] but it should be offered

case, however, the use was not under circumstances from which a promise to pay could have been implied. Boogher *v.* Roach (above).

The common-law rule was that in an action on an alleged joint contract, plaintiff must recover against all the defendants or be defeated in the action. This rule has been somewhat modified by statute in some jurisdictions (see N. Y. Code Civ. Pro., § 1204). A plaintiff may now recover against one of several defendants on a several contract, notwithstanding that he has alleged in his complaint that it is joint. Niles *v.* Battershall, 27 How. 381, 18 Abb. Pr. 161, 25 N. Y. Super. Ct. 146; Brumskill *v.* James, 11 N. Y. 294. But even in those jurisdictions, if the contract sued upon is joint only, there can, if the nonjoinder be properly insisted upon, be no recovery against one only of the joint contractors, save in those cases where the defense is a personal one. Fowler *v.* Kennedy, 2 Abb. Pr. 347.

[95] Halliday *v.* McDougall, 22 Wend. 264, 270, and cases cited. An allegation of fact, made as a part of one of several defenses in an answer, operates only as an admission by the party in whose pleading it occurs, and may, as evidence merely of that fact, be rebutted or explained in the same manner as other admissions. Young *v.* Katz, 22 App. Div. (N. Y.) 542.

[96] Bostwick *v.* Lewis, 1 Day (Conn.), 33; Daniels *v.* Potter, M. & M. 501.

for this purpose, and not as evidence against those who defend.[97]

4. Admissions, etc., of Persons Not Parties to the Action.

The fact that one who is not a party to the action was a party to the contract sued on, does not alone render his admissions and declarations competent against those who sue or are sued.[98] It must first appear that he is the real party in interest,[99] or other special grounds must be shown for

[97] Tenth Nat. Bk. *v.* Darragh, 3 Supm. Ct. (T. & C.) 138.

Testimony of alleged admissions by a defendant who had defaulted and against whom judgment had been rendered is inadmissible against another defendant who has appeared, being mere hearsay. The fact that the two defendants were brother and sister and lived together, is not sufficient to charge either with the admission of the other. Graham *v.* Walsh, 14 Ga. App. 287, 80 S. E. Rep. 693.

[98] Hamlin *v.* Fitch, Kirby (Conn.), 174; Abel *v.* Forgue, 1 Root, 502. Nor is the admission of such person, that he was jointly interested, competent in support of a plea in abatement. Storrs *v.* Wetmore, Kirby (Conn.), 203.

The admissions of one who is not a party to the action are mere hearsay. Garr *v.* Shaffer, 139 Ind. 191, 38 N. E. Rep. 811.

[99] Bucknam *v.* Barnum, 15 Conn. 68, 73.

The admission of a real party in interest is provable as against a nominal party. Barber *v.* Bennett, 60 Vt. 662, 15 Atl. Rep. 348, 6 Am. St. Rep. 141, 1 L. R. A. 224; Brown *v.* Brown, 62 Kan. 666, 64 Pac. Rep. 599.

The admissions of one not a party to the record are competent only when he is represented by one who is a party. H. C. Judd *v.* New York, etc., S. S. Co., 128 Fed. Rep. 7, 62 Cir. Ct. App. 515.

The statements of the real party in interest relevant to the issue, and against his interest at the time of the making thereof, are admissible against the representative of his interest who is the nominal party, though the person who makes the statements be not a party to the action, such statements not being admitted to establish the fact that the person making them is the real party in interest, but, that fact being established, to affect the interest of such real party. The admissions of the *cestui que trust*, the trust being otherwise established, are admissible, to affect, not the estate of the trustee, but the trust estate. Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. Rep. 239.

When a conspiracy between a husband and wife to defraud his creditors has been established,

imputing his acts to the party against whom they are offered; and the rule is the same as to one named as a defendant on the record, but who has never been served nor appeared.[1]

5. Admissions and Declarations of Parties Having a Common Interest or Liability.

A *common* or several interest, or a common or merely several liability, does not render the hearsay of the one party admissible against the other. Tenancy in common, that is in fractional shares, whether of real [2] or personal [3] prop-

evidence of declarations made by him while the conspiracy was pending, and tending to show the intent to defraud, are admissible against the wife; especially so when the husband remains in possession of the property which his creditors are seeking to reach and which he had conveyed to her. Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. Rep. 898.

Where an administrator brings a suit for the benefit of the next of kin, the administrator is only the nominal party and the next of kin are the real parties in interest and their admissions will be competent as against him. Atchison, etc., Ry. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. Rep. 603.

Where the personal representative of a decedent sues on a life insurance policy payable to the decedent's estate, the declarations against interest of the decedent's widow, who is not a party in interest, cannot be introduced to defeat the recovery of the executor. Merchants' Life Assoc. *v.* Yoakum, 39 Cir. Ct. App. 56, 98 Fed. Rep. 251.

Testimony of the declarations of a nominal party can be given only in impeachment of his subsequent contradictory testimony and not as substantive evidence. Medlin *v.* County Board of Education, 167 N. C. 239, 83 S. E. Rep. 483, Ann. Cas. 1916, E. 300.

[1] Peck *v.* Yorks, 47 Barb. 131.

The declarations of an alleged partner of the defendant, who has not been served and who has not appeared, are not admissible to prove the defendant's partnership. Menzie *v.* Wolff, 120 N. Y. Supp. 53.

[2] Dan *v.* Brown, 4 Cow. 483, 492. In a proceeding to establish a will, evidence of the admissions or dec-

[3] McLellan *v.* Cox, 36 Me. 95.

The declarations of a sheriff in making a levy, in connection with the performance of his acts, are admissible in behalf of the owner of such property suing for its conversion. McKnight *v.* United States, 130 Fed. Rep. 659, 65 Cir. Ct. App. 37.

erty, is not enough to render the admissions or declarations of one co-tenant, admissible against the other; but of course they may be rendered competent by showing that they were made in the presence and hearing of the other,[4] or otherwise brought to his knowledge.

6. —Joint Interest or Liability.

In case of *joint* [5] interest or liability, the principle upon which the admissions and declarations of one are admissible

larations of a party interested in the estate as a tenant in common with others is inadmissible against any of the parties, inasmuch as the will cannot be admitted as to some and rejected as to the others. In re Kennedy, 167 N. Y. 163, 60 N. E. Rep. 442; Naul *v.* Naul, 75 App. Div. 292, 78 N. Y. Supp. 101; Matter of Van Dawalker, 63 App. Div. 551, 71 N. Y. Supp. 705; In re De Laveaga, 165 Cal. 607, 133 Pac. Rep. 307. Such evidence may, however, be admissible in impeachment of the testimony of an interested party on the probate. In re De Laveaga (above).

[4] Crippen *v.* Morse, 49 N. Y. 63. Evidence of a declaration by one, of what he had heard the other say, not competent. Quinlan *v.* Davis, 6 Whart. 169.

In an action on a guaranty, the statements of the principal debtor are not admissible as against the surety. Strobel, etc., Co. *v.* Wiesen, 144 N. Y. App. Div. 149, 128 N. Y. Supp. 798.

[5] As to the test of the distinction between joint and common interests in contracts, see 1 Addison on Contr. 78–88, 1 Pars. on Contr. 11, 1 Story on Contr., § 52, &c. "The nature and form of a contract generally determines whether the liabilities of the parties are joint, or several, or joint and several. Where a contract is made by two or more persons jointly, and there are no words which indicate a several liability, the contract is a joint one." Rosenzweig *v.* McCaffrey, 28 Misc. 485, 59 N. Y. Supp. 863. By statute, in some states contracts which, at common law, would be construed as joint, are required to be construed as joint and several. Bagnell Timber Co. *v.* Missouri, etc., Railway Co., 242 Mo. 11, 145 S. W. Rep. 469; White *v.* Connecticut, etc., Ins. Co., 34 App. (D. C.) 460. Similar statutes have been passed in other states, for instance, providing that "where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." Rutherford *v.* Halbert, 42 Okl. 735, 142 Pac. Rep. 1099, L. R. A. 1915, B. 221. A bill of parcels delivered on a sale, and mentioning several as the sell-

against the other, is that of agency. Where the one may be deemed to have been, at the time the words passed, the agent of the other in the matter, they may be proved against both. Formerly the common law courts applied a technical rule that a mere joint interest or obligation, without anything to indicate actual intent, raised a sufficient legal presumption of agency for this purpose;[6] and this rule is still applied in England[7] and in some of our States.[8]

ers, is not conclusive evidence that the sale was joint, but parol evidence is competent to show that one of those named was really the seller. Harris *v.* Johnson, 3 Cranch, 311.

On a doubtful question whether an account with plaintiffs was joint on the part of the defendants, evidence that one had a separate account at the same time, is competent. Quincey *v.* Young, 63 N. Y. 370, rev'g 5 Daly, 327.

A conveyance or mortgage made by one defendant is not competent evidence in favor of the other to show that the subject of the conveyance was the sole property of the other. Harris *v.* Wessels, 5 Hun, 645.

[6] 1 Pars. on Contr. 24; Shoemaker *v.* Benedict, 11 N. Y. 175, 181, and cases cited. See also Ringelstein *v.* City of Chicago, 128 Ill. App. 483.

[7] Steph. Dig. L. Ev., art. 17.

[8] Black *v.* Lamb, 1 Beasl. N. J. 108, 122. See also Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. Rep. 275; Cady *v.* Shepherd, 11 Pick. 400; Walling *v.* Rosevelt, 16 N. J. L. 41; Lowle *v.* Boteler, 4 Harr. & M. 346. The rule stated by PHILLIPS, is that, as a general principle, "in a civil suit by or against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him, and against all who are parties with him to the suit." He adds in effect, that a joint interest in the decision is not essential where there is a joint interest in the transaction (1 Phil. Ev. 491). And the American editor adds, that where this rule is applied, it is necessary that it should appear that the defendants had an existing joint interest when the admission was made. Id., n. 1.

GREENLEAF states the rule more loosely: There must be "some joint interest, &c., * * * In the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all. They stand to each other, in this respect, in a relation similar to that of existing copartners" (citing Whitcomb *v.* Whiting, 2 Dougl. 652). 1 Greenl. Ev., § 174.

TAYLOR more guardedly says: "When several persons are *jointly*

Under the freer rules of evidence now applied, it is better to be prepared with some evidence, at least, besides the mere fact of a joinder in interest, to sanction the inference that one might speak for the other.[9] Joint possession alone,

interested in the subject-matter of the suit, the general rule is, that the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favor of or against one or more of them separately; provided the admission relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered." 1 Tayl. Ev. 655, § 674.

STARKIE tersely indicates the true test. Stating that an admission against interest is deemed true against the one who made it, he adds: "The same rule it will be seen applies to admissions by those who are so identified in situation and interest with a party that their declarations may be considered to be made by himself. 1 Stark. Ev. 50.

STEPHEN says nothing of joint owners, and classes all joint contractors with partners, saying that "Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts;" but not for the purpose of acknowledgment by promise or payment, to remove the bar of the statute of limitations when once operative, against a simple contract. Steph. Dig. Ev., art. 17. *Wigmore* states the rule as follows:

"So far as one person is privy in obligation with another, i. e. is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally * * * There being an identity of legal liability, the two persons are one so far as affects the propriety of discrediting one by the statements of the other." Wig. Vol. II, § 1077.

Where the admission of one jointly interested is competent, the relative smallness of the amount of his interest cannot render it incompetent. Black *v.* Lamb, 1 Beasl. 108, 122.

[9] In Lewis *v.* Woodworth, 2 N. Y. 513, it was determined that an admission made by one joint promissor, although acted on by a third person, could not estop the other promissor; and it was put upon the ground that simple joint contractors are not, like partners, agents for each other. In Van Keuren *v.* Parmalee, Id. 528, and Shoemaker *v.* Benedict, 11 Id. 176, the same court more fully discussed the principle, and gave almost unanimous sanction to the

may be sufficient to admit evidence of the separate contemporaneous declaration of either possessor, as characterizing the joint possession; [10] but this is on the principle that it is part of the *res gestæ*. Joint possession is not enough to render other declarations of one binding on the other, except in some cases where the latter claims under the possession in the former. A joint business or adventure furnishes usually ground for inferring the agency of one to speak and act for the other,[11] and where the agency is sought to be

doctrine that a joint debtor has not, merely as such, any authority to make admissions which will affect his fellows (2 N. Y. 528, 11 N. Y. 185); and the justice of their conclusion in repudiating the English doctrine is vindicated by the subsequent English legislation adopting, to a great extent, the rule in respect to acknowledgments by copartners after dissolution, to which this doctrine led them. 19 & 20 Vic., c. 97. In Wallis *v.* Randall (81 N. Y. 164, 170), it was said: "A joint debtor has no authority to bind any other person jointly liable with him by his statements or admissions, unless he is the agent, or, in some other way, the representative of such person. The mere fact that he is a joint debtor never gives the authority."

In a proceeding to remove trustees the admissions of one are incompetent as against the other. Belding *v.* Archer, 131 N. C. 287, 42 S. E. Rep. 800.

[10] Dawson *v.* Callaway, 18 Geo. 573, 580. This is in harmony with the general principle that the declarations of a party in possession are admissible, as part of the *res gestæ*, as tending to show the nature of the possession. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. Rep. 13.

[11] Thus where one of the several proprietors of a theatre made the contract in suit on behalf of all the proprietors, the declarations of one of them were held admissible against all. Kemble *v.* Farren, 3 Carr. & P. 623.

Where several persons are cooperating in carrying forward a business enterprise, the admissions of one in the absence of the others are competent against the others. Summerville *v.* Penn Drilling Co., 119 Ill. App. 152.

In an action against a joint-tort feasor an allegation by the plaintiff in his complaint against another defendant that the injury was due entirely to the negligence of the defendant in the other action is competent as an admission against the plaintiff but is not conclusive. Walsh *v.* N. Y. Central, etc., R. Co., 204 N. Y. 58, 97 N. E. Rep. 408, 37 L. R. A. N. S. 1137.

The statements of one of several associates in a business enterprise not made in the presence of the

inferred from the course of business, evidence of former joint transactions in the same employment or business, even for several years back,[12] and with other persons,[13] is competent, for the purpose of aiding the conclusion that the transactions in suit were also joint; and an authority in one to speak for both may be inferred from the fact of his activity, and the knowledge and silence of the others; [14] but evidence that one advanced funds, or had an interest as a secured creditor, is not alone enough. The joint authority or agency must relate to the subject of the joint title or adventure.[15] Where an admission or declaration is received by virtue of such a relation, it must be shown to have been made during the continuance of the relation; and if it consists of a writing, the date is not, for this purpose, sufficient evidence of the time when it was made.

The admissions and declarations of one when thus admissible against others, are competent equally against both,

others are evidence against the latter in favor of a third person acting and relying upon what was then said and done. Pearsall *v.* Tenn. Cent. Ry. Co., 2 Tenn. Ch. App. 682.

As to admissions and declarations of partners, see Chapter IX, par. 32 of this volume.

[12] Trego *v.* Lewis, 58 Penn. St. 463.

[13] Bowers *v.* Still, 49 Penn. St. 65.

[14] Bank of U. S. *v.* Lyman, 20 Vt. 666.

[15] Thus those who own part of a ship as copartners and another part as tenants in common, may bind each other as to the former interest by their admissions, but as to the latter interest they may not, without other evidence of agency than the common interest.

The acts and declarations of a partner will not bind his associates in matters foreign to the partnership business; nor are such declarations competent evidence of the extent of the maker's authority to bind the firm. Taft *v.* Church, 162 Mass. 527, 39 N. E. Rep. 283; Samstag *v.* Ottenheimer, 90 Conn. 475, 97 Atl. Rep. 865. In an action against a partnership to recover damages for personal injuries evidence was offered of a declaration by one of the partners that he was willing to pay plaintiff but that the other members of the firm disagreed with him—*Held*, that such evidence was inadmissible, notwithstanding that its effect was limited to the party making it. Folk *v.* Schaeffer, 180 Pa. St. 613, 37 Atl. Rep. 104.

but are not evidence against the others in exoneration of the declarant—as, for instance, to show that he was merely their surety;—and in all cases they are rendered incompetent by evidence of fraud.

7. —Joint Promisees.

In so far as joint promisees [16] or obligees [17] are the agents of each other for the purpose of collection, the admissions and declarations of either are competent in an action by both against both.

8. Notice.

Notice to one of two joint promisors [18] or joint tenants or purchasers,[19] is not notice to the other, unless agency is shown.

9. Declarations of Conspirators or Confederates.

The familiar rule that where several persons are engaged together in the furtherance of a common illegal design, the acts and declarations of one confederate, made in pursuance of the original concerted plan and with reference to the common object, are competent evidence against the others,

[16] Pringle *v.* Chambers, 1 Abb. Pr. 58.

[17] Cross *v.* Bedingfield, 12 Sim. 35; Black *v.* Lamb, 1 Beasl. (N. J.) 108, 122. Whether these cases are now to be deemed authority with us for the doctrine that the joint interest alone is enough, see note to paragraph 6, above. If the rule goes farther than stated in the text, it should be only within the limits stated by Phillips and Taylor.

[18] See Lewis *v.* Woodworth, 2 N. Y. 513.

But see Knight *v.* Fifield, 7 Cushing (Mass.) 263, where it was held that where two or more persons are subject to a joint duty or obligation upon notice, and where other special notice is not made necessary by statute, or by contract, a notice addressed to all, and served on *one* is notice to all, compare also cases cited in 29 Cyc. 1124, note 8, and Curtis *v.* Sexton, 252 Mo. 221, 259, 159 S. W. Rep. 512.

[19] Wade on Notice, § 684. Compare Spencer *v.* Campbell, 9 Watts & S. 32.

though made in their absence,[20] does not rest on the joinder of parties,[21] but rather on the principle of legally imputed agency; and the evidence is confined to that which the rule of the *res gestæ* admits,[22] and excludes narratives of past transactions.[23]

[20] The declarations of one not a party may be admitted under the rule. American Fur Company *v.* U. S., 2 Pet. 358, 364; Preston *v.* Bowers, 13 Ohio St. 1, 13.

A conspiracy being established, everything said, written or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every one of them and may be proved against each. Hamilton *v.* Smith, 39 Mich. 222; Lasher *v.* Littell, 202 Ill. 551, 67 N. E. Rep. 372; American Trust Co. *v.* Chitty, 36 Okla. 479, 129 Pac. Rep. 51.

If two or more persons act in concert or conspire to commit a fraud upon another, each is responsible for the false and fraudulent representations of the others within the scope of the conspiracy. Miller *v.* John, 208 Ill. 173, 70 N. E. Rep. 27.

Statements made by one of several conspirators before the conspiracy was formed are admissible against each. Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. Rep. 147.

In an action to recover money obtained through a conspiracy, evidence of prior similar conspiracies involving the same parties are admissible. Stewart *v.* Wright, 147 Fed. Rep. 321, 77 Cir. Ct. App. 499.

[21] Lincoln *v.* Claflin, 7 Wall. 132; Cuyler *v.* McCartney, 40 N. Y. 221, rev'g 33 Barb. 165. The objection of absence in such a case goes only to the weight of the evidence. Bushnell *v.* City Bank, 20 La. Ann. 464.

[22] Apthorp *v.* Comstock, 2 Paige, 482, 488; Farley *v.* Peebles, 50 Neb. 723, 70 N. W. Rep. 231; State *v.* Tice, 30 Ore. 457, 48 Pac. Rep. 367; Osmun *v.* Winters, 30 Ore. 177, 46 Pac. Rep. 780; Garnsey *v.* Rhodes, 138 N. Y. 461, 34 N. E. Rep. 199.

The fraud of an insurer's agent in the procurement of a policy is

[23] Clinton *v.* Estes, 20 Ark. 216; Patton *v.* The State, 6 Ohio St. 467.

As long as the conspiracy is still pending every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. Smith *v.* National Benefit Soc., 123 N. Y. 85, 25 N. E. Rep. 197, 9 L. R. A. 616; Connecticut Mutual Life Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. ed. 446.

The declarations of a co-conspirator, made after the comple-

10. Preliminary Question as to Connection.

The connection between the parties which renders the declaration of one competent against the other, can never be proved by the declaration itself, but must be separately proved, as the foundation for admitting the declaration.

binding upon the principal. Connecticut Mutual Life Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 Supm. Ct. 294, 47 L. ed. 446.

What is merely narrative of a past occurrence, or what is merely expressive of a future purpose, is not admissible; but an act performed, a declaration made, a writing made or delivered, as a part of the matter in dispute, that is, in itself tending to advance the common purpose or object of the alleged conspiracy, is neither hearsay nor merely the admission of one of the parties. It is an overt act in pursuance of the object. Farley *v.* Peebles, 50 Neb. 723, 70 N. W. Rep. 231.

Where *prima facie* evidence of a conspiracy is given, the declarations of the conspirators made in carrying it out are competent. Voisin *v.* Commercial Mutual Life Ins. Co., 60 N. Y. App. Div. 139, 70 N. Y. Supp. 147.

Where husband and wife have conspired to defraud creditors the declaration of either after the conspiracy has terminated are not admissible against the other. Muller *v.* Flavin, 13 S. Dak. 595, 83 N. W. Rep. 687.

In a conspiracy to procure a will by undue influence, the declarations of the conspirators made after the will is executed but before it is probated are admissible, as the common purpose must have contemplated and embraced the probate of the will, and the conspiracy did not expire until then. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. Rep. 459.

In an action upon a boycotting conspiracy, the statements of different defendants indicative of their purpose, and of members of the association, not defendants, as to the force and effect of the vote, made contemporaneously with and in explanation of their action under it, are admissible. Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. Rep. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746.

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tion of the criminal enterprise, relating to a past transaction, and accompanying no act done in furtherance of the enterprise, are incompetent against the other. Lederer *v.* Adler, 46 N. Y. Misc. 564, 92 N. Y. Supp. 827.

The declarations of one of several co-conspirators made after the conspiracy has been completed are admissible against him alone. Standard Oil Co. *v.* Doyle, 118 Ky. 662, 82 S. W. Rep. 271, 26 Ky. Law Rep. 544, 111 Am. St. Rep. 331.

Strictly it ought to be proved first, but it is in the discretion of the court to allow the declaration to be proved first on the promise of counsel to connect afterward,[24] and it is not error to allow this even in cases of conspiracy.[25] Where a

[24] Bowers *v.* Still, 49 Penn. St. 65, s. p., Cobb *v.* Lent, 4 Greenl. (Me.) 503.

[25] Place *v.* Minster, 65 N. Y. 89; State *v.* Ross, 29 Mo. 32, 50. It is true that it is of no consequence (on the question of error) in what order the testimony was introduced if it in the end proves relevant (Jenne *v.* Joslyn, 41 Vt. 478); but if it does not prove relevant, the judge's instructions will often fail to remove the unjust impression produced. In cases of confederacy, particularly, the foundation for the admission of the evidence should be scrutinized with caution, lest the jury be led to infer a conspiracy from the declarations of strangers. Burke *v.* Miller, 7 Cush. 547, 550. A conspiracy, like other facts, may be proved by circumstantial evidence, and one means of proof is by showing overt acts of the individuals charged with conspiring from the fact that different persons at different times by other acts pursued the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object. Farley *v.* Peebles, 50 Neb. 723, 70 N. W. Rep. 231.

To make the declarations of an alleged conspirator admissible in evidence against his co-conspirators, there must be preliminary proof of the joint purpose and action, not necessarily conclusive, but sufficient to submit to the jury on the fact; and the declarations so admissible must have been made during the pendency of the conspiracy. To allow the declarations to be proved without prior evidence of the conspiracy upon the counsel's promise to connect it, lies in the discretion of the judge. Marshall *v.* Faddis, 199 Pa. St. 397, 49 Atl. Rep. 225.

Wherever the writings or words of any of the parties charged with or implicated in a conspiracy can be considered in the nature of an act done in furtherance of the common design, it is admissible in evidence, not only as against the party himself, but as proof of an act from which the jury may infer the conspiracy itself. Cleland *v.* Anderson, 66 Neb. 252, 92 N. W. Rep. 306, 96 N. W. Rep. 212, 5 L. R. A. N. S. 136.

Until several individuals are by evidence shown to have been in the relation of conspirators they cannot legitimately be prejudiced by any evidence of the declarations of others charged with the alleged conspiracy. Douglas *v.* McDermott, 21 N. Y. App. Div. 8, 47 N. Y. Supp. 336.

Where no conspiracy has been testified to it is error to admit any declarations alleged to have been

joint judgment is sought, there is the more reason for requiring the connection to be first proved; and in this class of cases, as well as where the declaration is that of an alleged agent, it is the better opinion that the question of connection is a preliminary question for the judge,[26] who should

made in connection with the conspiracy. Hertrich *v.* Hertrich, 114 Iowa, 643, 87 N. W. Rep. 689, 89 Am. St. Rep. 389.

The declaration of an alleged conspirator cannot be admitted against an alleged co-conspirator for the purpose of proving the conspiracy itself. Lent *v.* Shear, 160 N. Y. 462, 55 N. E. Rep. 2, rev'g 20 N. Y. App. Div. 624, 46 N. Y. Supp. 1095.

A conspiracy is the combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. In order to establish a conspiracy, evidence must be produced from which a jury may reasonably infer the joint assent of the minds of two or more persons to the prosecution of the unlawful enterprise. Until such evidence is produced, the acts and admissions of one of the alleged conspirators are not admissible as evidence against any of the others, unless the court, in its discretion, permits their introduction out of their order. But when such evidence has been produced, any act or declaration of one of the parties in reference to the common object which forms a part of the *res gestæ* may be given in evidence against any one of the others who has consented to the enterprise. Pettibone *v.* United States, 148 U. S. 197, 13 S. Ct. 542, 37 L. ed. 419; Spies *v.* People, 122 Ill. 1, 102, 238, 12 N. E. Rep. 865, 17 N. E. Rep. 898, 3 Am. St. Rep. 320; Drake *v.* Stewart, 22 Cir. Ct. App. 104, 76 Fed. Rep. 140; Archer *v.* State, 106 Ind. 426, 7 N. E. Rep. 225.

[26] The sufficiency of the evidence of the necessary foundation is held a question for the judge, in *New York*, Jones *v.* Hurlbut, 39 Barb. 403; *Massachusetts*, Burke *v.* Miller, 7 Cush. 547, 550; *Missouri*, State *v.* Ross, 29 Mo. 32, 51; *Iowa*, State *v.* Nash, 7 Iowa, 347, 384; and see Dickinson *v.* Clarke, 5 W. Va. 280. But the ruling that it is sufficient usually means merely that it is sufficient to go to the jury, who may still pass on the sufficiency of the connection, as well as on the sufficiency of the admission or declaration, if the connection be shown. Commonwealth *v.* Brown, 14 Gray, 419, 432. But see Jones *v.* Hurlburt, 39 Barb. 403. Hence, if the necessary connection is shown by the testimony of a competent witness, the court will not question his credibility, but leave it to the jury. Commonwealth *v.* Crowninshield, 10 Pick. 497. It seems to be

exclude the evidence, or, when it has been admitted by anticipation, strike it out or direct the jury to disregard it, if it is not as matter of law sufficient to lay the foundation. In those cases where a separate judgment is sought, as well as in all cases in those courts where the question of connection is deemed one for the jury instead of for the judge, the evidence, if received against the declarant, should be accompanied by instructions clearly pointing out the distinction between evidence admitted for the purpose of establishing the confederacy or other connection, and that which is to be considered only after the connection has been proved and found by them. The jury should also be instructed as to the persons who must be found united in the confederacy.[27]

treated as a question for the jury, in the first instance, in *Pennsylvania*, Helser *v.* McGrath, 58 Penn. St. 458; *Kentucky*, Oldham *v.* Bentley, 6 B. Mon. 428, 431.

The declarations of one defendant do not bind the other defendants in the absence of proof of assent or proof that all were engaged in a joint enterprise. Whaples *v.* Fahys, 109 N. Y. App. Div. 594, 96 N. Y. Supp. 323.

A declaration of a co-conspirator not made in the carrying out of the conspiracy is inadmissible. Seitz *v.* Starks, 136 Mich. 90, 98 N. W. Rep. 852.

[27] Wiggins *v.* Leonard, 9 Iowa, 194. But if there is any evidence to connect, it is not error to omit such instructions when they are not asked for. Boswell *v.* Blackman, 12 Geo. 591. If connection is disproved, it is error to leave the question to the jury. Page *v.* Scranton, 39 Me. 400.

CHAPTER VIII

ACTIONS BY AND AGAINST PUBLIC OFFICERS

I. GENERAL PRINCIPLES

1. Different Proof of Title, in Different Cases.

There are three principal grades of proof of the official character of an alleged officer, adequate in different classes of cases: 1. That he was officer *de jure*, that is, with legal title. 2. That he was officer *de facto*, that is, that he acted as such, with color of title,[28] though it may be without legal

[28] To constitute color of office there must be some color of election or appointment, or at least an exercise of the office, and a public acquiescence for a sufficient length of time reasonably to authorize the presumption of at least colorable election or appointment. State *v.* Carroll, 38 Conn. 449, s. c., 9 Am. R. 409, 427; Wilcox *v.* Smith, 5 Wend. 231.

Mere irregularities in the qualification or in the appointment of an officer will not prevent his being a *de facto* officer. If he be illegally elected or appointed by one

title. 3. That he assumed to act as such in the transaction in question, though it may be without color of title. It will be seen, in this chapter, that: 1. On an issue directly between the officer and the public, whether in an action by the State, or by or against other public officers, strict proof of title is necessary.[29] 2. On an issue between third persons,[29½] or between them and the officer, or between them and the public, evidence that he was an officer *de facto* is always sufficient and conclusive against every party, and equally in favor of any party but the officer himself,[30] while, in his favor, it is commonly regarded as competent, for the purpose of raising a presumption that he was officer *de jure*. 3. On an issue between a third person and the alleged officer, evidence that he acted as such in the transaction is competent and usually conclusive evidence of his official character,

who himself has only a claim to an office, it is still possible for his acts to be recognized as valid, because he was exercising *de facto* the functions of an office. But to constitute one an officer *de facto* there must be not only facts, circumstances, or conditions which would reasonably lead persons who have relations or business with the office to recognize him and treat him as the lawful incumbent, and to submit to and invoke his official action without inquiry as to his title—he must not only have the reputation of being an officer—but above all else there must be an office corresponding with that which he purports to hold. If there is no office there can be no officer *de facto*.

An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.

There cannot be a *de facto* judge *pro hac vice* because he is appointed for only one case. Hall *v.* Manchester, 39 N. H. 295; Bedingfield *v.* First Natl. Bk., 4 Ga. App. 197, 61 S. E. Rep. 30.

[29] Paragraphs 8 and 13 below. *Contra*, 1 Greenl. Ev. 115, § 92.

[29½] Cooper *v.* Ricketson, 14 Ga. App. 63, 80 S. E. Rep. 217.

[30] The English rule, embodied in Greenleaf's statement, allows this evidence to be conclusive in favor of the officer. The presumption is sufficiently strong under Act No. 125, Ex. Ses. of 1877, to entitle a person who has qualified as a statutory officer in an office, the appointment to which is vested in the Governor, *prima facie* to possession of the books of the office. State *v.* Rost, 47 La. Ann. 53, 16 So. Rep. 776.

as against him; and evidence that he was recognized as such by the other party, is competent and sufficient, though not conclusive evidence thereof, against such party.

2. Legal Title.

Where legal title is in issue, and strict proof is required, the certificate of election or commission coming from the proper source, is presumptive evidence of his right to the office; [31] but it is only matter of evidence, and its existence is not essential, unless made so by statute.[32] Thus, if the statute simply authorizes a judge to appoint without more, proof of writing, is not necessary, but proof of an oral appointment by some open, unequivocal act, is sufficient, and the subsequent failure to sign an order entered for appointment does not affect the title to the office.[33] If a writ-

[31] 2 Dill. Mun. C. 807, § 716, s. p., State *ex rel.* Leonard *v.* Sweet, 27 La. Ann. 541; Wood *v.* Peake, 8 Johns. 69.

Where a person produces a certificate of election from the proper election officers, of his election to an office, with proof that he has taken the constitutional oath of office and filed the same, and given the necessary undertaking, where one is required by law, he is entitled to the delivery to him of the books and papers to such office. Matter of Foley, 8 N. Y. Misc. 196, 28 N. Y. Supp. 611.

In controversies between claimants to the same office, the one who holds a commission or a certificate of election is generally deemed the one entitled to the office since the commission or certificate is the best evidence of title to the office until the same is annulled in a proper judicial proceeding. Stamps *v.* Little, 167 S. W. (Tex. Civ. App.) 776.

[32] State *v.* Markham, 160 Wis. 431, 152 N. W. Rep. 161; State *v.* Meder, 22 Nev. 264, 38 Pac. Rep. 668; People *v.* Murray, 70 N. Y. 521; Marbury *v.* Madison, 1 Cranch, 137; People *ex rel.* Babcock *v.* Murray, 5 Hun, 42. Where in cities of a certain class it was provided by statute that the office of police judge must be created by ordinance, the mere testimony of an incumbent of such an office to the effect that he was a police judge is insufficient to prove his appointment. The evidence should show that the office of police judge had been provided for in the manner prescribed by the statute. An objection, however, is necessary, in order that the insufficiency may be availed of. De Soto *v.* Brown, 44 Mo. App. 148.

[33] Hoke *v.* Field, 10 Bush, 144;

ing exists, however, it should be produced as the best evidence, or should be accounted for, to lay a foundation for secondary evidence, in cases where strict proof of title is required. Where appointment must be proved, extrinsic evidence is inadmissible to show that Robert, the officer *de facto*, was the person intended to be appointed by the name of William, used in the commission.[34] Production of a certified copy of the appointment on file does not dispense with all proof of authenticity of the original.[35] If the statute requires a written oath to be filed, the taking of the oath cannot be proved by a memorandum at the foot of the commission, "sworn before me," with date and signature of the magistrate.[36] But a copy of the oath duly certified by the officer with whom it was duly filed, is competent.[37] Where it is necessary to show a vacancy to justify an appointment, it is enough to show that the office was, as matter of law, vacated by a prior incumbent, without proving that there was no other new appointment.[38]

s. c., 19 Am. Rep. 58. Where a city charter authorized the Common Council to appoint a certain officer, without, however, indicating the mode of appointment, and the appointment was made by ballot, the officer thus chosen was deemed duly appointed. The council, possessing no power of removal, could not, by any subsequent action on its part, repeal or set aside the appointment and choose some one else. State *v.* Barbour, 53 Conn. 76, 22 Atl. Rep. 686, 55 Am. St. Rep. 65. As to mode of proving appointment by vote of municipal body, see Canniff *v.* Mayor, etc., of N. Y., 4 E. D. Smith, 430.

[34] Bench *v.* Otis, 25 Mich. 29.

[35] Curtis *v.* Fay, 37 Barb. 67. Where the notary who administered the oath failed to attach his official seal to the jurat, the officer may show by oral evidence that the oath was in fact taken. State *v.* Van Patten, 26 Nev. 273, 66 Pac. Rep. 822.

[36] Halbeck *v.* Mayor, etc., of N. Y., 10 Abb. Pr. 439.

[37] Devoy *v.* Mayor, etc., of N. Y., 35 Barb. 264, s. c., 22 How. Pr. 226.

In a summary proceeding to authorize the delivery of the books and papers of an office to the person who appears to be entitled to the office, an attempt to file the constitutional oath of office within the time prescribed by law is a sufficient compliance with the statute. Matter of Foley, 8 N. Y. Misc. 196, 28 N. Y. Supp. 611.

[38] Canniff *v.* Mayor, etc., of N. Y.,

3. Contracts in Official Capacity.

A contract made by a public officer, connected with a subject fairly within the scope of his authority, is presumed to have been made in his official capacity.[39] If the other party was aware of his official character, this presumption arises, although he used language importing a personal promise,[40] and it is not necessary to show that he said he acted as officer.[41] The question is one of intent and credit, with a strong presumption against personal liability. Where he contracts under private seal, designating himself as one of the parties, yet if the deed appears on its face to be made on behalf of the State, the same presumption applies.[42] In an action against a public officer on a contract apparently made by him as such, it is not necessary to allege that he had authority to make it, for his making it is an admission.[43] But if the statute requires his contracts to be in writing, and makes it unlawful to contract otherwise, the other party cannot recover without proof of such a contract, or at least

4 E. D. Smith, 430. Compare Randall *v.* Smith, 1 Den. 214.

One seeking to compel his reinstatement as police patrolman must show that the office legally exists and that he has occupied it in a *de jure* capacity. Moon *v.* Mayor, 214 Ill. 40, 73 N. E. Rep. 408.

[39] Parks *v.* Ross, 11 How. U. S. 362.

[40] Olney *v.* Wickes, 18 Johns. 127; Lyon *v.* Irish, 58 Mich. 568, 25 N. W. Rep. 517.

[41] Nichols *v.* Moody, 22 Barb. 611; Holmes *v.* Brown, 13 Id. 599.

Where certain commissioners of a city under an act passed by the legislature purchase certain goods and the seller agrees to charge the city and not the commissioner as agents, and subsequently the act is declared unconstitutional, the commissioners are not personally liable. Schloss *v.* McIntyre, 147 Ala. 557, 41 So. Rep. 11.

[42] Hodgson *v.* Dexter, 1 Cranch, 345; Streets *v.* Selden, 2 Wall. 187.

The addition of a title, *i. e.*, "collector," to an officer's signature would not, in the absence of other facts, prevent him from being personally liable. Rogers *v.* French, 214 Mass. 337, 101 N. E. Rep. 988.

See also Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. Rep. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509, an action against three individuals as "Selectmen of Milton." Compare Knight *v.* Clark, 48 N. J. L. 22, 2 Atl. Rep. 780, 57 Am. Rep. 534.

[43] Shelbyville *v.* Shelbyville, 1 Metc. (Ky.) 54, 57.

without proving part performance and a *quantum meruit.*[44] The government is not bound by the act or declaration of its officer or agent, unless it manifestly appear that he acted within the scope of his authority, or was employed, in his capacity as public agent, to do the act or make the declaration for it.[45]

To charge him personally there should be satisfactory evidence of an absolute engagement to be personally liable.[46] Even if his authority proves void, yet if he acted in good faith, and within his instructions, he is not necessarily personally bound.[47] When it is sought to charge him individu-

[44] Clark *v.* United States, 95 U. S. (5 Otto), 539.

[45] Whiteside *v.* United States, 93 U. S. (1 Otto) 247; and see Noble *v.* United States, 11 Ct. of Cl. 608. Compare 4 Abb. New Cas. 450.

The statements of an officer of a city who has no power to bind the city are inadmissible. Peters *v.* Davenport, 104 Ia. 625, 74 N. W. Rep. 6.

The legal title to land acquired by a county cannot be disturbed by the declarations of its agents and officials. Lamar County *v.* Talley (Tex. Civ. App.) 94, S. W. Rep. 1069.

The admissions of the president of the Water & Light Commission of a municipality are not binding upon the latter where the charter gives him no authority in matters concerning which the admissions were made. Austin *v.* Forbis, 99 Tex. 234, 89 S. W. Rep. 405, rev'g 86 S. W. Rep. 29.

Declarations of an ex-councilman of a municipality made after the expiration of his term as to his knowledge during such term of a defective sidewalk, are not admissible, as he cannot bind the city after his term expired. Adkins *v.* Monmouth, 41 Oreg. 266, 68 Pac. Rep. 737.

Statements by a third person that for a certain sum of money the harbor commissioners of a city could be induced to allow certain conditions to remain are not admissible if the person making them is not shown to be connected with the commission or to have any authority from it. Union Transportation Co. *v.* Bassett, 118 Cal. 604, 50 Pac. Rep. 754.

[46] Hupe *v.* Sommer, 88 Kan. 561, 564, 129 Pac. Rep. 136, 43 L. R. A. N. S. 565; Parks *v.* Ross (above), and see 7 Opin. of Atty.-Gen. 88. Compare Paulding *v.* Cooper. 10 Hun, 20.

[47] Schloss *v.* McIntyre, 147 Ala. 557, 41 So. Rep. 11; Black *v.* Brown, 196 Ill. App. 508; Hall *v.* Lauderdale, 46 N. Y. 70.

The rule is the same where the officer in good faith exceeds his authority. Martin *v.* Schuermeyer,

ally on his contract, his communications to the superior branches of his government, and their directions to him, are competent in his favor for the purpose of showing that he acted as such.[48] He may recover on an apparently personal contract, though made with his official addition,—such as a bank deposit, in his own name, with the addition of his title,—unless the defendants show that they are liable to the government.[49]

4. Acts by Part of Board or Body.

In cases where, by law,[50] a majority of a board or body [51] may act, provided all the members who are living and qualified,[52] are present and deliberate, or were duly notified, the act of a majority of the officers is presumed to have been upon a meeting and consultation of all.[53] But the presumption may be rebutted.[54]

5. Demand and Notice.

A demand must be made in a reasonable and proper manner; and if accompanied by gross rudeness and insult, is not a legal demand; but such misconduct does not justify the refusal of a subsequent proper demand.[55] Proof of the mailing of a letter to a public officer is not alone sufficient

30 Okl. 735, 121 Pac. Rep. 248; Waldron First Natl. Bank *v.* Whisenhunt, 94 Ark. 583, 588, 127 S. W. Rep. 968; Coberly *v.* Gainer, 69 W. Va. 699, 703, 72 S. E. Rep. 790.

[48] Bingham *v.* Cabbot, 3 Dall. 19, 40.

[49] Swartwout *v.* Mechanics' Bank of N. Y., 5 Den. 555.

[50] 2 N. Y. R. S. 555, § 27; Green *v.* Miller, 6 Johns. 39. Compare Schuyler *v.* Marsh, 37 Barb. 350.

[51] Where the statute number was variable, the court presumed no more officers than the lowest number, in order to support the act of the majority of that number. Jay *v.* Carthage, 48 Me. 353.

[52] People *ex rel.* Kingsland *v.* Palmer, 52 N. Y. 83; People *ex rel.* Kingsland *v.* Bradley, 64 Barb. 228.

[53] Doughty *v.* Hope, 3 Den. 249, 594, 1 N. Y. 79.

[54] Doughty *v.* Hope (above).

[55] Boyden *v.* Burke, 14 How. U. S. 575, 583.

evidence of notice of its contents.[56] Though, together with slight evidence of actual receipt, it may be sufficient.

6. Former Judgments.

A former judgment does not necessarily bind the officer in a new action, unless he appeared in the same capacity in both.[57] Where an officer sues in his representative capacity, the estoppel created by the judgment is available in favor of those whom he represented, and the judgment is therefore conclusive against him when they put it in evidence in their action against him.[58]

II. ACTIONS BY OFFICERS

7. Pleading by Officer Suing as Such.

In an action by a public officer in his official capacity, if he is named personally, the pleading must indicate that he sues officially. A mere addition of his title, without anything to indicate that he sues as such officer, is not enough.[59]

[56] Huntley *v.* Whittier, 105 Mass. 391, s. c., 7 Am. Rep. 536.

A notice served by mail, on the comptroller of a municipality instead of the corporation counsel, as required by law, is nevertheless a sufficient compliance with the statute where it appears that the comptroller transmitted the notice to the corporation counsel, who filed it and acted upon it. Missano *v.* New York, 160 N. Y. 123, 54 N. E. Rep. 744. See also Wieting *v.* Millston, 77 Wis. 523, 46 N. W. Rep. 879.

[57] See Rathbone *v.* Hooney, 58 N. Y. 463.

A judgment in favor of one officer is conclusive in another action against a different officer, the subject-matter of the two actions being such that the determination of the first action would also determine the second. Zimmerman *v.* Savage, 145 Ind. 124, 44 N. E. Rep. 252.

[58] People *ex rel.* Knapp *v.* Reeder, 25 N. Y. 302, 304.

[59] Thus, "John Doe, supervisor," &c., in the title, is not alone enough. Gould *v.* Glass, 19 Barb. 179. But commencing the complaint as "the complaint of John Doe, as supervisor," &c., is; Smith *v.* Levinus, 8 N. Y. 472; so is "John Doe, supervisor, &c., complains." Fowler *v.* Westervelt, 17 Abb. Pr. 59, s. c., 40 Barb. 374; see Rogers *v.* French, 214 Mass. 337, 101 N. E. Rep. 988; Brown *v.* Bradlee,

But if it appears from the title or the body of the complaint that he complains as officer, a cause of action accruing to him in his official capacity, may be proved,[60] even though it arises under a statute authorizing him to sue on behalf of another person or body, and there is not express allegation that he sues for their benefit.[61] Unless the regular legal title is directly involved in the action, he need not aver the mode of acquiring the office, but may prove his official character under a general allegation that he is, and was at the times in question, such officer.[62]

8. Proof of Title.[63]

An officer suing for moneys or property as to which his only title is by virtue of his office,—as where he sues for public funds which he is to administer,—must show a legal title to the office.[64] It is not enough, that he is an officer *de facto*. According to the English doctrine, however, evidence that he was acting in the office is competent, and sufficient, at least, to go to the jury (especially where he sues

156 Mass. 28, 30 N. E. Rep. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509.

[60] See Stilwell *v.* Carpenter, 2 Abb. New Cas. 240, and note.

[61] Griggs *v.* Griggs, 66 Barb. 291, 300, aff'd in 56 N. Y. 504.

[62] Kelly *v.* Breusing, 33 Barb. 123, affi'g 32 Id. 601.

In a suit brought by a public officer he need allege only that he is such officer. Pennoyer *v.* Willis (Oreg.), 32 Pac. Rep. 57.

An allegation in a complaint by an officer that he "duly qualified and entered upon his duties" is a sufficient allegation of the doing of everything necessary to a proper qualification as contemplated by law, such as filing of a bond, taking the oath, etc. Willenburg *v.* State, 12 Ind. App. 462, 40 N. E. Rep. 547.

While the acts of an officer *de facto* are valid, in so far as the rights of the public are involved and in so far as the rights of third persons having an interest in such acts are concerned, still, where a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer *de facto*. To do this he must be an officer *de jure*. An officer *de facto* can claim nothing for himself. People *v.* Weber, 89 Ill. 347.

[63] See paragraphs 1 and 13.

[64] People *ex rel.* Henry *v.* Nostrand, 46 N. Y. 375, 382.

a private person), from which the jury may infer regular legal title, even although the title is put in issue.[65] But evidence that he has not taken the oath or given the bond required by law, is competent against him.[66]

9. Process as Supporting a Cause of Action.

An officer suing by virtue of process issued to him, and possession under it, sufficiently proves his authority under it by producing the process, if fair on its face,[67] and need not, in the first instance, prove the judgment or order on which it issued.[68] But the defendant may impeach the process for want of jurisdiction, and if he does this by evidence, the officer must establish the jurisdiction or his action fails.

10. Return, Adduced in His Own Action.

In an action by a public officer, founded on his own official acts,—as where a sheriff sues to recover goods levied on,[69] or to recover the purchase money of land sold by him,—his own return is competent *prima facie* evidence in his favor,[70] It is a general principle that the certificate of an officer, when, by law, evidence for others, is competent testimony for himself, provided he was competent, at the time of making

[65] McMahon *v.* Lennard, 6 H. of L. Cas. 970; Dexter *v.* Hayes, 11 Irish L. N. S. 106, aff'd in 13 Id. 22; Radford *v.* McIntosh, 3 T. R. 632; Doe d. Bowley *v.* Barnes, 8 Q. B. 1037. Having dealt with the officer as such, deemed an admission of his title. 2 Whart. Ev., § 1153.

[66] People *v.* Hopson, 1 Den. 579. Per Bronson, J.

Where, by statute, an officer was required to file a bond within 10 days after the receipt of his commission or certificate and he delays such filing for a period of 6 months, he will be deemed to have abandoned the office. He cannot, after such delay, enforce the acceptance of his bond by the officer whose duty it is to file it. State *v.* Johnson, 100 Ind. 489.

[67] See paragraph 19, and note.

[68] Earl *v.* Camp. 16 Wend. 562; Clearwater *v.* Brill, 63 N. Y. 627; Kelly *v.* Breusing, 33 Barb. 123, affi'g 32 Id. 601; Dunlap *v.* Hunting, 2 Den. 643.

[69] Cornell *v.* Cook, 7 Cow. 310. *Contra*, 8 Pick. 397.

[70] Hyskill *v.* Givin, 7 Serg. & Rawle, 369.

it, to act officially in the matter. Subsequently acquired interest does not affect the competency of the certificate.[71]

11. Action for Emoluments.

In his action for salary or other emoluments belonging to himself, the officer sues in his individual capacity, and his regular legal title at the time for which he claims compensation, is in issue and must be directly proved,[72] except where he sues private persons for services which would be valid if rendered by an officer *de facto*, and which they have accepted.[73] Evidence of general usage may be competent to show the measure though not the right to compensation.[74] The official audit or taxation of his fees by the proper officers, such as a board of supervisors, having jurisdiction is conclusive.[75]

III. ACTIONS AGAINST OFFICERS

12. Plaintiff's Pleading.

In an action against a public officer, for a wrong not involving the violation of any official duty he or his predecessor owed to plaintiff, the cause of action may be proved, although the complaint does not allege that he was such officer,[76] but where the breach of such a duty is involved, the

[71] McKnight *v.* Lewis, 5 Barb. 681. A return, contrary to the fact, if it has been canceled by leave of the court, does not estop him. Barber *v.* Binninger, 14 N. Y. 270.

[72] Henderson County *v.* Dixon, 63 S. W. Rep. 756, 23 Ky. L. Rep. 1204; People *ex rel.* Morton *v.* Tieman, 8 Abb. Pr. 359 (ALLEN, J.); Dolan *v.* Mayor, &c., of N. Y., 68 N. Y. 278. See Gay *v.* City of Chicago, 124 Ill. App. 586.

[73] See Sawyer *v.* Steele, 3 Wash. C. Ct. 464; Hunter *v.* Chandler, 45 Mo. 452.

Another exception has been made of the case where a *de facto* officer, suing for emoluments, is the only person claiming or having a right to claim the salary in question. Elledge *v.* Wharton, 89 S. C. 113, 71 S. E. Rep. 657.

[74] United States *v.* Fillebrown, 7 Pet. 28.

[75] Supervisors of Onondaga *v.* Briggs, 2 Den. 26, 40; but compare U. S. *v.* Smith, 1 Wood. & M. 184.

[76] Curtis *v.* Fay, 37 Barb. 64; Dennis *v.* Snell, 54 Id. 411.

A complaint against an officer for failure to collect certain fines

complaint should designate him as such officer, and aver him to be such.[77] But an allegation that he collected plaintiff's money on process, need not add that he received it as such officer.[78] And even where defendant is not sued in his official capacity, evidence of moneys received in that capacity is admissible.[79]

13. Plaintiff's Proof of the Official Character of Defendant or His Deputy.

In a private action against an alleged officer, parol evidence of his official character is admissible, notwithstanding there is a record.[80] And evidence that he assumed to act as such officer in the matter in question, is conclusive against him as an estoppel.[81] But to charge him with responsibility for a deputy or other subordinate, the appointment must be shown, either by producing the original on file,[82] or by evi-

which does not state circumstances to show that it was his duty to collect such fines, is demurrable. Burns *v.* Moragne, 128 Ala. 493, 29 So. Rep. 460.

[77] Formerly it was held that if title was averred and put in issue, the pleader might be held to prove legal title. 1 Greenl. Ev. 115, § 92. The better opinion under the new procedure is, that if the mode of acquiring title is not in issue, proof that he was an officer *de facto* is admissible under allegation of official character.

[78] Armstrong *v.* Garrow, 6 Cow. 465.

[79] Walton *v.* U. S., 9 Wheat. 651.

[80] Dean *v.* Gridley, 10 Wend. 254.

[81] 1 Greenl. Ev., 13th ed. 245, § 207; Lister *v.* Priestly, Whightw. 67; Rose, N. P. 70.

In an action brought by *A* against a municipality for damages to his private property, resulting from an alteration in the street grade, *A*, who was mayor of the town, testified that *B* was city engineer at a certain time and that *B* fixed the grade for *A*. *Held*, that *A* by reason of his official position was deemed to know who was city engineer; that it was sufficient, under the circumstances, to prove that the officer acted, and was recognized, as such. The testimony of *A* was accordingly held admissible. Mauldin *v.* Greenville, 64 S. C. 444, 42 S. E. Rep. 202.

The testimony of a police judge to the effect that he held such office is insufficient as proof of his appointment but the insufficiency must be raised by objection; otherwise it is deemed waived. De Soto *v.* Brown, 44 Mo. App. 148.

[82] Curtis *v.* Fay, 37 Barb. 64.

dence that the latter acted as such with his knowledge and assent.[83] Neither the appointment of the deputy, nor his relation to his principal, can be proved merely by his acts,[84] or his testimony that he acted as such [85] Evidence that the subordinate appointment is irregular, does not render the principal or appointing officer liable for the acts of the subordinate as if they were done without authority, provided the subordinate was an officer *de facto*.[86]

14. Cause of Action.

The burden of proving affirmatively a breach of official duty complained of, is upon the plaintiff, who must show every fact necessary to constitute such breach, and without it damages will not be presumed.[87] To charge one officer, the court will not, without evidence, presume that the precedent duty of another officer was performed.[88] An officer,

A certified copy, unless made evidence by statute, is inadmissible for this purpose, without excusing the absence of the original. Ib.

[83] Boardman *v.* Halliday, 10 Paige, 223, 230; Sprague *v.* Brown, 40 Wis. 612.

Parol evidence may be sufficient. Mann *v.* Martin, 82 Ky. 242. See Mathis *v.* Carpenter, 95 Ala. 156, 10 So. Rep. 341, 36 Am. St. Rep. 187.

[84] Meyer *v.* Bishop, 27 N. J. Eq. 141. *Contra*, Briggs *v.* Taylor, 35 Vt. 57, 67.

[85] Curtis *v.* Fay, 37 Barb. 67.

[86] Hamlin *v.* Dingman, 5 Lans. 61. *Contra*, Cummings *v.* Clark, 15 Vt. 653.

[87] Craig *v.* Adair, 22 Ga. 373.

"A private person can recover from the officer only when he can show that he has a direct interest in the duty to be performed, and that a special damage to himself, has resulted as the natural consequence of the wrongful act or failure to act, and it is immaterial that the duty is primarily imposed on public grounds. The right of action springs from the fact that the private individual receives a special injury from the neglect of the performance of a duty which it was the purpose of the law to impose partly for his benefit." State *v.* Lane, 184 Ind. 523, 111 N. E. Rep. 616.

[88] Id. The presumption in favor of official acts is not to be pressed too far. When invoked in lieu of direct evidence, it cannot serve as a substitute for all other evidence of an independent and material fact. It aids general evidence by dispensing with proof of material circumstances and incidents. United States *v.* Ross, 92 U. S. (Otto) 281, 285.

especially when acting under the sanction of an oath, or in whom government reposes trust, is presumed to have done his duty until the contrary be proved; and this principle applies in favor of the officer as well as in favor of strangers.[89] And when an officer is charged with fraud or conspiracy in the discharge of his duties, the presumption of innocence is strong in his favor, but it may be overcome by evidence of other similar delinquencies.[90] To charge an officer with neglect to execute process, the plaintiff cannot rely on the rule that process valid on its face, etc., is a protection. The officer is not bound to act, if the process or judgment is void for want of jurisdiction.[91] The admissions and declarations of a subordinate, who was not the general agent and representative of the defendant, are not competent against the defendant, unless within his authority,[92] or part of the *res gestæ*. It is not enough that they were made before his term expired,[93] nor that they were against interest, and he has subsequently died.[94]

The acts of a public officer, on public matters within his

[89] Hickman *v.* Boffman, Hard. (Ky.) 348. Thus, the fact that a sheriff made a levy is presumed in support of his justification under process. Hartwell *v.* Root, 19 Johns. 345.

Until the contrary appears, it must be assumed that public officials obeyed the law. People *v.* Dalton, 46 N. Y. App. Div. 264, 61 N. Y. Supp. 263.

An officer of a city must be presumed to have discharged his duty in the absence of allegations to the contrary. Scott *v.* State, 43 Fla. 396, 31 So. Rep. 244.

The presumption always is, in the absence of any showing to the contrary, that public officers perform their duties rightly. Owen *v.* Baker, 101 Mo. 407, 14 S. W. Rep. 175, 20 Am. St. Rep. 618; Washington *v.* Hospital, 43 Kan. 324, 23 Pac. Rep. 564, 19 Am. St. Rep. 141; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. Rep. 132.

[90] Bottomley *v.* U. S , 1 Story C. Ct. 135. As to evidence of motives, see Gregory *v.* Brooks, 37 Conn. 365; Moran *v.* McClearns, 4 Lans. 288; Wilkes *v.* Dinsman, 7 How. U. S. 89.

[91] Cornell *v.* Barnes, 7 Hill, 35; Housh *v.* People, 75 Ill. 487.

[92] Green *v.* Town of Woodbury, 48 Vt. 5.

[93] Burgess *v.* Wareham, 7 Gray (Mass.), 345.

[94] Lawrence *v.* Kimball, 1 Metc. (Mass.) 524.

jurisdiction, and where he has a discretion, are presumed legal, till shown to have been unjustifiable. This presumption avails in his own favor when he is sued.[95] To sustain a

[95] It rests not merely on the presumption of innocence, but also on grounds of public policy. Wilkes *v.* Dinsman, 7 How. U. S. 130.

Where a clerk fails to file a remittitur within the statutory period of four months, it will be presumed that it was because the fee for filing had not been paid or tendered, or that there was some other sufficient cause. Mabb *v.* Stewart, 7 Cal. Unrep. Cas. 186, 77 Pac. Rep. 402.

The law presumes that, when officers of a municipality issue their obligations, they are issued for lawful corporate purposes, and that they act within the scope of their powers. Custer County *v.* De Lana, 8 Okla. 213, 57 Pac. Rep. 162.

The presumption that a county surveyor did his duty and complied with the statute in choosing disinterested assistants will prevail in the absence of proof to the contrary. Christ *v.* Fent, 16 Okla. 375, 84 Pac. Rep. 1074.

When it is the duty of a clerk to administer the oath to parties applying for registration for election, and an affidavit, upon which the clerk had omitted the jurat, is inserted in the precinct register as that of a person entitled to vote, the court is justified in presuming that the clerk discharged his duty and administered the necessary oath, but neglected certifying the fact. Huston *v.* Anderson, 145 Cal. 320, 78 Pac. Rep. 626.

An officer will be protected by the presumptions of law in the performance of the duties required of him, unless it is clearly shown that his motives are private and malicious, and that he has wantonly and unnecessarily used the power incident to his official station to gratify a personal spirit of revenge. Gregory *v.* Brooks, 37 Conn. 365.

Where election officers open a ballot box in order to remove an obstruction which prevented ballots from being passed through, it will not be necessary in a subsequent suit for the officers to show that they locked the box after they removed the obstruction. The law will presume that they did their duty and that they relocked the box. Graham *v.* Graham, 24 Ky. Law. Rep. 548, 68 S. W. Rep. 1093.

Where a public election has been held the results of it will be sustained unless it is clearly and affirmatively shown that there has been fraud. Motley *v.* Wilson, 26 Ky. Law Rep. 1011, 82 S. W. Rep. 1023.

The presumption is that the commissioners, appointed by the board of supervisors of a town, make and file their reports as required by law. Matter of Webster, 106 N. Y. App. Div. 360, 94 N. Y. Supp. 1050, aff'd in 186 N. Y. 549, 79 N. E. Rep. 1118.

private action against him, it must be shown that he exercised the power confided to him in a case without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression.[96] In case of a judicial officer malice is not enough.[97]

15. Return, as Evidence Against the Officer.

As against the officer, and those claiming in privity with him, his return [98] is conclusive [99] as to his acts [1] stated in it, within the scope of his duty, as evidence in favor of parties who claim an interest or right under the return; [2] and when

[96] See note 95.

[97] Lange *v.* Benedict, 8 Hun, 366, aff'd in 73 N. Y. 12.

[98] And the principle extends to his indorsement upon an execution, of the time of its receipt. Williams *v.* Lowndes, 1 Hall, 579. So also of a deputy's return, offered in evidence against the sheriff. Sheldon *v.* Payne, 7 N. Y. 453. That the power to return is a common-law power, see McCullough *v.* Commonw., 67 Penn. St. 30.

The return of a sheriff upon a process in his hands as to his official acts properly done thereunder is conclusive upon the parties to the action and their privies, and cannot be collaterally impeached, but must be set aside, if at all, in some direct proceeding brought for the purpose. Toepfer *v.* Lampert, 102 Wis. 465, 78 N. W. Rep. 779; Yatter *v.* Pitkin, 72 Vt. 255, 47 Atl. Rep. 787; Sawyer *v.* Harmon, 136 Mass. 414.

The return may be contradicted when the question of jurisdiction of the parties arises, and it may be shown that jurisdiction was never in fact obtained, notwithstanding recitals to that effect in the record. Toepfer *v.* Lampert, 102 Wis. 465, 78 N. W. Rep. 779; St. Sure *v.* Lindsfelt, 82 Wis. 346, 52 N. W. Rep. 308, 33 Am. St. Rep. 50, 19 L. R. A. 515.

[99] Sheldon *v.* Payne (above).

In a suit against a sheriff upon his official bond, he is concluded by his return. Breckenridge Merc. Co. *v.* Bailif, 16 Colo. App. 554, 66 Pac. Rep. 1079.

In an action of *scire facias* the return of an officer, in the absence of fraud, is conclusive. Yatter *v.* Pitkin, 72 Vt. 255, 47 Atl. Rep. 787; Winchel *v.* Stiles, 15 Mass. 230; Cozine *v.* Walter, 55 N. Y. 304; McArthur *v.* Pease, 46 Barb. (N. Y.) 423.

[1] See Splahn *v.* Gillespie, 48 Ind. 397.

[2] As, for instance, the plaintiff, in an action against a sheriff for a false return; or an action for not paying over. Sheldon *v.* Payne (above); Armstrong *v.* Garrow, 6 Cow. 465.

When a sheriff recites in his re-

thus conclusive, not even the officer,[3] or his deputy,[4] can testify in contradiction to it. But returning that the goods were taken as property of A. does not estop him from showing that they were not in fact A.'s property,[5] or that plaintiff is not entitled to the proceeds.[6] And he may prove other facts relevant to his defense, which were not included in nor contradicted by his return.[7]

The plaintiff, although suing on a return, may contradict it, for instance, by denying that the acts were done by his special direction.[8]

When the return is adduced in evidence by one not deriving any right or interest under it,—as, for instance, when one sues for an alleged wrongful levy,—it is a mere admission, and only *prima facie* evidence against the officer.[9]

turn on an execution that the purchase price of one hundred dollars was paid to him, it concludes all question as to that matter. Mason *v.* Perkins, 180 Mo. 702, 79 S. W. Rep. 683, 103 Am. St. Rep. 591.

[3] Freem. on Ex., § 364, n. 3.

A return of a sheriff, being specific and not uncertain, is conclusive and it is not competent for the sheriff to contradict it. Brechtel *v.* Cortright, 13 Pa. Super. Ct. 384.

A legal levy having been made upon certain goods, it cannot be denied by the sheriff. Cox *v.* Patten (Tex. Civ. App.), 66 S. W. Rep. 64.

[4] Sheldon *v.* Payne (above).

[5] Hopkins *v.* Chandler, 17 N. J. L. (2 Harr.) 299.

A sheriff is precluded from the assertion of a different title to the goods seized under his execution than that shown to have been acquired by his levy of the process. Hopke *v.* Lindsay, 83 Mo. App. 85.

[6] Id.

[7] Evans *v.* Davis, 3 B. Monr. (Ky.) 346; Freem. on J., § 366.

In a suit against a sheriff upon his official bond, he is concluded by his return. He cannot be permitted to dispute it. The return, if not in accordance with the facts, might have been amended in the suit in which the writ of execution issued, but it could neither be amended nor contradicted by the sheriff in the suit brought against him. Bishop *v.* Poundstone, 11 Colo. App. 73, 52 Pac. Rep. 222; Grove *v.* Wallace, 11 Colo. App. 160, 52 Pac. Rep. 639.

[8] Townsend *v.* Olin, 5 Wend. 207.

[9] Baker *v.* McDuffie, 23 Wend. 291 (Nelson, Ch. J.); Boynton *v.* Willard, 10 Pick. 166. This distinction rests on sound principles and the highest N. Y. authority. It is not noticed by Wharton, who gives conflicting rules (2 Whart. Ev., §§ 833*a*, 837, 1155); nor by Freeman on Ex., § 366, who regards

When adduced in evidence by the officer himself in his own defense, whether in a direct action for a false return, or in an action for breach of duty, it is not conclusive in his favor.[10] And it is evidence in his favor only of such official acts as he is by it required to perform, and not of matters stated as an excuse for their non-performance.[11]

The return which is conclusive against the officer is not simply his indorsement upon the process, but it is the actual placing of it in the office from which it is issued. Until then he may change the indorsement, and afterwards only by permission of the court.[12] A return or indorsement made by him is, though not filed, competent against him as an admission, and, if made in pursuance of his duty, is competent in his favor,[13] even though made after suit is brought.[14]

the officer as always concluded. See also Bullis *v.* Montgomery, 50 N. Y. 352, rev'g in part, 3 Lans. 255.

The return of a proper officer on an execution is conclusive upon the parties to that proceeding. It cannot be attacked by such parties in a collateral proceeding to vary or to contradict it; a direct proceeding must be had for that purpose by a party to that proceeding.

As to the facts which the officer is required to state in a return, the return is *prima facie* but not conclusive evidence for or against a stranger to the suit. Holt *v.* Hunt, 18 Tex. Civ. App. 363, 44 S. W. Rep. 889.

[10] Whitehead *v.* Keyes, 3 Allen, 495, s. c., 1 Am. L. Reg. N. S. 471, and note by Redfield.

The recitals in the return of a constable are only *prima facie* evidence of the truth of the facts stated, in a subsequent action against the constable on his bond. State *v.* Devitt, 107 Mo. 573, 17 S. W. Rep. 974, 28 Am. St. Rep. 426; Sanborn *v.* Baker, 1 Allen, 526; Smith *v.* Emerson, 43 Pa. St. 456; Barrett *v.* Copeland, 18 Vt. 67, 44 Am. Dec. 362; Splahn *v.* Gillespie, 48 Ind. 397.

[11] Browning *v.* Hanford, 5 Den. 586, rev'g 7 Hill, 120; and see Splahn *v.* Gillespie, 48 Ind. 397, affi'g 1 Wils. 228. *Contra*, Freeman on Ex., § 366.

[12] Nelson *v.* Cook, 19 Ill. 440, 455; and see Barker *v.* Binninger, 14 N. Y. 270. But once made, it may relate back to the return day. Armstrong *v.* Garrow, 6 Cow. 465.

[13] Glover *v.* Whittenhall, 2 Den. 633.

[14] Bechstein *v.* Sammis, 10 Hun, 585.

16. Public Action for Refusing to Serve.

In a prosecution on behalf of the public, for refusing to accept office, or to continue its exercise, the best evidence of appointment must be produced; [15] and it is not enough to prove that defendant was an officer *de facto*.[16]

17. Pleading by Officer Defendant.

By the New York statute,[17] in every action against a public officer for his official acts, though not in actions for nonfeasance,[18] the defendant may give special matter in evidence, under the general issue, without notice. When he pleads his justification, however, he must do so strictly.[19]

18. Defendant's Proof of Official Character in Justification.

If defendant, justifying as an officer, produces the record of his appointment by an authority having apparent jurisdiction, this is conclusive; [20] and if there be no writing and none required by law, parol evidence is competent to prove the appointment.[21] But he need not prove that the appointing power was *de jure*.[22] Whether evidence that he himself was an officer *de facto* is enough, is disputed.[23]

[15] Per SAVAGE, Ch. J., Dean *v.* Gridley, 10 Wend. 254.

[16] Bentley *v.* Phelps, 27 Barb. 524, S. P., Green *v.* Burke, 23 Wend. 490.

[17] 2 R. S. 353, § 15.

[18] Fairchild *v.* Case, 24 Wend. 380; Persons *v.* Parker, 3 Barb. 249.

[19] Lawton *v.* Erwin, 9 Wend. 233; Dennis *v.* Snell, 54 Barb. 441. So far as the latter case holds that new matter proved, though not pleaded, to avoid new matter in the answer, cannot be met by new matter not in the answer, it is perhaps of doubtful soundness.

[20] Wood *v.* Peake, 8 Johns. 69; State *ex rel.* Leonard *v.* Sweet, 27 La. Ann. 541.

[21] Hoke *v.* Field, 10 Bush (Ky.), 144.

[22] Stevens *v.* Newcomb, 4 Den. 437.

[23] Three rules are asserted on this point: (1) That he must aver and prove that he was legally an officer, duly elected or appointed and qualified to act (Short *v.* Symmes, 150 Mass. 298, 23 N. E. Rep. 42, 15 Am. St. Rep. 204; Conover *v.* Devlin, 15 How. Pr. 478, and cases cited). (2) That he must at least show color of election or appointment from competent authority (State *v.* Carroll, 38 Conn. 449, s.

19. Process as a Protection to Defendant.

Where the person against whom, or whose property, process,[24] or a warrant,[25] or order,[26] has been issued by any tribunal or official body having jurisdiction of the subject, sues the officer for executing it,[27] the process, if fair on its face,[28] is a protection, and it is not necessary to give other evidence of jurisdiction of the person than the production of the process or order.[29] If process or a warrant signed by public officers, and produced as a justification, lack their

c., 9 Am. Rep. 409); and that this is *prima facie* sufficient for the protection of an officer *de facto* (Willis *v.* Sproule, 13 Kans. 257). (3) That he may *prima facie* establish his official character by proof of general reputation, and that he acted as such officer (1 Dill. M. C. 295, note, and cases cited; Colton *v.* Beardsley, 38 Barb. 29), in other matters besides those in question (Hutchings *v.* Van Bokkelen, 34 Me. 126).

[24] Savacool *v.* Boughton, 5 Wend. 170, 180; Parker *v.* Waldrod, 16 Id. 514; Morgan *v.* Oliver, 129 S. W. Rep. 156.

[25] Chegaray *v.* Jenkins, 5 N. Y. 376, 380; O'Mera *v.* Merritt, 128 Mich. 249, 87 N. W. Rep. 197.

[26] Erskine *v.* Hohnback, 14 Wall. 613. If the proceedings and order of a board of public officers, such as a board of health, are relied on as a justification in an act which, if without such justification, is a serious wrong, strict proof of the proceedings may be required. Meeker *v.* Van Rensselaer, 15 Wend. 397. Compare Chap. III, paragraphs 56–65.

[27] The rule is the same as against voluntary assignees, who become such after a levy. Heath *v.* Westervelt, 2 Sandf. 110.

[28] What is requisite to make it fair on its face within the rule, see, as to direction, Russell *v.* Hubbard, 6 Barb. 654; name of party, Farnham *v.* Hildreth, 32 Ind. 277, 281; 1 Abb. New Cas. 309; alterations, Wattles *v.* Marsh, 5 Cow. 176; amendable defects, seal, etc., Dominick *v.* Eacker, 3 Barb. 17; completeness, Prell *v.* McDonald, 7 Kans. 426; process *functus officio*, State *v.* Queen, 66 N. C. 615.

Warrants emanating from inferior magistrates must show upon their face legal authority for their issue. Jacques *v.* Parks, 96 Me. 268, 52 Atl. Rep. 763. See also Heath *v.* Halfhill, 106 Iowa, 131, 76 N. W. Rep. 522.

[29] Unless, perhaps, where he was the actor in promoting the illegal proceedings. Leachman *v.* Dougherty, 81 Ill. 324. As to necessity of return, see 2 Phil. Ev., by Edw. 366; Sheldon *v.* Van Buskirk, 2 N. Y. 473, 476; but it is, it seems, unnecessary. Id.; signature essential, Barhydt *v.* Valk, 12 Wend. 143.

official additions, parol evidence is competent to show that they actually held the offices by virtue of which they acted. And where jurisdiction may be impeached, it will usually be enough, for the purpose of protecting the officer, to show that the jurisdictional facts were duly alleged in the application,[30] unless the officer was the applicant;[31] and that the process was issued by a person *de facto*, and with color of title, a magistrate such as has jurisdiction.[32] The process, even though it may not justify the taking, may be admissible in mitigation, to justify the entry for the purpose of taking.[33] Where the act is sought to be justified by instructions from the head of an executive department, the court may presume in the officer's favor that the proper direction was given by the chief executive. If the officer is sued for an

[30] Whitney *v.* Shufeldt, 1 Den. 592; Magerstadt *v.* People, 105 Ill. App. 316.

"It is the law that a ministerial officer is protected in the execution of process, when it issues from a court of general jurisdiction, although such court, in fact, has no authority in the particular case, provided it appears upon the face of the process that the court has jurisdiction, and nothing appears to apprise the officer that the court has no authority. But it is also held that if a ministerial officer executes any process upon the face of which it appears that the court which issued it had not jurisdiction of the subject matter nor of the person or the process, such process will afford the officer no protection for acts done under it." Casselini *v.* Booth, 77 Vt. 255, 59 Atl. Rep. 833.

An officer who seizes property by virtue of a process issuing from a court having no jurisdiction of the subject matter of the process is a trespasser, notwithstanding that he acted in good faith and without malice. Hamer *v.* White, 110 Ga. 300, 34 S. E. Rep. 1001.

[31] An officer justifying under a summary proceeding in his favor, taken by an inferior magistrate who was only authorized to act on complaint of a particular officer must show that he was such officer. And plaintiff may prove that he was not. Walker *v.* Moseley, 5 Den. 102.

[32] Weeks *v.* Ellis, 2 Barb. 320; Wilcox *v.* Smith, 5 Wend. 233.

If the process issues from a court of competent jurisdiction and it is regular on its face, the officer executing the same is not bound to inquire into the validity of the proceedings on which the process is based. Wilbur *v.* Stokes, 117 Ga. 545, 43 S. E. Rep. 856.

[33] Parker *v.* Waldrod, 16 Wend. 514; Paine *v.* Farr, 118 Mass. 74; Wilcox *v.* Jackson, 13 Pet. 498.

act of subordinates, performance of which the facts show it to have been his duty to direct, the court may presume in his favor that the necessary request was duly given.[34]

Where a third person sues the officer for enforcing against him process, or a warrant or order against another, the officer must produce the judgment, or other foundation of the process.[35] The process itself, and the record of the judgment or decree, if any, on which it was issued, are primary evidence; and unless a foundation for secondary evidence is laid, they cannot be proved by testimony to their contents,[36] nor to an admission of their existence by the adverse party.[37]

[34] Rankin *v.* Hoyt, 4 How. U. S. 327, 335.

[35] Parker *v.* Waldrod, 16 Wend. 514; Jansen *v.* Acker, 23 Id. 480. And if he seizes under an attachment, he must show the attachment regularly issued. Noble *v.* Holmes, 5 Hill, 194.

[36] Stebbins *v.* Cooper, 4 Den. 191. See Adamson *v.* Noble, 137 Ala. 668, 35 So. Rep. 139.

[37] Per THOMPSON, J., Jenner *v.* Joliffe, 6 Johns. 9.

CHAPTER IX

ACTIONS BY, AGAINST, OR BETWEEN PARTNERS

I. ACTIONS BY PARTNERS

1. Allegation of Partnership.

An allegation of partnership between plaintiffs is unnecessary in their complaint, unless their right of action depends on the partnership. When a joint ownership or joint contract will enable them to recover, it is no objection to the complaint that the partnership is not pleaded.[38] If plaintiffs allege their partnership, it is well to be prepared to prove it,[39] unless admitted; and a general denial is not an admission, but puts the allegation in issue.[40]

2. Proof of Partnership.

Partners in a general partnership, suing as such, may prove their partnership by the testimony of a partner,[41] or by that

[38] Loper *v.* Welch, 3 Duer, 644.

A demurrer to a complaint on the ground that it does not affirmatively state that the plaintiffs constitute a firm, nor who compose the firm, is frivolous. Cowan *v.* Baird, 77 N. C. 201.

[39] Cooper *v.* Coates, 21 Wall. 105; Millerd *v.* Thorn, 56 N. Y. 401.

An answer denied any information or belief as to the partnership of the plaintiffs and further alleged a notice to them not to deliver the goods which were the subject matter of the suit. It was held that the latter allegation implied that the plaintiffs were the parties with whom the defendant was dealing, which entitled them to recover whether or not a partnership was proved. Doll *v.* Goellner Furniture Co., 159 N. Y. Supp. 737.

[40] Fetz *v.* Clark, 7 Minn. 217. The fact of partnership, though it may not be material in the sense of being essential to a recovery (Oechs *v.* Cook, 3 Duer, 161), may be material to a set-off, &c., and as laying a foundation for admitting evidence of the acts and declarations of one plaintiff for or against both.

[41] See Gates *v.* Manny, 14 Minn. 21.

A partnership may be proved

of a witness who has done business with them,[42] or for them, —as a clerk, for instance; [43]—and a witness who knows that they have done business as such, at the time in question, or other times reasonably proximate,[44] may testify directly to the fact that they were partners, subject, of course, to cross-examination as to the details.[45] If he cannot testify that they were partners, he should not be allowed to state his opinion. The facts being brought out, the question of partnership or no partnership between plaintiffs is one of law for the court.[46] Evidence that the plaintiffs represented

between the parties, as well as with others, by evidence of the acts, dealings, conduct, admissions, and declarations of the parties themselves as well as direct proof in different lines. Jones *v.* Purnell, 21 Del. 444, 62 Atl. Rep. 149.

[42] Gilbert *v.* Whidden, 20 Me. 368.

[43] McGregor *v.* Cleveland, 5 Wend. 475. "The usual proof of partnership is by the evidence of clerks or other persons who have done business with the parties as partners; and, although the partnership may have been constituted by indentures or other writings, it is ordinarily not necessary in an action between the partners and a third person to produce them. Their declarations in transacting business with third persons may be given in evidence to prove their partnership; and the entries made in their books in the course of business are evidence of the same character and equally competent." American Credit Indemnity Co. *v.* Wood, 38 U. S. App. 583, 589, 73 Fed. Rep. 81. The use of the words "& Co." after the name of an individual, raises a presumption of a partnership, which, unless rebutted by evidence, is conclusive. Henderson *v.* Perryman, 114 Ala. 647, 22 So. Rep. 24.

Employees who had been for many years with the defendant concern which was doing business as "A. R. Clark & Co." were held competent to testify whether the firm was a corporation or a partnership. Clark *v.* Hoffman, 128 Ill. App. 422, 428.

[44] See Gilbert *v.* Whidden (above).

[45] Grew *v.* Walker, 17 Ala. 824.

Any person, whether a member of the partnership or not, was competent to testify as to who composed the firm and who were the survivors thereof, provided he spoke from knowledge of the fact. Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. Rep. 1038.

[46] Id. As to proving partnership under foreign law, see Barrows *v.* Downs, 9 R. I. 446, s. c., 11 Am. Rep. 283.

What constitutes a partnership—that is, the legal elements of a part-

themselves to be partners,—as, for instance, where one introduced the other to witness as his partner,—is competent, for partnership may be proved, even in favor of the partners, by the acts and declarations of all,[47] but the declarations of one partner, or the testimony of a witness whose only information is by such declaration or hearsay, is not alone enough. And evidence that defendants were universally understood to be partners is not competent to prove the existence of that relation between them.[48] Plaintiffs have the means of proving their own partnership; and, where the fact is material, may be held to strict proof.[49] If a written contract sued on runs to the plaintiffs in a firm style, its production is sufficient *prima facie* evidence of the existence of a partnership, as against defendants who have signed or

nership—is a question of law for the court. Whether in fact a partnership existed between the parties is a question of fact for the jury. Jones *v.* Purnell, 21 Del. 444, 62 Atl. Rep. 149.

The statement of a layman that another is his "partner" is a mere assertion of a conclusion based upon what he may think constitutes a partnership, but which may not conform upon a critical analysis of the facts to the legal definition thereof, and is therefore inadmissible. Bakmazian *v.* Tatosian et al., 161 N. Y. Supp. 450.

In determining the fact of partnership the testimony of witnesses who give their general understanding or opinion concerning the partnership will not be considered—but such evidence as tends to show circumstances surrounding the parties at the time is competent. Reeves *v.* Jordan, 72 So. Rep. (Ala.) 322.

[47] Gilbert *v.* Whidden, 20 Me. 368. *Contra,* Lockridge *v.* Wilson, 7 Mo. 560.

The declarations of one person as to the existence of a partnership between himself and another person are not admissible evidence against the latter to prove the fact of partnership, unless they were made in his presence or fall within the exception to the general rule excluding hearsay evidence. Guin *v.* Grasselli Chemical Co., 72 So. Rep. (Ala.) 413.

[48] Stiewel *v.* Borman, 63 Ark. 30, 37 S. W. Rep. 404.

The existence of a partnership cannot be proved by general repute; yet when the fact is otherwise established, general notoriety in the neighborhood may be proved as competent evidence, to charge a resident in such community with knowledge of it. Guin *v.* Grasselli Chemical Co., 72 So. Rep. (Ala.) 413.

[49] McGregor *v.* Cleveland (above).

indorsed it,[50] but unless it is admitted that the plaintiffs composed the firm, they must give some evidence of the fact beside that afforded by the correspondence of surnames and their production of the instrument sued on.[51] Articles of copartnership, even if shown to exist, need not be produced, unless some question is made as to their contents or scope.

3. Parol Evidence to Vary the Contract Sued On.

Where partners sue on a simple contract made with a member of the firm in his own name, they may show by parol that the contract was made by him for the firm.[52] The fact that it was made in his name throws on them the burden of doing so. Evidence that the consideration proceeded from the firm assets, is not alone enough.[53] A sealed instrument cannot be thus varied by parol; even a partner who became such subsequent to the contract, cannot sue thereon,[54] unless upon evidence that he has been recog-

[50] Griener *v.* Ulerey, 20 Iowa, 266.

[51] McGregor *v.* Cleveland, 5 Wend. 475; Barnes *v.* Elmbinger, 1 Wisc. 56.

Where the endorsement on a note made to a partnership is special, proof of the partnership must be given. Boswell *v.* Dunning, 5 Del. 231.

[52] Cooke *v.* Seely, 2 Exch. 745; S. P., Coleman *v.* First Nat. Bank, 53 N. Y. 388, 391.

In an action upon a written contract not under seal extrinsic evidence may be given to show that a contract was made on behalf of the parties other than those whose names appear in or are signed to the instrument, and to charge such other parties. In this case the contract produced was signed by only one of the two firms against whom the action was brought. Ropes *v.* Arnold, 30 N. Y. Supp. 997, 81 Hun, 476.

[53] See Townsend *v.* Hubbard, 4 Hill, 351; Briggs *v.* Partridge, 64 N. Y. 362.

[54] Duff *v.* Gardner, 7 Lans. 165.

Similarly, in the case of parties signing an instrument as "agents" of undisclosed principals, it was held that "where an instrument is under seal, no person can sue or be sued to enforce the covenants, therein contained, except those who are named as parties to the instrument and who signed and sealed the same." Henricus *v.* Englert, 137 N. Y. 488, 499, 33 N. E. Rep. 550. Quoted in Belasco Co. *v.* Klaw, 48 Misc. (N. Y.) 597, 599, 97 N. Y. Supp. 112. See also

nized as a joint contractor by the other party.[55] But if the sealed contract is made in the name of the firm or all the partners, evidence that the one who signed and sealed had authority from the others to do so, need not be proved for the purpose of sustaining their action.[56]

4. Firm Books as Evidence in Favor of the Firm.

Where the books of a party are competent in his own favor,[57] the books of a firm are equally so in their favor, upon the same conditions, but in those States where the suppletory oath of the party is requisite, the partner who made the entries must be called for the purpose, unless he is dead or has gone beyond jurisdiction.[58]

5. Declarations.

Evidence of the declarations of the partners is not competent in favor of the firm, except to establish the fact of partnership, or under the rule of *res gestæ*, or on other grounds of competency common to the declarations of other classes of parties.[59]

6. Defendant's Evidence.

Plaintiffs' allegation that they were partners is conclusive on them so far as to render evidence of the admissions and declarations of either of them, made while he sustained that relation,[60] competent against all, and under this rule, the

O'Brien *v.* Clement, 160 N. Y. Supp. 975.

[55] Compare Cramer *v.* Metz, 57 N. Y. 659.

[56] Gates *v.* Graham, 12 Wend. 53.

[57] Vosburgh *v.* Thayer, 12 Johns. 461; Tomlinson *v.* Borst, 30 Barb. 42; Stroud *v.* Tilton, 4 Abb. Ct. App. Dec. 324, 2 Phil. Ev. 370, note 108.

[58] New Haven Co. *v.* Goodwin, 42 Conn. 230.

[59] Crousne *v.* Fitch, 1 Abb. Ct. App. Dec. 475.

[60] A statement by one, who became partner after the cause of action arose, is not evidence against his copartner who sues on it. Tunley *v.* Evans, 2 D. & L. 747; Rosc. N. P. 75.

Where a partnership was established by *prima facie* proof, the declarations and admissions of one, made in the conduct of the alleged partnership business were submit-

declaration of one, that the cause of action was exclusively his own, is competent against the others.[61] An entry in partnership books is not, even against a member, conclusive evidence that the transaction was a firm transaction.[62]

7. Matter in Abatement.

An allegation of the non-joinder of copartners as plaintiffs is sustained by proof that some of those alleged were copartners; and the failure to prove that others were is matter of variance, to be disregarded unless defendant is prejudiced.[63] Under the new procedure, a dormant partner, although one of the real parties in interest, should not be held a necessary coplaintiff;[64] and evidence showing that the partners who sue are "trustees of an express trust" for him, within the statute,[65] clearly dispenses with the necessity of joining him. So also would evidence that the contract was taken in the name of a part of the firm by assent of the others.[66] Neither evidence that a third person employed by plaintiffs has an interest in the profits and therefore in the recovery,[67] nor the fact that he was a nominal partner,

ted to the jury, along with the other evidence, as tending to confirm the fact and define the scope of the partnership. Conner *v.* Ray, 195 Ala. 170, 70 So. Rep. 130.

[61] Lucas *v.* De la Cour, 1 M. & S. 249; especially if part of the *res gestæ*. Atherton *v.* Tilton, 44 N. H. 452, 458. As to the effect of such evidence, see paragraph 1, Chapter VII. of this vol., note 87.

[62] Langton *v.* Hughes, 107 Mass. 272. Compare Farner *v.* Turner, 1 Iowa, 53.

[63] See Fowler *v.* Atlantic Mut. Ins. Co., 8 Bosw. 332, 344. Compare paragraph 37.

[64] This was the common-law rule, but the contrary was held in Secor *v.* Keller, 4 Duer, 419. The soundness of this case is doubtful under the Code, as amended in 1851. See Moak's Van Sant. Pl. 90, 118. The better opinion is that the partnership relation is itself sufficient evidence of a trust. See also Chew *v.* Brumagem, 13 Wall. 497.

[65] N. Y. Code Civ. Pro., § 459.

[66] Mynderse *v.* Snook, 1 Lans. 488.

[67] Lewis *v.* Greider, 51 N. Y. 231, affi'g 49 Barb. 606.

One who is not a member of a firm, but who is entitled to a share of the profits for his services is not a necessary party to an action brought by the firm, and it needs

under a stipulation that he was to have no interest, but to receive wages or a salary only,[68] is enough to prove him a partner.[69] If the existence of a partner who is not joined, does not appear in the complaint nor in the answer, evidence of the fact is not ground for dismissing the complaint.[70]

II. ACTIONS AGAINST PARTNERS

8. Allegation of Partnership.

If it is substantially alleged in the complaint that the defendants contracted as partners, the fact of partnership will be put in issue by a general denial,[71] though not by a

no assignment from him to maintain the action. Cassidy *v.* Hall, 97 N. Y. 159; Richardson *v.* Hughitt, 76 N. Y. 55, 32 Am. Rep. 267.

[68] Beudel *v.* Hettrick, 35 Super. Ct. (3 J. & S.) 405.

Showing that an alleged salaried employee of a firm had power to sign notes for raising funds for the firm and that he was held out as a member of the firm, will establish him to be a partner. Clarke *v.* North, 151 N. Y. App. Div. 337, 135 N. Y. Supp. 422.

A participation in the profits of a business by a party as a compensation for his labor or services does not make him a partner. Conklin *v.* Barton, 43 Barb. (N. Y.) 435.

[69] Compare paragraphs 11 to 19. See Law *v.* Cross, 1 Black, 537. Declarations of the omitted one are not competent to prove the partnership. McFayden *v.* Harrington, 67 N. C. 29.

[70] Dickinson *v.* Vanderpoel, 2 Hun, 626.

[71] See paragraph 1.

Where the complaint alleges a partnership and the answer denies it, and such partnership is an essential part of the plaintiff's case, it must be proved. Harvey *v.* Walker, 59 Hun, 114, 13 N. Y. Supp. 170.

Where the joint liability is denied by a part of the defendants, the burden of proof, by a plea verified by affidavit, is upon the plaintiff to show the joint liability of all the defendants, including those who failed to file pleas, unless he shall amend his declaration and dismiss the suit as to such of the defendants as are not shown to be jointly liable with the others. M. W. Powell Co. *v.* Finn, 198 Ill. 567, 64 N. E. Rep. 1036.

An allegation of copartnership is not necessary if it can be shown by proof that the goods were sold to one of the defendants while conducting business in which both of them were copartners together, which would prove the allegation in the complaint that the goods were sold to the defendants. Wolf

denial of the contract alleged.[72] Under a general allegation of partnership, plaintiff may prove a supposed special partnership under the statute, and the violations of the statute relied on as rendering the defendant liable as general partner.[73] Where a joint liability appears on the face of the contract, a partnership need neither be alleged nor proved;[74] and the chief effect of alleging and proving it, is to open the way for admitting more freely the acts and declarations of one partner against the others.[75]

9. Proof of Partnership.

Plaintiffs may prove defendant's partnership in the same way in which, as above stated, plaintiffs may prove themselves to be partners.[76] The existence of a firm may be in-

v. Strahl, 3 Silv. Sup. 552, 7 N. Y. Supp. 593.

See Richmond *v.* Boyd, 130 Tenn. 187, 169 S. W. Rep. 755, holding that where a defendant in his unsworn answer denied membership in the alleged partnership, the issue of partnership was thereby raised.

[72] Anable *v.* Conklin, 25 N. Y. 470, affi'g 16 Abb. Pr. 286. Compare Oechs *v.* Cook, 3 Duer, 161.

[73] Stone *v.* De Puga, 4 Sandf. 681. See paragraph 36.

[74] Kendall *v.* Freeman, 2 McLean, 189.

In an action against partners upon a partnership obligation, it is not necessary to allege a partnership between the defendants, but they may be declared against as any joint debtors. Pike *v.* Zadig, 171 Cal. 273, 152 Pac. Rep. 923.

It was held in Smith *v.* Cain, 180 Mo. App. 457, 166 S. W. Rep. 653, to have been long settled that in an action against several defendants, an allegation of partnership was not necessary to entitle one to offer evidence of that relation.

Where it appeared that the plaintiffs were the owners of the cause of action upon which an action was based, it was held to be immaterial whether they held it as copartners or otherwise. Klemik *v.* Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. Rep. 871.

[75] See paragraphs 23, 32, 52.

Where the complaint asserts that the defendants while carrying on a business as copartners became indebted to the plaintiff, and demands judgment against them, a joint liability is alleged and the judgment must be taken against all the defendants, although only one was served. Brandagee *v.* Cleary, 152 N. Y. Supp. 628.

[76] Paragraph 2. Widdefield *v.* Widdefield, 2 Binn. (Penn.) 245, s. p., 37 Penn. St. 92, and cases cited.

The existence of a partnership

ferred from the agreement of dissolution; but even a formal notice of dissolution signed by all the members, and published, stating a dissolution on a day named, is not conclusive evidence against them that the firm continued until that day.[77] The names of the members must be proved; but slight evidence is enough to go to the jury.[78] If the witness cannot recollect the names, a list of names may be read to him, and he may be asked whether those persons are members.[79] As the adverse party has not the same means of knowledge, he is not to be held to make so strict proof of the partnership as if proving his own.[80]

10. Best and Secondary Evidence.

If the question involves the construction of written articles of agreement, they should be called for as a foundation for secondary evidence.[81] The proper certificates of acknowledgment or proof under the statute, render the instrument competent, without other proof of execution.[82] And the whole of the agreement must be taken together.[83] But even though the articles do not establish a partnership,

cannot be established by the declarations of one of the partners. Franklin *v.* Hoadley, 145 N. Y. App. Div. 228, 130 N. Y. Supp. 47.

After a *prima facie* case as to partnership is made, the admissions and conduct of the several partners in the course of the partnership business are admissible as against the others. Dennis *v.* Kolm, 131 Cal. 91, 63 Pac. Rep. 141.

[77] Emerson *v.* Parsons, 46 N. Y. 560, affi'g 2 Sweeny, 447.

[78] Varnum *v.* Campbell, 1 McLean, 313.

[79] Acerro *v.* Petroni, 1 Stark. 100.

[80] See McGregor *v.* Cleveland, 5 Wend. 475. Thus, if plaintiff proves that defendants were partners, and proves a contract made by one member signed with his own name and the addition "& Co.," this is enough to go to the jury without proving that defendants did business under that name. Drake *v.* Whittaker, 1 Cai. 184, KENT, J.

[81] Price *v.* Hunt, 59 Mo. 258. As to *subpœna duces tecum*, and notice to produce, see McPherson *v.* Rathbone, 7 Wend. 216.

[82] Mattison *v.* Demarest, 4 Robt. 161; and see page 27 of this vol. paragraph 11.

[83] Manhattan Brass Manufacturing Co. *v.* Sears, 1 Sweeny, 426.

it may be established by parol evidence.[84] Parol evidence is competent, even for the purpose of proving a partnership in transaction in real property.[85] And where written articles are proved, the prior existence of the relation may still be proved by parol.[86]

11. Indirect Evidence of Partnership.

A partnership may be shown by the separate admissions, acts, declarations or conduct of the parties, or by the act of one, the declaration of another, and the acknowledgment or consent of a third;[87] and it matters not which declaration is offered first.[88] But it can never be proved in this way alone, unless the evidence fixes such a concession on each or all of those charged. The concession of one is evidence against himself, but not against another, unless shown to have been authorized or ratified by that other.[89] To admit such evidence generally, as if competent against all, where there is no other evidence against the others, is error.[90]

[84] McStea *v.* Matthews, 50 N. Y. 167.

[85] Chester *v.* Dickinson, 54 N. Y. 1, 8, affi'g 52 Barb. 349.

[86] Id.

[87] Barcroft *v.* Haworth, 29 Iowa, 462.

Where the evidence shows that a fire loss was proved and collected in a partnership capacity, it is strong corroboration of the alleged partnership. Thomas *v.* Mosher, 128 Ill. App. 479.

[88] Edwards *v.* Tracy, 62 Pa. St. 374.

Evidence as to the manner of operating property as to how each interested party participated, and the disposition of the profits, is pertinent on the inquiry as to the existence of a partnership. Lutz *v.* Billick, 172 Iowa, 543, 154 N. W. Rep. 884.

[89] See notes to paragraph 14, and also Chapter VII. Whether evidence of an admission of his own liability by one, coupled with evidence of an admission of liability as a partner by the other, is enough, compare Mitchell *v.* Roulstone, 2 Hall, 351; and Brahe *v.* Kimball, 5 Sandf. 237.

"The declaration of an alleged member of a partnership, in the nature of an admission that he was a member thereof, is admissible for the plaintiff on the trial of an action against the firm, to which the declarant has interposed the defense of 'no partnership' as to him." Cary *v.* Simpson, 15 Ga. App. 280, 82 S. E. Rep. 918.

[90] Whitney *v.* Ferris, 10 Johns. 66. The usage of other persons is

12. Holding Out to the Public.

Without other evidence of a partnership in fact as between the defendants, liability of a defendant as if a copartner is established by evidence that he held himself out, or suffered himself to be held out to the world as a partner;[91] and for this purpose it is not necessary, at least in the first instance, to prove a representation to the plaintiff.[92] Where it is proved that they advertised that they were partners, it may be presumed that the plaintiff's subsequent dealings were on the faith of the partnership.[93] A nominal partner, held

not competent. Foye *v.* Leighton, 22 N. H. 71.

[91] If the evidence is objected to, the offer should be explicit, and not susceptible of being understood as an offer to prove general repute. Bowen *v.* Rutherford, 60 Ill. 41, s. c., 14 Am. Rep. 25.

Although the parties may not in fact be partners, yet they may so conduct themselves towards a third party as to make themselves liable as such. Jones *v.* Purnell, 21 Del. 444, 62 Atl. Rep. 149.

In Fennell *v.* Myers, 25 Ky. Law Rep. 589, 76 S. W. Rep. 136, it was held immaterial whether or not a party was a member of a firm, if he held himself out as such or knowingly permitted others so to hold him out and credit was extended to the firm in reliance upon such representation.

Where one permits himself to be held out generally as a partner, he is liable to one who relies upon the fact, regardless of whether there was an actual partnership or not. Conner *v.* Ray, 195 Ala. 170, 70 So. Rep. 130.

[92] For this purpose, evidence is competent that the defendent dealt as a copartner of the other defendants in their transactions with third persons. Bennett *v.* Holmes, 32 Ind. 108. That handbills, bearing their names as partners, were circulated by the defendant (Walcott *v.* Caulfield, 3 Conn. 195); or were so circulated that they must reasonably be presumed to have come to his notice (Tumlin *v.* Goldsmith, 40 Ga. 221; compare McNamara *v.* Dratt, 33 Iowa, 385); that merchandise on the premises was marked with their firm name (Penn *v.* Kearney, 21 La. Ann. 21); and that they suffered judgment by default when sued as partners in another action. Cragin *v.* Carleton, 21 Me. 493; compare Hall *v.* Lanning, 91 U. S. (1 Otto), 160. So a contract or conveyance made in the firm name, and signed by each, though foreign to the matter in suit, is competent as an admission. Crowell *v.* Western Reserve Bk., 3 Ohio St. 406, 414. So is their joint application for a license for their business. Conklin *v.* Barton, 43 Barb. 435.

[93] Kelly *v.* Scott, 49 N. Y. 595.

out as such, is liable though having no interest, and receiving only wages,[94] or a mere compensation for the use of his name.[95] But if it appear that plaintiff was ignorant of the representations, or did not deal on the faith of them, they are not conclusive,[96] and may be rebutted by evidence that there was no partnership whatever, active, nominal or constructive.[97]

13. Representations to Particular Creditor.

Proof that defendants represented or conducted themselves as partners, and were trusted as such in the dealing in question,[98] or that the only one whose relation is contested did so,[99] is conclusive; and their own acts and declarations,

[94] See Beudel *v.* Hettrick, 35 Super. Ct. (J. & S.) 411.

[95] Poillon *v.* Secor, 61 N. Y. 456. The better opinion is that a general holding out is enough to raise a legal presumption of partnership, irrespective of whether the representation was brought to the dealer's notice. Poillon *v.* Secor, 61 N. Y. 456; Case of Wright, 26 Weekly R. 195, s. c., 5 Rep. 670. Some authorities hold that plaintiff must prove that he dealt on the faith of the representation; that mere representations to third persons are not competent. Teller *v.* Patten, 20 How. U. S. 125; Bowen *v.* Rutherford, 60 Ill. 41, s. c., 14 Am. Rep. 25; Heffner *v* Palmer, 67 Ill. 161; and that a representation made to the particular creditor is not enough to take the case from the jury, unless made before credit given or contract made. Ridgway *v.* Philip, 5 Tyrwhitt, 131. These rulings are not well considered. But on a question of priority between individual and partnership debts, isolated statements to a stranger are not enough. Case of Wright (above).

[96] Bostwick *v.* Champion, 11 Wend. 582, NELSON, J.

[97] Fitch *v.* Harrington, 13 Gray, 468, 470.

[98] Johnston *v.* Warden, 3 Watts, 101; Kelly *v.* Scott, 49 N. Y. 601.

[99] Hicks *v.* Cram, 17 Vt. 449; Kelly *v.* Scott, 48 N. Y. 601. Even though he was actually a special partner. Barrows *v.* Downs, 9 R. I. 446. Where the question is which of two persons of the same surname was the partner, evidence that the one joined as defendant represented himself as such to plaintiff, and that the other person was unknown to plaintiff, is competent without anything to connect the other defendant with the holding out. Hicks *v.* Cram, 17 Vt. 449, REDFIELD, J. A letter saying that the writer is "interested" in a firm, and asking credit for them, is evidence to charge the writer as a member for credit given on the

showing that they were not partners, cannot then disprove their liability. Where such representations are proved, evidence of similar representations, made at about the same time to third persons, is competent in corroboration.[1] A representation made by one will bind the others, if he was authorized by them to make it; [2] and the fact of his authority may be proved by his own testimony.

14. Admissions and Declarations to Prove Partnership.

As against any one defendant, whether litigating the case, or not appearing,[3] or not even served,[4] evidence of his own [5] admission, whether made to the plaintiff,[6] or to third persons,[7] and whether made at or after the transaction in suit,[8] or within a reasonable time before it,[9] is competent for the

faith of the letter, until notice of dissolution. Carmichael *v.* Greer, 55 Geo. 116.

One who not only permitted herself to be held out generally as a partner but at different times assured the plaintiff in person that she was a member of the concern, in reliance upon which fact he became a creditor of the firm was held to be liable, whether or not a partnership relationship actually existed. Comer *v.* Ray, 195 Ala. 170, 70 So. Rep. 130.

[1] Hicks *v.* Cram (above).

[2] Montgomery *v.* Bucyrus Machine Works, 92 U. S. (2 Otto) 257; Hinman *v.* Littell, 23 Mich. 484.

[3] Taylor *v.* Henderson, 17 Serg. & R. 453, 457.

The statements of the individual partners are competent to charge them respectively upon the question of the existence of the partnership in fact, and the nature and scope of its business. Smith *v.* Collins, 115 Mass. 388.

[4] Grafton Bank *v.* Moore, 14 N. H. 145, 146.

[5] As to admissions made by an agent, see Campbell *v.* Hastings, 29 Ark. 512; Hoppock *v.* Moses, 43 How. Pr. 201. Where the complaint alleges that several defendants are copartners, the declarations or admissions of one of them that they are such copartners are competent evidence against him of the existence of such copartnership, but are not sufficient to charge the others as partners. Boosalis *v.* Stevenson, 62 Minn. 193, 64 N. W. Rep. 380.

[6] See paragraph 13.

[7] Bennett *v.* Holmes, 32 Ind. 108, and see other illustrations in note 92 to paragraph 12.

[8] Taylor *v.* Henderson, 17 Serg. & R. 453, 457.

[9] Bennett *v.* Holmes (above); Ralph *v.* Harvey, 1 Adol. & E. N. S. 845, 849, s. c., 41 Eng. Com. L. 803.

purpose of proving the existence of the firm,[10] his own membership,[11] who were his copartners,[12] and what was the nature and scope of the business.[13] But such evidence is incompetent as against any other than the declarant, except in connection with other *prima facie* evidence that such other was a partner with the declarant,[14] or authorized him

[10] Johnson *v.* Warden, 3 Watts, 101.

[11] Edwards *v.* Tracy, 62 Penn. St. 374; Crossgrove *v.* Himmelrich, 54 Id. 203; Fleshman *v.* Collier, 47 Ga. 253.

[12] Taylor *v.* Henderson, 17 Serg. & R. 453, 457.

[13] Smith *v.* Collins, 115 Mass. 388, 399.

The admissions of each partner are competent evidence against the party making such admission. Armstrong *v.* Potter, 103 Mich. 409, 61 N. W. Rep. 657.

A firm's bank pass-book will be admitted in evidence, after the partnership has been proved, and its dealings with the bank and the entry by the latter of the deposits and withdrawals in the book. Arnold *v.* Hart, 176 Ill. 442, 52 N. E. Rep. 936, affi'g 75 Ill. App. 165.

[14] Pleasants *v.* Fant, 22 Wall. 120; McPherson *v.* Rathbone, 7 Wend. 216; Robins *v.* Warde, 111 Mass. 244; Donley *v.* Hall, 5 Bush, 549. But when sufficient evidence has been introduced to raise a fair presumption of the existence of the partnership, the acts and declarations of each are admissible against the others to strengthen the *prima facie* case already made. Conlan *v.* Mead, 172 Ill. 13, 49 N. E. Rep. 720. In an action to recover money alleged to have been loaned to a partnership, the admissions of a deceased person that he was a partner in the firm are competent. Stanfield *v.* Knickerbocker Trust Co., 1 App. Div. (N. Y.) 592. It is not alone enough to show that the others had previously been members with the declarant of another firm which meanwhile was dissolved. Kirby *v.* Hewitt, 26 Barb. 607. Compare Johnson *v.* Gallivan, 52 N. H. 143; Van Eps *v.* Dillaye, 6 Barb. 244.

The declarations of one partner in the absence of the other, to the effect that the other is his partner, do not charge the other. Pretzfelder *v.* Strobel, 17 N. Y. Misc. 152, 39 N. Y. Supp. 333.

The declarations or admissions of one partner that another is his partner are not sufficient to charge the latter as such partner, but are competent evidence as against the one making the admissions as to the existence of a copartnership between them. Boosalis *v.* Stevenson, 62 Minn. 193, 64 N. W. Rep. 380.

The admissions of one of a number of persons sought to be charged as partners cannot be used against the others. Lyon *v.* Fitch, 61 N. Y. Sup. Ct. 74, 18 N. Y. Supp.

to make the representation,[15] or was aware of it and silent.[16]

867; Drennen *v.* House, 41 Pa. St. 30; Currier *v.* Silloway, 1 Allen, 19.

Nothing short of separate admissions of each is competent to establish a partnership between them. Lyon *v.* Fitch, 61 N. Y. Super. Ct. 74, 18 N. Y. Supp. 867; Field *v.* Tenney, 47 N. H. 513; Bryer *v.* Weston, 16 Me. 261; Robins *v.* Warde, 111 Mass. 244.

Neither the admissions nor declarations of an alleged partner are competent evidence on the question of the existence of the copartnership, but after *prima facie* evidence of the existence of the copartnership has first been adduced such admissions and declarations in the course of the copartnership business are admissible and binding on the copartners. Franklin *v.* Hoadley, 115 N. Y. App. Div. 538, 101 N. Y. Supp. 374, 126 N. Y. App. Div. 687, 111 N. Y. Supp. 300.

In Franklin *v.* Hoadley, 126 N. Y. App. Div. 687, 111 N. Y. Supp. 300, McLaughlin, J., in a concurring opinion, says:

"Where the existence of a partnership is in issue, the declaration of one party that another is his partner is not competent to establish the partnership nor do such declarations for that purpose become admissible after *prima facie* evidence of the existence of the partnership has been given. The existence of the partnership cannot be strengthened, fortified or bolstered in this way. All that is meant by the authorities and text books in saying that such declarations become admissible when *prima facie* evidence has been given of the partnership is that they may be received for the purpose of binding the partnership, assuming, of course, its existence can be found solely from the other evidence. And whenever such issue is presented at a trial before a jury, then specific instructions should be given to this effect."

[15] Paragraph 11.

Where the defendants were sued as partners, it was held that the fact of their partnership could not be proved by the acts or declarations of an alleged partner until a *prima facie* case was made out that a partnership existed and then the declarations of the alleged partner would be admissible only as corrobative evidence. Willoughby *v.* Hildreth, 182 Mo. App. 80, 167 S. W. Rep. 639.

[16] Bancroft *v.* Haworth, 29 Iowa, 462; and see Campbell *v.* Hastings, 29 Ark. 512. Strictly speaking, when there is *prima facie* proof of partnership as against the others, the declaration does not really corroborate it, as against the others; but it ceases to be error to receive it as against them. See Gardner *v.* Northwestern Mfg. Co., 52 Ill. 367.

15. Hearsay.

Neither general reputation,[17] common rumor,[18] nor the opinion or belief [19] of a witness founded on such hearsay, is competent evidence of partnership. The question turns on the assent of the one to be charged.[20] Hence a business directory,[21] or the reports of a commercial agency,[22] are not admissible, unless knowledge of the statement, or means of knowing it, is brought home to the party charged.

[17] Bowen *v.* Rutherford, 60 Ill. 41, s. c., 14 Am. Rep. 25; Brown *v.* Crandall, 11 Conn. 93. Such evidence, if competent at all, is so only for two purposes: (1) In corroboration of previous evidence. (2) To show knowledge on the part of plaintiff. Not as direct and principal evidence. Turner *v.* McIlhaney, 8 Cal. 575. Even when admitted without objection, it is not alone enough to sustain a finding that partnership existed. But if admitted without objection it may be considered in connection with other evidence of partnership. Halliday *v.* McDougall, 22 Wend. 264. It may be competent, where the partnership is not directly in issue, but only incidentally in question; as, for instance, when relied on as an excuse for not giving notice. Gowan *v.* Jackson, 20 Johns. 176.

It is not competent to prove a partnership by general reputation, common rumor, or the opinion or belief of a witness founded on such hearsay testimony. (Citing text.) White *v.* Whaley (Tex.), 1 White & W. Civ. Cas. Ct. App., § 100.

The existence of a partnership cannot be proved by general reputation or common rumor. Tanner, etc., Engine Co. *v.* Hall, 86 Ala. 305, 5 So. Rep. 584.

Common reputation, being nothing more than rumor, cannot be allowed as competent evidence to establish the existence of a copartnership between individuals. Campbell *v.* Hastings, 29 Ark. 512.

[18] Tumlin *v.* Goldsmith, 40 Ga. 221.

But where one admitted his previous connection as a member of a partnership, general rumor in the neighborhood that the firm continued to exist as formerly was held to be a circumstance which could be considered in showing that he permitted himself to be held out as a partner. Guin *v.* Grasselli Chemical Co., 72 So. Rep. (Ala.) 413.

[19] Hicks *v.* Cram, 17 Vt. 449.

It is not competent to prove a partnership by general reputation, common rumor, or the opinion or belief of a witness founded on such hearsay testimony. Cleveland *v.* Duggan (Tex.), 2 Willson, Civ. Cas. Ct. App., § 81.

[20] Bowen *v.* Rutherford (above).

[21] Union Bank *v.* Mott, 39 Barb. 180.

[22] Campbell *v.* Hastings, 29 Ark. 512.

16. Ownership.

The joint purchase or ownership of property,[23] whether real [24] or personal,[25] is not alone any evidence of partnership; [26] though coupled with participation in profits,[27] or evidence of agency for each other,[28] it may be equivalent.

17. Dormant and Secret Partners.

To charge a dormant partner with the others, the knowledge or ignorance of those dealing with the firm, that he was such, is wholly immaterial. It is enough to prove that

[23] For the distinction between partnerships and other associations, see Ebbinghousen *v.* Worth Club, 4 Abb. New Cas. 300, 308, note; Raisbeck *v.* Oesterricher, Id. 347; Story on Partn., ch. xvi; 1 Wood's Coll. 9–48.

[24] Thompson *v.* Bowman, 6 Wall. 316.

Where two parties jointly entered into an agreement to purchase land and each paid money on account of the purchase price therefor, it was held that upon acquiring title they would hold the premises as tenants in common, rather than as copartners. Breen *v.* Arnold, 157 Wis. 528, 147 N. W. Rep. 997.

[25] Such as a patent. Boeklen *v.* Hardenberg, 60 N. Y. 8, affi'g 37 Super. Ct. (J. & S.) 110.

A community of interests in money or property, or both, used in carrying on a business, does not of itself constitute a partnership in such business. There must be some joint adventure and agreement to share in the profits. Willamette Casket Co. *v.* McGoldrick, 10 Wash. 229, 38 Pac. Rep. 1021.

[26] And mere declarations of one that they "bought it in partnership," may not be alone enough, for he may have meant merely as tenants in common. Gregory *v.* Martin, 78 Ill. 38.

Not every joint venture constitutes a partnership within the meaning of the law. Thus where parties bought land jointly, but it did not appear that either person could sell without the other's consent, nor that there was a firm name, it was held that the ownership was a circumstance to be considered but it was not conclusive of the existence of the relation. Mayes *v.* Palmer, 208 Fed. Rep. 97, 125 C. C. A. 325.

[27] Paragraph 18. Compare Davis *v.* Morris, 36 N. Y. 569, affi'g 35 Barb. 227; Reynolds *v.* Cleveland, 4 Cow. 282.

Where two parties share in a joint adventure, and participate in the profits, they become partners. Farr *v.* Morrill, 53 Hun, 31, 5 N. Y. Supp. 720.

[28] Ebbinghousen *v.* Worth Club, 4 Abb. N. Cas. 300; Phillips *v.* Nash, 47 Ga. 218.

he was actually a partner,[29] unless the contracting party had knowledge of the relation, and dealt solely on the credit and name of the others.[30] Generally, fraud in the purpose of forming the firm, is not relevant in support of the existence of partnership,[31] but to charge a secret or dormant partner, evidence of his declarations, even to third persons, that the partnership existed and was concealed,[32] is competent; and his offers to third persons to become a secret partner for the purpose of concealing his property, are competent, in corroboration of other evidence.[33]

18. Community of Profits; the Common-law Rule.

At common law (both in courts of law and of equity) it is sufficient to establish the liability of an alleged partner, to show that by agreement [34] he had a right [35] in the entire net profits,[36] which entitled him to a definite share,[37] as profits.

[29] Lea *v.* Guice, 13 Smedes & M. 656, 669.

Where the question whether one party was really a dormant or secret partner of another is in issue, the plaintiff was held to have the burden of establishing the relation. Bakmazian *v.* Tatosian, 161 N. Y. Supp. 450.

[30] Bigelow *v.* Elliott, 1 Cliff. 28; Palmer *v.* Elliott, Id. 63.

If a dormant partner be *known* as a member of the firm to one with whom the firm has dealings, actual notice of dissolution must be carried home to the person who has thus dealt with the firm. Park *v.* Wooten, 35 Ala. 242.

[31] Thomas *v.* Moore, 71 Penn. St. 193.

[32] Bennett *v.* Holmes, 32 Ind. 108.

[33] Butts *v.* Tiffany, 21 Pick. 95.

[34] Even where the partnership was in a real estate transaction, the agreement need not be in writing. Chester *v.* Dickenson, 54 N. Y. 1, affi'g 52 Barb. 349.

An agreement to share profits and losses, may be either express or implied. Jones *v.* Purnell, 21 Del. 444, 62 Atl. Rep. 149.

[35] P. on Partn. 70. The right to an account has commonly been regarded as a decisive circumstance; but this is doubtful. See Bentley *v.* Harris, 10 R. I. 434, s. c., 14 Am. Rep. 695.

[36] Sharing in losses is not essential. Manhattan Brass Co. *v.* Sears, 45 N. Y. 797.

[37] A voluntary promise to pay an indefinite share is not even competent evidence of partnership. Pleasants *v.* Fant, 22 Wall. 116.

To create a partnership independent of express agreement, there must be an interest in prof-

This rule, still commonly followed in our courts, though not in England, is regarded as a conclusive presumption, in the absence of evidence showing that he received it not as the profits of a principal, or of money, but in some other character not involving that of partner.[38]

its as profits and not as a mere means of payment for labor performed. Griggs *v.* Kohl, 132 Ill. App. 484.

When a party is only interested in the profits of a business as a means of compensation for services rendered, or for money advanced, he is not a partner. Cassidy *v.* Hall, 97 N. Y. 159; Richardson *v.* Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Meehan *v.* Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835; Beecher *v.* Bush, 45 Mich. 188, 7 N. W. Rep. 785, 40 Am. Rep. 465; Smith *v.* Knight, 71 Ill. 148, 22 Am. Rep. 94; Williams Soutter, 7 Iowa, 435; Russell *v.* Herrick, 127 N. Y. App. Div. 503, 111 N. Y. Supp. 974.

An agreement which appoints one to be the "exclusive agent" to sell and manage a tract of land, and which further provides that the "agency" shall continue a specified time, and that certain expenses of sale are to be borne by the agent and his compensation for his services is to be determined by the net profits, rather than by a commission on the amounts realized, contains nothing inconsistent with the existence of an agency, and will not be construed as creating a partnership. Title Insurance, etc., Co. *v.* Grider, 152 Cal. 746, 94 Pac. Rep. 601.

[38] Leggett *v.* Hyde, 58 N. Y. 272, affi'g 1 Supm. Ct. (T. & C.) 18, and cases cited; and see King *v.* Sarria, 69 N. Y. 35. The principle running through the well-considered cases which apply this rule, is that on the one hand disavowals of the partnership relation in an agreement, or even the withholding of some of the usual powers of partners, cannot negative the obligation to creditors, if any substantial elements of the partnership relation exist in a joint adventure, for the sake of profit, as such, yet, on the other hand, a right to draw profits by way of compensation does not alone make a partner of one whose real relation is that of agent, servant, factor, landlord, annuitant, or co-tenant without agency, and the like. The court look at the real relation resulting from the engagements of the parties, and if it does not establish some other and subordinate tie, they give effect, in favor of creditors, to the doctrine that he who has a right in the profits as such must bear his share of the liabilities. And this is applied as a rule of law. It is not enough that the parties did not intend a partnership, nor that they intended there should be none. They must have intended and constituted a distinct and different relation ex-

cluding that of partnership. See Leggett *v.* Hyde (above); Eastman *v.* Clark, 53 N. H. 276, s. c., 16 Am. Rep. 192; Parker *v.* Canfield, 37 Conn. 250, s. c., 9 Am. Rep. 317; Connolly *v.* Davidson, 15 Minn. 519, s. c., 2 Am. Rep. 154; Owens *v.* Mackall, 33 Md. 382; notes in 13 Moak's Eng. 839.

In the following cases participation in profits has been held not to prove partnership within the foregoing rule (2 Am. L. Rev. 1, 23, 193):

I. When the participant is legally incapable of contracting generally. (Id. 7; but see 1 Wood's Coll. 12.)

II. When his stipulations were to the effect that he should not be liable to creditors, and the creditor, at the time of the dealing, knew of such stipulations. (Alderson *v.* Pope, 1 Campb. 404, n.; and see Livingston *v.* Roosevelt, 4 Johns. 251, 266.)

III. When the participation is in profits derived from a contract of shipment on half profits, as is generally practiced in this country. (Story on Partn. 72, §§ 43, 44. Compare Eldridge *v.* Troost, 3 Abb. Pr. N. S. 20, s. c., 6 Robt. 518; Post *v.* Kimberly, 9 Johns. 470; Marsh *v.* N. A. Ins. Co., 3 Biss. 351.)

IV. When the profits are taken in lieu of rent (Holmes *v.* Old Colony R. R. Co., 5 Gray, 58, 3 Kent's Com. 33, 34. Compare Cushman *v.* Bailey, 1 Hill, 526; Catskill Bank *v.* Gray, 14 Barb. 471); or for other general benefits rendered a firm. (2 Am. L. R. 23.)

V. When taken by seamen in lieu of wages. (Story on Partn. 69, § 42.)

VI. When taken as compensation for labor or services, performed, not as principal (Dob *v.* Halsey, 16 Johns. 34); but as agent, servant, factor, broker, &c. (Burckle *v.* Eckhart, 3 N. Y. 132.)

VII. When the participants are creditors, and participate to the extent of their claims, in the profits of a partnership carried on for their benefit, as creditors. (Brundred *v.* Muzzy, 1 Dutch. (N. J.) 268, 279; and see Cox *v.* Hickman, 8 Ho. of L. 268, 9 C. B. N. S. 47, rev'g 3 C. B. N. S. 523, 18 C. B. 617, and see 69 N. Y. 35.)

VIII. When the participant is an annuitant, and does not take the profits as profits, but relies upon them merely as a fund for paying an annuity to which he is entitled from the firm. (Story on Partn. 115, §§ 66–70.)

IX. When he is the devisee of a deceased partner, and receives the profits derived from left funds by the will of a deceased partner in the firm; and he does not go into the firm for the purpose of personally representing such funds. (Id., 2 Am. L. R. 17; Burwell *v.* Mandeville, 2 How. U. S. 560; Pitkin *v.* Pitkin, 7 Conn. 307.)

Whether one who has an interest in the separate share of a partner in the profits of the firm,—that is, a sub-partner,—is liable to creditors, with the partners, is disputed. (Neg. 1 Wood's Coll. 44, § 27, affi'g Fitch *v.* Harrington, 13 Gray, 468.)

"An agreement to share profits

19. —The English Rule.

The English rule, adopted also in some American States,[39] is that the test of liability is not merely whether there was a participation of profits, but whether there was such a participation as constituted the relation of principal and agent between the percipients and the actors in the business; [40] and therefore participation in profits is not conclusive evidence of partnership, but, at best, a circumstance to be considered, with others, in determining whether the relation of the parties was such as to create that agency between them in which partnership consists. It is a cogent circumstance, but the inference of partnership arising from it is susceptible of control by other circumstances of the case.[41]

20. Evidence in Respect to Date.

To charge one as a partner, he must be shown to have been a member when the contract sued on was made,[42] or

is an essential element in every partnership and the absence of profit sharing is conclusive that a partnership does not exist." Willoughby *v.* Hildreth, 182 Mo. App. 80, 91, 167 Mo. App. 639.

[39] See Harvey *v.* Childs, 22 Am. Rep. 387, s. c., 28 Ohio St. 319, and cases cited.

[40] Cox *v.* Hickman, 8 H. of L. Cas. 268, 306.

Though some courts hold that an agreement to share profits and losses is conclusive evidence of partnership, "the true rule is that such agreement is merely *prima facie* evidence of partnership." Roberts *v.* Nunn, 169 S. W. Rep. (Tex. Civ. App.) 1086.

[41] *Ex parte* Tennant, 37 Law Times N. S. 285. And see Holme *v.* Hammond, L. R. 7 Exch. 218, s. c., 2 Moak's Eng. R. 125; Mollevo *v.* Court of Wards, L. R. 4 P. C. 419, s. c., 4 Moak's Eng. 121.

"Sharing equally the net profits of a mercantile business is *prima facie* evidence of a partnership. But it does not conclusively establish the partnership relation, as the presumption arising from proof of such fact may be rebutted." Glove *v.* Dawson, 106 Mo. App. 107, 80 S. W. Rep. 55.

[42] Fuller *v.* Rowe, 57 N. Y. 23, rev'g 59 Barb. 344. Proof of a stipulation that, as between the partners, the partnership shall be deemed to have commenced at a date prior to its actual commencement, will not alone charge them in favor of creditors. 2 Wood's Coll. 1113, n.; unless sufficient to show assumption of intermediate liabilities. Hengst's App., 24 Penn. St. 413.

the tort committed,[43] unless his assumption of prior liabilities is shown. But a partnership shown once to have existed, is presumed to continue until the contrary is shown.[44] Hence evidence of its existence within a reasonable time prior to the date of the transaction in suit, is competent;[45] and in connection with such evidence, or any evidence tending to show a partnership at the time of the transaction, evidence of its existence within a reasonable period afterward is admissible.[46] The date in the articles is not sufficient evidence of the date of execution,[47] except as against a party to the articles. The creditor may prove the commencement of the partnership from the commencement of the agency or holding out, though that be before the commencement of the contemplated business of the concern,[48] and before the performance of conditions precedent in the articles,[49] or even before the date or execution of the articles.

21. Assumption of Debts by Incoming Partner.

In the absence of anything to indicate that an incoming partner assumed liability for outstanding debts, the presumption of law is that he did not.[50] But an agreement on

[43] Chester *v.* Dickinson, 54 N. Y. 1, affi'g 52 Barb. 349.

[44] Walrod *v.* Ball, 9 Barb. 271; Cooper *v.* Dedrick, 22 Barb. 516, s. p., Wilkins *v.* Earle, 44 N. Y. 172; Fassin *v.* Hubbard, 55 Id. 465.

Where a partnership is not limited as to time and there is nothing to show the intention of the parties as to its duration, it will be held to be a partnership at will. But where a partnership has for its object the completion of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished and until that time arrives. Hardin *v.* Robinson (App. Div.), 162 N. Y. Supp. 531.

[45] Burnett *v.* Holmes, 32 Ind. 108.

[46] Fleshman *v.* Collier, 47 Geo. 253.

[47] Philpot *v.* Gruninger, 14 Wall. 570.

[48] Aspinwall *v.* Williams, 1 Ohio, 84, 94.

[49] Burns *v.* Rowland, 40 Barb. 368.

[50] Story on Partn. 273, § 152, 274, § 153.

In order to make an incoming partner liable on a note executed

his part to do so may be proved, either by his express contract, or by inference from its terms, or from the treatment of such debts, by the new firm, to the knowledge of the incoming partner, as the debts of the new firm.[51] If the new firm takes the assets and continues the business in the same place, slight evidence is sufficient to warrant the evidence that it has assumed the liabilities of the old firm.[52]

22. Variance as to Number of Partners.

At common law, under a declaration alleging a contract by one person, if he interposed no plea in abatement, plaintiff might prove a contract by a firm of which defendant was a member;[53] and under the new procedure, a recovery against one or several may be had under the same circumstances. So, on the other hand, when several are alleged to be partners, and the evidence shows that only a part of them constituted the firm, plaintiff may recover against

by the firm before he became a member, it must be proved that in some way be assumed the obligation created by the note. San Luis Obispo First National Bk. *v.* Simmons, 98 Cal. 287, 33 Pac. Rep. 197.

[51] Updike *v.* Doyle, 7 R. I. 446, 463.

An incoming partner who is not liable on any express contract, but who enjoys the benefits of a partner in the firm is liable upon an implied contract to pay for what he has had as a member of the firm upon the terms upon which the firm had it. Rogers *v.* Riessner, 30 Fed. Rep. 525.

[52] Shaw *v.* McGregory, 105 Mass. 96; Ex p. Peele, 6 Ves. 604.

A retiring partner is not released from liability to firm creditors except by agreement with such creditors. Webb *v.* Butler, 192 Ala. 287, 68 So. Rep. 369, Ann. Cas. 1916, D. 815.

If, upon the dissolution of a partnership by the retirement of one of two partners, the other continues the business and agrees to assume the debts of the firm, the retiring partner becomes a surety for his former partner. Grigg *v.* Empire State Chemical Co., 17 Ga. App. 385, 87 S. E. Rep. 149.

[53] Barry *v.* Foyles, 1 Pet. 311; Smith *v.* Cooke, 31 Md. 174. As to variance in the case of limited partnership, where the sign required by the statute was not displayed, see the statute N. Y. Law, 1862, p. 880, c. 476, § 1, am'd'g 1 R. S. 765, § 13, 2 N. Y. L. 1866, p. 1424, c. 661. Now contained in Partnership Law, § 35.

those who are found liable, and be nonsuited as to the others; [54] whether the others were served or not.[55] So he may recover against one only, on evidence that there was no firm, but that such one was solely liable.[56]

23. Presumption of Partner's Authority.

Under an allegation that the partners did an act, evidence that one of them did it on their behalf is admissible.[57] If the act was within the scope of their business, or properly incidental to an act within the scope of their business,[58] and done in the firm name, and not requiring a seal, the existence of the partnership is sufficient evidence of authority,[59] and in favor of one who gave credit, is conclusive, in the absence of evidence of notice of actual lack of authority.[60] If the act be not of such character, there must be evidence, either direct or circumstantial,[61] tending to show authority or ratification.[62] Evidence that the partner, exercising a power not implied in the nature of the partnership, was the general manager, is not enough. If the authority sufficiently appear, either presumptively or by direct evidence, it is not

[54] Fielden *v.* Lahens, 2 Abb. Ct. App. Dec. 111, s. c., 6 Abb. Pr. N. S. 341, rev'g 9 Bosw. 436; Snelling *v.* Howard, 51 N. Y. 373, affi'g 7 Robt. 400; and see Chapter VII, paragraph 1, of this vol., n. 86.

A creditor may proceed directly against the administrators of a deceased partner, making the surviving partner a party. He need not sue the firm, nor the surviving partner alone. United States *v.* Hughes, 161 Fed. Rep. 1021.

[55] Pruyn *v.* Black, 21 N. Y. 300; McKensie *v.* Farrell, 4 Bosw. 192. *Contra*, Smith *v.* Halett, 65 Ill. 495.

[56] Stimson *v.* Van Pelt, 66 Barb. 151; Angel *v.* Cook, 2 Supm. Ct. (T. & C.) 175, 177.

[57] See King *v.* Fitch, 2 Abb. Ct. App. Dec. 508; Walton *v.* Dodson, 3 Carr. & P. 162.

[58] As, for instance, directing the levy of an execution when collecting a debt due the firm. Chambers *v.* Clearwater, 1 Abb. Ct. App. Dec. 341, affi'g 41 Barb. 200.

[59] Smith *v.* Collins, 115 Mass. 388, 399.

Where a note is produced signed by the partnership name it is not necessary, in order to make out the plaintiff's case, to prove that the note was made in the business of the firm. Paul *v.* Van Da Linda, 58 Hun, 611, 12 N. Y. Supp. 638.

[60] Edwards *v.* Tracy, 62 Penn. 374; Hoskinson *v.* Elliot, Id. 393.

[61] Butler *v.* Stocking, 8 N. Y. 408.

[62] See paragraphs 28 and 29.

necessary to show that the partnership had the benefit of the consideration.

24. Evidence as to the Scope of the Business, etc.

To prove the scope of the business and the manner of transacting it, for the purpose of establishing the authority of a partner to bind the others, the creditor need not produce or call for the articles, unless restrictions in them are shown to have been known to him. Evidence of the previous dealings, the acts of the partners, and the length of time such a course of business has continued, etc.,[63] and of the common and usual dealings of persons engaged in the same trade or business at the same locality,[64] is competent.

25. Evidence of Express Authority.

The admission or declaration of one partner as to authority, or the scope of business from which it is implied, is competent as against him,[65] but the partnership relation does not authorize him to exaggerate its scope, as against the others, by his declarations, and therefore such declarations are not competent for this purpose as against the others,[66] even if made as part of the *res gestæ* of the act in question,[67]

[63] Clayton *v.* Hardy, 27 Mo. 536. Where the authority of the agent of a partnership to purchase supplies for the firm is denied by one of the partners in a suit against the firm for the price, it is proper to permit the inquiry as to the scope of the business actually transacted by the firm. McDonald *v.* Fairbanks, Morse & Co., 161 Ill. 124, 43 N. E. Rep. 783.

In order to show the authority of a partner it is competent to show that by the firm's general course of business, the authority to bind in like cases, as by the use of a particular partnership name, had been recognized and acted upon. Pursley *v.* Ramsey, 31 Ga. 403.

[64] Smith *v.* Collins, 115 Mass. 388, 399. The usage must be that of the particular trade or business. Story on Partn. 202, § 113.

[65] Smith *v.* Collins, 115 Mass. 388, 399.

[66] 1 Wood's Coll. 736, § 459.

One partner has no right, by his promise, to bind his copartners without their assent, to pay his own private debt from the partnership assets. Low *v.* Arnstein, 73 Ill. App. 215.

[67] Elliott *v.* Dudley, 19 Barb. 326.

unless shown to have been authorized or permitted by such others, or to have been so open or continued that permission may be inferred.

26. Question to Whom Credit was Given.

The partnership having been proved, and the act not being beyond its scope, the declaration of any partner made at the time of the transaction,[68] or at any time during the continuance of the partnership relation,[69] is competent to show that the act was done on behalf of the partnership; and if the credit was obtained on the faith of such declaration, the falsity of the representation is not material.[70] To prove that the transaction was for partnership purposes, it is *prima facie* enough to show that it was in the firm name,[71] except where the name used by the firm was merely that of an individual partner. Evidence that the partner acting in the matter, signed the contract, self "& Co.," or self "and partners," is *prima facie* sufficient proof of the firm name, and throws on defendants the burden of showing that they had adopted a different name.[72] If they had not adopted a different name, such a signature will bind the firm, though they never received the proceeds.[73] If the partners had not, either by agreement or usage, adopted a composite name, the fact that they did business in the individual name of one

[68] Oliphant *v.* Mathews, 16 Barb. 608.

[69] Smitha *v.* Cureton, 31 Ala. 653. *Contra*, 1 Wood's Coll. 645, n. 3.

If the existence of the defendant partnership is established by competent evidence, admissions against interest made by one of the partners within the scope of the business of the partnership are admissible to show liability on its part. Thompson *v.* Mallory, 108 Ga. 797, 33 S. E. Rep. 986.

[70] Stockwell *v.* Dillingham, 50 Me. 442; U. S. Bank *v.* Binney, 5 Mas. 176, 184.

When a contract is made in the firm name it will *prima facie* bind the firm, unless it is *ultra* the business of the firm. Stockwell *v.* Dillingham, 50 Me. 442, 79 Am. Dec. 621.

[71] Wood's Coll. 678, n. .

[72] Drake *v.* Elwyn, 1 Cai. 184, s. c., less fully, 3 Johns. Cas. 594.

[73] Aspinwall *v.* Williams, 1 Ohio, 84; Austin *v.* Williams, 2 Id. 61.

partner, may be shown by evidence of their usage,[74] especially where their agreement charged him with the sole management of the business,[75] or of that part of it in which the transaction was had.[76] But even though their adoption of the individual name be shown, one seeking to charge the copartners on a transaction in that name must give further evidence that the transaction was had in the business of the partnership, or upon its credit;[77] otherwise it will be presumed to have been an individual transaction.[78] Evidence that it was actually on their credit, is alone enough,[79] and, on the other hand, evidence that it was actually in their business, if the dealer did not expressly restrict himself to the individual credit, is alone enough, even though he was ignorant of the other partners, and of the partnership object.[80] Where a partner carries on the firm business in his

[74] Ontario Bank *v.* Hennessy, 48 N. Y. 545. In such case even the occasional drawing of a bill, etc., by one member in his own name, for partnership purposes, is competent to go to the jury as evidence of trading under that name, but does not alone raise a presumption of law. Le Roy *v.* Bayard, 2 Pet. 200.

[75] Id.

[76] See Wright *v.* Ames, 4 Abb. Ct. App. Dec. 644.

[77] Story on Partn. 192, § 106, 199, § 106.

Where partners give a note in payment for land and sign it in their individual names but not in the firm name, and the purchase was entered into as a partnership venture, and the land and its proceeds were carried on the firm's books as partnership assets, the note will be deemed to have been given for a partnership indebtedness. Dreyfus *v.* Union National Bk., 164 Ill. 83, 45 N. E. Rep. 408.

[78] Oliphant *v.* Mathews, 16 Barb. 608. Where a partnership business is done in the name of an individual member of the firm, the burden is upon one, seeking to charge the copartnership upon a note given for money loaned, executed in the name of such individual member, to show that the money was borrowed for or appropriated to the use of the firm, or at least that the name was in fact used to denote the firm. Gernon *v.* Hoyt, 90 N. Y. 631.

[79] Story on Partn. 253, § 139.

It is immaterial in whose name certain orders were drawn, provided the goods obtained under them were an advance by the firm. Horton *v.* Miller, 84 Ala. 537, 4 So. Rep. 370.

[80] Story on Partn. 253, § 139. Especially if the avails were ap-

sole name, and also carries on a different kind of business of his own, in the same name, the fact that the dealer knew the transaction was in aid of the one kind of business or the other, will, in the absence of other evidence, determine the question; [81] and neither the fact that he was ignorant of the partnership, nor that the consideration was never actually applied in aid of its business, is then material.[82] The creditor's entry in his own book, charging exclusively an individual member [83] or the firm, is not conclusive against him when he seeks to hold the firm or the individual alone liable, but may be explained by evidence of his intent.

27. Parol Evidence to Charge Firm on Individual Signature.

Where a written contract not under seal, is made, not in the firm name, but in the name of an individual partner, parol evidence is competent to show that the transaction was in reality for firm account.[84]

28. —of Sealed Instrument.

The general implied power of a partner does not extend to binding the firm by executory instruments under seal; [85]

plied to the firm use. Ontario Bank *v.* Hennessy (above). Compare Story on Partn. 250, § 136.

[81] Story on Partn. 253, § 139.

[82] Id.; 5 Pet. 529.

[83] Story on Partn. 260, § 144; Smith *v.* Cooke, 31 Md. 174.

One who makes a contract with a partner without knowing that the latter is acting for the partnership may hold the individual or the firm liable on the contract. The burden of proof is upon the partner to show the existence of the firm and knowledge of it on the part of the person contracting with him. Shanley *v.* Merchant, 140 N. Y. App. Div. 797, 125 N. Y. Supp. 587.

[84] Per COWEN, J., Lawrence *v.* Taylor, 5 Hill, 113; Brown *v.* Lawrence, 5 Conn. 399.

[85] Schmertz *v.* Shreeve, 62 Penn. St. 457, s. c., 1 Am. Rep. 439, and cases cited, SHARSWOOD, J.

One partner cannot bind his copartners by *deed*, unless he has express authority by *deed* for that purpose. Wharton *v.* Woodburn, 20 N. C. 647.

"The authority of one partner to bind the others on the ground of agency, does not extend to the conveyance of real property, and deeds conveying such property must be executed by all the partners." Robinson *v.* Daughtry, 171 N. C. 200, 88 S. E. Rep. 252.

and a sealed instrument [86] executed in the name of a firm by one of its members, without the proper authority, where a seal is necessary, is the deed of such member only, and he alone is bound by it.[87] If the seal is unnecessary from the nature of the instrument, the act will bind the firm as a simple contract,[88] although it sets forth that the firm have set their hands and seals, and is signed on behalf of the firm, by one member with his seal. The seal may be rejected as surplusage. Hence a sealed note is competent in evidence of the precedent debt acknowledged thereby.[89] To render the deed of the firm, executed by one partner, valid as a deed by the firm, it is enough to show a prior authority or a subsequent ratification by the other partners, either in writing or by parol, either express or implied.[90]

[86] Other than a release.

[87] Gibson *v.* Warden, 14 Wall. 247.

A partner has no implied power to bind his copartner personally by a note under seal, with power of attorney to confess judgment and, in a suit on such a note, although given for a loan to the partnership, recovery can be had only against the partner who executed it. Funk *v.* Young, 254 Pa. 548, 99 Atl. Rep. 76.

[88] As, for instance, in the case of a chattel mortgage. Gibson *v.* Warden (above), or a contract of sale of goods under seal. Schmertz *v.* Shreeve, 62 Penn. St. 457. This rule cannot avail to sustain an action on a formal bond executed by a partner, without authority or ratification. Russell *v.* Annable, 109 Mass. 72, s. c., 12 Am. Rep. 665. As to a lease, compare Mason *v.* Breslin, 9 Abb. Pr. N. S. 427; s. c., 40 How. Pr. 436, 2 Sweeny, 386.

Where a partnership contract would be good without a seal, the addition of a seal will not prevent its inuring as a simple contract, although the partner who executed the instrument had no special authority to put the partnership name to such paper. Human *v.* Cuniffe, 32 Mo. 316.

If a seal be attached by a partner, who is authorized to act, to a writing upon which a seal is not at all essential, the attaching of one does not bring the instrument within the reason or operation of the rule with respect to instruments under seal. Patten *v.* Kavanagh, 11 Daly (N. Y.), 348.

[89] Hoskinson *v.* Eliot, 62 Penn. St. 393.

[90] Story on Partn. 214, § 122; Gibson *v.* Warden (above). In an action for rent, on a sealed lease, one of the lessees who entered under the lease is estopped to show that his copartner was not authorized to sign his name to it. Holbrook

Proof that the firm actually received the consideration, is enough.[91]

A deed running to the firm name, even though conveying land, may be explained by parol evidence of who composed the firm.[92]

29. Evidence of Ratification.

To make an act, done by one partner, beyond the scope of his authority, binding on the others, a clear ratification must be shown, but it need not have been express; it may be inferred from circumstances.[93] The circumstances must be such that knowledge, and action thereon, or knowledge and expressed intent, can be inferred. Knowledge of the act of the partner, without knowledge of the facts making the

v. Chamberlin, 116 Mass. 155, s. c., 17 Am. Rep. 146.

If one partner sign and seal an instrument in the firm name, with the assent of the other, the latter is as much bound as if he had signed and sealed it himself, and his assent can be proved by any of the usual modes of evidence. Fichthorn *v.* Boyer, 5 Watts, 159, 30 Am. Dec. 300; Miller *v.* Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. Rep. 350.

"If a contract under seal, executed by one partner in behalf of the firm, be ratified by the other partner by conduct or by parol, it then becomes the deed of the firm as fully as if executed under seal by both partners." National Citizens' Bank *v.* McKinley, 129 Minn. 481, 152 N. W. Rep. 879.

[91] Daniel *v.* Toney, 2 Metc. (Ky.) 524.

[92] Lindsay *v.* Hoke, 21 Ala. 542, s. p., Webb *v.* Weatherhead, 17 How. U. S. 576, paragraph 50 (below). *Contra*, Arthur *v.* Weston, 22 Mo. 283.

[93] 1 Wood's Coll. 677.

"Ratification means the adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him except for his subsequent assent. The acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances is a ratification." Samstag *v.* Ottenheimer, 90 Conn. 475, 97 Atl. Rep. 865.

Where one of two partners enters into a contract and the other partner knowingly participates in the use of funds advanced upon the contract and does not question the agreement until its completion, he thereby ratifies it. McDougal *v.* McDonald, 86 Wash. 334, 150 Pac. Rep. 628.

act a fraud on them, is not enough;[94] and silence and inaction under full knowledge is not enough,[95] unless made so by being known to and acted on by the other party as a reasonable indication of assent. Failure to give notice of dissent within a reasonable time after knowledge, especially if coupled with evidence of a like course of dealing continued, is sufficient to go to the jury.[96] Evidence of the consideration for the act is relevant to the question of implied ratification;[97] and evidence of mere expressions of assent is competent.[98] Where acts of ratification are shown, intent that they should have that effect is not material.[99]

30. Evidence of Deceit or Fraud.

Evidence of fraud or deceit committed by one partner, in a transaction in the course of the partnership business, is competent against the others, and cannot be rebutted by proving their ignorance or innocence.[1]

[94] Hayes *v.* Baxter, 65 Barb. 181.

In the absence of notice or knowledge on the part of the other partners, there could be no ratification of the act of one partner in paying his individual debt out of firm funds. Baker-McGrew Co. *v.* Union Seed, etc., Co., 125 Ark. 146, 188 S. W. Rep. 571.

[95] Elliott *v.* Dudley, 19 Barb. 326.

An entry of appearance by one partner in a suit in a foreign state is not binding on his copartner. Weldon *v.* Fisher, 194 Mo. App. 573, 186 S. W. Rep. 1153.

[96] Id.; Ferguson *v.* Shepherd, 1 Sneed, 256.

Notwithstanding that one partner directed the plaintiff not to lend money to his firm, he was, by his failure to object, deemed to have ratified the subsequent act of his copartner, who, as manager of the firm with full power to contract debts and negotiate loans, borrowed money of the plaintiff, which he used in paying firm obligations. Bank of Morton *v.* Ethridge & Hardee, 112 Miss. 208, 72 So. Rep. 902.

And where the plaintiff sought to replevy mules and a wagon which his partner had traded to the defendant, it was held that he had ratified his partner's act by allowing the delivery of the said chattels and delaying to object until after the defendant's check had been received. Williams *v.* Carson, 191 S. W. Rep. (Ark.) 401.

[97] Carter *v.* Pomeroy, 30 Ind. 438.

[98] Nichols *v.* English, 3 Brews. 260.

[99] Hazard *v.* Spears, 2 Abb. Ct. App. Dec. 353.

[1] Chester *v.* Dickinson, 54 N. Y.

31. Evidence of Other Torts.

If the act itself was one within the scope of the business, and done as such, then it is not material that the other partners were ignorant and innocent; [2] nor that it was wilful; [3] otherwise if the act was wholly foreign to the business. If the act was presumptively a partnership act, because, though not in the line of the trade, it was incidental to the exercise of an implied power,—as where a partner in collecting a debt due the firm directs an officer to make a tortious levy,—then the act of one partner is presumptively that of all; [4] and

1, affi'g 52 Barb. 349; Wolf *v.* Mills, 56 Ill. 360.

All the partners are liable for a fraud committed by one of them in the course of partnership business. Kavanaugh *v.* McIntyre, 74 N. Y. Misc. 222, 133 N. Y. Supp. 679.

[2] Stockwell *v.* United States, 13 Wall. 531.

Partners are liable for torts committed by them or either of them within the scope of the business. Miller *v.* Phenix Ins. Co., 109 Ill. App. 624.

An act of a member of a copartnership within the scope of his authority is binding upon all the partners as a firm. Where the business of the copartnership is that of keeping an inn and one of the partners accepts money deposited with him by a guest, and then absconds, the other partners are liable. Clark *v.* Ball, 34 Colo. 223, 82 Pac. Rep. 529, 114 Am. St. Rep. 154, 2 L. R. A. N. S. 100.

"Partners are individually responsible for torts by a firm when acting within the general scope of its business, whether they personally participate therein or not." McIntyre *v.* Kavanaugh, 242 U. S. 138, 37 S. Ct. 38.

Partners are liable jointly and severally for the wrong of one partner committed in the course and within the scope of the firm business. Fennell *v.* Peterson, 225 Mass. 598, 114 N. E. Rep. 744.

[3] Id. Compare Goldsmith *v.* Picard, 27 Ala. 142; 1 Wood's Coll. 724, § 449.

But a firm or a partner will not be liable for the wilful or negligent tort of a partner acting beyond the scope of his authority. Van Dyk *v.* Mosterdt, 171 Iowa, 3, 153 N. W. Rep. 206.

[4] Chambers *v.* Clearwater, 1 Abb. Ct. App. Dec. 341; Harvey *v.* McAdams, 32 Mich. 472.

"Before the act of one partner can be charged against the firm as constituting negligence, and create liability on the part of the firm for the act, it must appear that the act was done within the scope of his agency and authority to act for the partnership. The negligence must have been committed within the scope of the part-

evidence that they, with knowledge of the facts, received the benefits of it, is conclusive against them.[5]

32. Admissions and Declarations of Partners.

After evidence of partnership, and of its scope as including the affairs in question, has been given, an admission or declaration made by one partner,[6] during the continuance of the partnership relation,[7] and concerning the partnership affairs [8] during the relation,[9] is competent against all, and

nership or in the furtherance, or attempt to further, the interests of the partnership. His act must be the act of the partnership to be binding upon it." Van Dyk *v.* Mosterdt, 171 Iowa, 3, 153 N. W. Rep. 206.

[5] Murray *v.* Binninger, 3 Abb. Ct. App. Dec. 336.

[6] Any general partner, though dormant or silent. Kaskaskia Bridge Co. *v.* Shannon, 1 Gilm. (Ill.) 15, 25; 1 Greenl. Ev. 13th ed. 218. And though he was not served with process, and has been therefore dismissed. (Kady *v.* Kyle, 47 Mo. 346); or was never joined. Rosc. N. P. 75. Evidence which shows that the declarant was either the partner or the agent may be enough to render his declarations competent, though it be uncertain which he was. Chamberlain *v.* Fobes, 3 Supm. Ct. (T. & C.) 277.

Before one alleged partner can be charged with the admissions or declarations of another, not made in his presence, the partnership must be proved by other evidence. But where there is *prima facie* proof of the partnership, the declarations and admissions of one, made in the conduct of the alleged partnership business, are proper as evidence tending to confirm the fact and define the scope of the partnership. Conner *v.* Ray, 195 Ala. 170, 70 So. Rep. 130.

[7] See next paragraph. Am. Iron Mountain Co. *v.* Evans, 27 Mo. 552.

[8] A partner's declarations or admissions do not bind his associates in concerns and transactions foreign to the partnership, and he cannot, by such declarations or admissions, bring a transaction within the scope of the partnership business, when in fact it had no connection therewith. Slipp *v.* Hartley, 50 Minn. 118, 36 Am. St. Rep. 629, 52 N. W. Rep. 386. Where one member of a firm has a transaction which is neither apparently nor in reality within the scope of the partnership business, the firm is not bound by his declarations or his acts in the transaction, and such declarations are not evidence against the firm or the other partner. In such a case the third person has notice that the transaction is outside of

[9] 1 Greenl. Ev. 217, n.

has the same effect as if made by all.[10] If the admission relates to the partnership affairs, it is not necessarily incompetent because expressed rather as an individual than as a firm declaration.[11] The competency of the declaration is not affected by the fact that it was made to a stranger.[12]

If the admission, being made with apparent authority, is contractual it is conclusive in favor of a person who acted on it in good faith. Otherwise it can be rebutted by proof of falsity.

The sufficiency of the proof of partnership, adduced as a foundation for proving, against one partner, and admission made by the other, is a preliminary question for the court.[13] But the court may, in its discretion, allow the admission to be proved first.

An entry in the firm books during the existence of the firm and relating to its affairs is competent evidence against all the partners, even though the books were kept exclusively by one member or by an agent, and the partner sought to be charged by the entry was not in fact privy to it.[14]

the partnership business, and he cannot rely upon the partnership credit. Union Nat. Bank of Rahway, N. J., *v.* Underhill, 102 N. Y. 336, 7 N. E. Rep. 293; Hahn *v.* St. Clair Savings, etc., Co., 50 Ill. 456. The rule is the same in an action of tort. Fail *v.* McArthur, 31 Ala. 27.

[10] Pollock's Dig. L. of P. 45, art. 21; Faler *v.* Jordan, 44 Miss. 283. The general principle is more fully stated in chapter VII, paragraph 2, of this vol. Where one of two or more persons sued as partners denies the partnership by proper plea, the admissions or statements of his alleged copartners, made in his absence, with reference to the partnership, are not admissible against him unless the partnership has been otherwise shown. Conlan *v.* Mead, 172 Ill. 13, 49 N. E. Rep. 720.

[11] Toby *v.* Brigham, 9 Humph. 750. But compare Rogers *v.* Batchelor, 12 Pet. 221, 232, where it was held that a letter written by a partner in his own name, not in that of the firm, and relating partly to his private affairs, is not presumably within the knowledge of his copartners, and therefore statements in it referring to firm affairs cannot bind them.

[12] Grant *v.* Jackson, Peake's Cas. 203.

[13] Harris *v.* Wilson, 7 Wend. 57; McCutchin *v.* Bankston, 2 Ga. 241. Compare paragraph 10, chapter VII, of this vol.

[14] Allen *v.* Coit, 6 Hill, 318; Wal-

33. Acts, Admissions, etc., after Dissolution.

The collection of debts and the disposal of assets, by either general partner, though done after dissolution, are presumptively valid as against the others, in favor of third persons; [15] and this presumption cannot be rebutted by merely showing that the others forbade the act,[16] or that the debts had been paid.[17] It may, however, be rebutted by showing that, to the knowledge of the party dealing, the partners had conferred the special power of liquidation upon another of their number.[18]

In other respects than as to the collection of debts and the disposal of assets, the agency of partners for each other terminates with dissolution; [19] and hence no executory contract or promise made or delivered [20] by one after dissolution binds the others, unless there is evidence from which special authority [21] or ratification may be inferred.

It is the better opinion that the same principle applies to admissions and declarations; and that no such concession made by a partner, after dissolution, even if he were authorized by the other members of the dissolved firm to adjust its business,[22] is competent evidence against a copartner, although relating to a contract which arose during the part-

den *v.* Sherburne, 15 Johns. 409. Entries in the firm books of a special partnership are competent against special partners and in favor of third persons as being in the nature of admissions of the facts therein stated. First Nat. Bank of Jersey City *v.* Huber, 75 Hun, 80; Kohler *v.* Lindenmeyr, 129 N. Y. 498; Hotopp *v.* Huber, 16 App. Div. 327, 330.

[15] Robbins *v.* Fuller, 24 N. Y. 570.

[16] Gillilan *v.* Sun Mut. Ins. Co., 41 N. Y. 376.

[17] Robbins *v.* Fuller, 24 N. Y. 570.

[18] Robbins *v.* Fuller (above).

[19] Thompson *v.* Bowman, 6 Wall. 316. Unless the dissolution was unknown, etc. See paragraphs 40–42.

[20] For legal purposes negotiable paper is deemed to have been signed at the time the partner delivers it to the third person. Gale *v.* Miller, 54 N. Y. 538.

[21] Graves *v.* Merry, 6 Cow. 701.

[22] Hackley *v.* Patrick, 3 Johns. 536. *Contra*, so far as to admit evidence of his liquidating the amount of a claim, the existence of which was proved by other evidence. Ide *v.* Ingraham, 5 Gray, 106, s. p., Feigley *v.* Whitaker, 22

nership.[23] In England,[24] and in some of our States,[25] the contrary rule is followed. Upon either view, however, the admission is competent against the one who made it.[26]

34. Notice, Tender and Demand.

When it is necessary to prove that a firm had notice from a third person in a matter within the scope of the partnership business, notice to or knowledge on the part of any acting member is *prima facie* sufficient;[27] and if two firms have

Ohio St. 606, s. c., 10 Am. Rep. 778.

[23] Baker *v.* Stackpoole, 9 Cow. 420; Thompson *v.* Bowman (above); Miller *v.* Neimerick, 19 Ill. 172; Hamilton *v.* Summers, 12 B. Monr. (Ky.) 11; Flowers *v.* Helm, 29 Mo. 324. There is no distinction, under this rule, between the admission of an account and the admission of a fact. Baker *v.* Stackpoole (above); nor between the power to acknowledge a debt barred by the statute, and the power to make a new contract. Van Keuren *v.* Parmelee, 2 N. Y. 523; and see Winchell *v.* Hicks, 18 N. Y. 558. The death of the declarant held not to alter the case. Hamilton *v.* Summers, 12 B. Monr. (Ky.) 11. "The declarations of one partner after the dissolution of a firm, not made in the business of winding up, and not connected with any transaction or dealing connected with the dissolution of the partnership, are inadmissible against his co-partner. He may bind himself by his admissions, but as to his former partners, his agency, except for special purposes, is terminated by the dissolution, and his admissions are like those of a stranger, and they are not bound by them. Nichols *v.* White, 85 N. Y. 531, 536. See also National Bank of Commerce *v.* Meader, 40 Minn. 325, 41 N. W. Rep. 1043." First Nat. Bank of Shakapee *v.* Strait, 65 Minn. 162, 165, 67 N. W. Rep. 987; Walden *v.* Sherburne, 15 Johns. 409; McPherson *v.* Rathbone, 7 Wend. 217; Hogg *v.* Orgill, 34 Penn. 344, 2 Greenleaf on Ev., § 484.

[24] Both at common law (Whitcomb *v.* Whiting, Doug. 652, s. c., 1 Sm. L. Cas. 703), and in equity. Pritchard *v.* Draper, 1 Russ. & M. 191.

[25] Merritt *v.* Day, 9 Vroom, 32, s. c., 20 Am. Rep. 362, Beardsley *v.* Hall, 36 Conn. 270, s. c., 4 Am. Rep. 74, and cases cited; 1 Greenl. Ev. by Redfield, 133, n. As to the principle involved in this controversy, see note to paragraph 6, chapter VII, of this vol.

[26] Hanna *v.* McKibben, 10 Ind. 547.

[27] 1 Wood's Coll. 672, 715; Williams *v.* Roberts, 6 Cold. (Tenn.) 493. That knowledge of a trustee is sufficient to charge with notice

a common partner, notice which is imputable to one firm will sustain a finding of notice to the other. Upon the same principle a demand on or by one member, on behalf of the firm, is a demand on or by the firm; [28] and so of a tender; [29] and an allegation referring to all the defendants admits the evidence as to the one.[30]

Dissolution does not change the rights and obligations under existing contracts; so that, notwithstanding dissolution, notice to or demand on one partner is sufficient against the firm.[31]

35. Defendant's Evidence to Disprove Partnership.

It is rarely enough to prove that defendants were not actually partners as between themselves; but this fact is relevant, and is always competent in defendant's favor, unless plaintiff has given evidence sufficient to entitle him to an instruction that, as matter of law, the defendant is liable as if a partner,—as, for instance, where a community of profits, or a representation raising an estoppel, is proved. If the plaintiff's evidence on the point is circumstantial, or only sufficient to go to the jury, then defendant is entitled to give evidence, even by his own testimony,[32] ex-

a firm of which he is a member, though not an active member, see Weetjen *v.* St. Paul & Pacific R. R. Co., 4 Hun, 529.

Notice to one partner in reference to any matter relating to a transaction within the scope of the firm's business, is notice to all of them. Northwestern Transfer Co. *v.* Investment Co., 81 Oregon, 75, 158 Pac. Rep. 281.

[28] Band *v.* Walker, 12 Barb. 298, s. c., 1 Code R. N. S. 329.

Where, in an action for the foreclosure of a mortgage, two partners are judgment creditors of the mortgagor, service of the summons upon one of them only is not sufficient to cut off the lien of the other. Liebert *v.* Reiss, 174 App. Div. 308, 160 N. Y. Supp. 535.

[29] 1 Wood's Coll. 665, § 414.

[30] See Geissler *v.* Acosta, 9 N. Y. 227.

[31] Hubbard *v.* Matthews, 54 N. Y. 43, 50, and cases cited.

[32] One who has made default and suffered judgment may nevertheless testify in favor of the others that they were not partners with him. Danforth *v.* Carter, 4 Iowa, 230, 236.

"Where from a consideration of all the facts and circumstances,

plaining his intent in the equivocal acts alleged, and corroborating his denials of the admissions charged;[33] or even explaining his admissions.[34] But his testimony that he was not a partner does not countervail facts from which the law deduces the liability of a partner.[35]

36. Proving a Limited Partnership.

To secure the exemption extended by law to the special partner in a limited partnership under the statute, it is

it appears that the parties intended, between themselves, that there should be a community of interest of both the property and profits of a common business or venture, the law treats it as their intention to become partners, in the absence of other controlling facts." Bacon *v.* Christian, 184 Ind. 517, 111 N. E. Rep. 628.

"Even if there is no express or definite agreement, either in writing or verbally, there still may be a contract of partnership created by implication or raised by implication of law from the acts and conduct of parties with each other in reference to property and business enterprises." Foot *v.* Porter, 131 Minn. 224, 154 N. W. Rep. 1078.

The burden of proof is upon those asserting partnership to show it by a fair preponderance of the evidence Id.

[33] Tracey *v.* McManus, 57 N. Y. 257. New member may defend on the ground of fraud inducing him to assume the debts. Hinman *v.* Bowen, 3 Hun, 192, s. c., 5 Supm. Ct. (T. & C.) 234. To show that one acting in the business was not a partner but a clerk, the contemporaneous declarations of admitted partners, made before difficulty arose, to inform dealers and the public, may be proved. Danforth *v.* Carter, 4 Iowa, 230, 235. *Contra*, Tomkins *v.* Reynolds, 17 Ala. 109, 118.

A denial of an allegation of partnership by one of the defendant partners inures to the benefit of all the defendants, and puts the plaintiff to the proof of the partnership. Hayden Saddlery Hardware Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. Rep. 595.

[34] Story on Partn. 263, § 146. As, for instance, where they were made under advice of counsel. Edgar *v.* McArn, 22 Ala. 796, 812. The contrary held of the admission resulting from a judgement against them as copartners. Cragin *v.* Carleton, 21 Me. 493.

[35] Rebould *v.* Chalker, 27 Conn. 114, 133.

A plea by one sued on a note as a member of a partnership, merely denying that he made or authorized the making of the note, is bad, as not being responsive to the issue. Hancock *v.* State Exchange Bank, 70 Fla. 243, 70 So. Rep. 211.

sufficient to show a substantial compliance with the statute preliminaries in the formation of the partnership.[36] The fact that the partnership was a foreign limited partnership may be proved, with the foreign law, in exoneration of the special partner.[37] Where a violation of the statute in the formation is shown, it need not be shown to have been intentional. Where, however, the limited partnership is shown to have been once regularly formed, evidence that the general partners departed from the statute, is not alone enough to charge a special partner who was not cognizant of the facts.[38]

All persons dealing with a limited partnership are chargeable with notice of the scope of the partnership business, as specified in the articles of copartnership, if the articles are duly filed and published pursuant to a requirement of law; and the limited partner cannot be charged as a general partner by evidence of departure from the articles, unknown to him.[39]

37. Matter in Abatement.

The omission to join a copartner as a defendant is not available, unless it appears by the pleadings; and an answer alleging a defect in this respect, must state precisely and truly who were the parties. An allegation that A. and B. were partners with defendant and should have been joined, is not sufficient to admit proof that only A. was a partner.[40] It is not enough to show that the one not joined was, in fact, a partner as between the defendants, nor that he participated in an advisory manner in regard to the conduct of the

[36] Van Ingen *v.* Whitman, 62 N. Y 513.

[37] King *v.* Sarria, 69 N. Y. 24, affi'g 7 Hun, 167, and see paragraph 8.

[38] Van Ingen *v.* Whitman (above).

[39] Taylor *v.* Rasch, 11 Bankr. Reg. 91.

[40] Wiegand *v.* Sichel, 4 Abb. Ct. App. Dec. 592.

A suit is maintainable against some of the members of a partnership unless they plead in abatement the nonjoinder of their associates, setting forth the names of all the members. Parker *v.* Heald, 29 App. D. C. 35.

business, nor even that his name was on their cards, if it is not shown that the fact was generally known, or known to plaintiffs, and if the name and the apparent mode of transacting business indicated that others alone composed the firm.[41] In such a case, the objection is not sustained without proof that plaintiffs knew he was a partner, at the time of the contract.[42] The fact that after the transaction and before suit brought, plaintiff became aware that the omitted person was a partner, is not enough.[43] On such a plea, the defendants may be held to strict proof,[44] and should produce their articles, if any.[45] To support such a plea, the fact that defendants signed a joint note, is not alone evidence of a partnership between them.[46] Neither the declarations of the third persons nor of the defendants are admissible in defendants' favor,[47] unless in some way brought home to plaintiff's knowledge. And upon the same principle, a judgment in an action by a stranger against such third person holding him to be a partner, is not competent.[48]

38. Evidence of Known Want of Authority.

If the public have the usual means of knowledge given them, and no acts have been done or suffered by the partnership to mislead them, the presumption of law is that those dealing with a partner, knew the extent of the partnership.[49] Evidence that the articles contained restrictions which were

[41] North *v.* Bloss, 30 N. Y. 380.

[42] N. Y. Dry Dock Co. *v.* Treadwell, 19 Wend. 525, s. p., 1845, Peck *v.* Cowing, 1 Den. 222.

[43] North *v.* Bloss (above).

[44] See paragraph 2.

[45] See Bonnaffe *v.* Fenner, 6 Smedes & M. 217; Kayser *v.* Sichel, 34 Barb. 84, aff'd without passing on this point in 4 Abb. Ct. App. Cas. 592.

[46] Hopkins *v.* Smith, 11 Johns. 161.

[47] Sweeting *v.* Turner, 10 Johns. 216; Nudd *v.* Burrows, 91 U. S. (1 Otto) 438. *Contra*, see 14 N. H. 145, and cases cited.

[48] De Graff *v.* Hovey, 16 Abb. Pr. 120. In contradiction or impeachment of a witness who testifies that he was a partner, his schedules in insolvency, containing no mention of his interest, were held admissible. Brigham *v.* Clark, 100 Mass. 430.

[49] 3 Kent's Com. 43.

known to the party dealing with a partner is competent, although the transaction was within the general scope of the business.[50] If the answer contains an admission of the firm contract, a denial of consideration does not avail to admit the defense of want of authority or fraudulent diversion.[51]

39. Transactions in the Interest of One Partner.

Evidence that a transaction with a partner was in a matter not within the scope of the business, raises a presumption of law, in the absence of countervailing circumstances, that the dealing was on his private account, notwithstanding the firm name was used.[52] But if, on the other hand, the subject-matter is consistent with the partnership business, the burden is on the firm to show that the contract was out of the regular course of their dealing,[53] unless the contract was in

[50] Dow *v.* Saward, 12 N. H. 275; Chapman *v.* Devereux, 32 Vt. 619, 623.

[51] Harger *v.* Worrall, 69 N. Y. 370, 373.

[52] 3 Kent's Com. 43; approved in Story on Partn. 241, § 133, n.

"When one partner has a transaction with a third person which is neither apparently nor really within the scope of the partnership business, the partnership is not bound by his declarations or acts in the transaction." Samstag *v.* Ottenheimer, 90 Conn. 475, 97 Atl. Rep. 865.

Where one partner purchases merchandise for a business, not connected with the partnership, he does not bind his firm by such transaction. Gimbel Bros. *v.* Martinson, 157 N. Y. Supp. 458.

[53] Id.

"A member of a trading co-partnership has implied authority to borrow money on the credit of the co-partnership; and if he so borrows from one loaning without notice and in good faith, and appropriates the proceeds to his own use, the co-partnership is liable upon the obligation." St. Paul First Nat. Bank *v.* Webster, 130 Minn. 277, 153 N. W. Rep. 736.

"In a business partnership it is presumed that a note signed by a member in the firm name was made in the partnership business. This presumption may be rebutted, however, by showing that the partnership was not such a partnership as called for the borrowing of money, or it may be rebutted by showing that the moneys borrowed were for another purpose than that of the partnership to the knowledge of the bank loaning the same." Williams *v.* Wuppermann, 171 App. Div. 592, 157 N. Y. Supp. 645.

writing, and in the individual name of a partner. In general, if one takes from a partner in discharge of his separate debt, the obligation or funds of the firm, it is not necessary for the other partners to bring home to him conscious knowledge that this was a misapplication; the nature of the transaction is enough to charge him with the duty of inquiry.[54] The burden is on the dealer with the partner, to show assent of the other partner or circumstances from which assent may be inferred; [55] knowledge alone is not necessarily enough.[56]

40. Burden of Proving Dissolution and Notice.

One who defends on the ground of dissolution, has the burden of proof of dissolution; and also of notice, if the other party had knowledge of the partnership; [57] except that if the dissolution was caused by war, death or bankruptcy, there need be no evidence of notice.[58] If the retiring partner was

[54] Story on Partn. 241, § 133, 2 Greenl. Ev. 446, § 480; Rogers *v.* Batchelor, 12 Pet. 229; compare Purdy *v.* Powers, 6 Barr. 492. A mortgagee of property standing in the name of one partner, has, from the joint possession of it by the firm, constructive notice of their title and relative interests. Cavander *v.* Bulteel, L. R. 9 Ch. App. 79, s. c., 8 Moak's Eng. 743.

In the absence of fraud or conduct constituting an estoppel, a partner, without the consent of his copartners, cannot apply firm property to the payment of his individual indebtedness. Bullock *v.* Power-Heafey Coal Co., 98 Neb. 221, 152 N. W. Rep. 392.

[55] Dob *v.* Halsey, 16 Johns. 34.

Where two persons enter into a partnership for the purchase of lands and one of them acting for both purchases at a less price than he has represented to the other, the law stamps the transaction as fraudulent, and will not permit the purchasing partner to retain the fruits of his misconduct. Chilton *v.* Groome, 168 N. C. 639, 84 S. E. Rep. 1038.

[56] Todd *v.* Lorah, 75 Penn. St. 155.

[57] See Story on Partn. 286, § 160; Wade on Notice, 234, § 530; Carmichael *v.* Green, 55 Geo. 116. Compare Goddard *v.* Pratt, 16 Pick. 412, 429.

A retiring partner is liable for subsequent transactions made by his former partner in the firm name with those who had previous dealings with the firm, and who entered into the new transaction without notice of the change in the partnership. Austin *v.* Holland, 69 N. Y. 571, 25 Am. Rep. 246.

[58] Griswold *v.* Waddington, 16

a dormant partner, unknown to plaintiff, and his name was never used, evidence that he ceased to be a partner before the transaction is enough without evidence of notice.[59] If he was known as a partner to the person dealing with the firm, some evidence of notice of withdrawal is necessary.[60]

41. Mode of Proving Dissolution.

A dissolution of partnership or withdrawal of a partner, may be proved by parol or partly by parol.[61]

Johns. 438, affi'g 15 Id. 57; Seaman *v.* Waddington, 16 Id. 510; Dickinson *v.* Dickinson, 25 Gratt. (Va.) 321. Civil war does not, *ipso facto*, absolve, except from the time of unequivocal public notice of the illegality of intercourse. Matthews *v.* McStea, 91 U. S. (1 Otto) 7, affi'g 50 N. Y. 166, 3 Daly, 349.

[59] Kelley *v.* Hurlburt, 5 Cow. 534; Davis *v.* Allen, 3 N. Y. 168; Phillips *v.* Nash, 47 Geo. 218.

Where persons hold themselves out as partners they are liable till notice of their withdrawal is given. But in the case of dormant partners who draw out before the liability is incurred by the firm, no notice of withdrawal need be given and no liability attaches. Gorman *v.* Davis, etc., Co., 118 N. C. 370, 24 S. E. Rep. 770.

[60] Park *v.* Wooten's Ex'r, 35 Ala. 242.

[61] Emerson *v.* Parsons, 46 N. Y. 560, affi'g 2 Sweeny, 447.

"Every change in the personnel of a partnership works a dissolution." Webb *v.* Butler, 192 Ala. 287, 68 So. Rep. 369, Ann. Cas. 1916, D. 815.

A partnership may be terminated at any time by consent, but the consent must be mutual. Hardin *v.* Robinson, 162 N. Y. Supp. 531.

Where one of the partners demands an accounting, which is refused, such refusal is in itself ground for the termination of the partnership relation. Frankfort Const. Co. *v.* Meneely, 112 N. E. Rep. (Ind. App.) 244.

"Where a partnership has been proven to exist, its existence will be presumed to continue until a dissolution is proved." Guin *v.* Grasselli Chemical Co. (Ala.), 72 So. Rep. 413.

The sale of one partner's interest works a dissolution of the partnership and it is not necessary that the consent of the other partner be obtained. Haworth *v.* Jackson, 80 Oregon, 132, 156 Pac. Rep. 590.

Where one partner without the knowledge or consent of the other transfers all of the partnership assets to a corporation, the act operates as an immediate dissolution of the copartnership. Parry *v.* Parry, 155 N. Y. Supp. 1072, 92 Misc. 490.

A deed of property from one

42. —Notice.

Against those who at or before the time of their transaction did not know of the existence of the partnership or the membership of the retiring partner, evidence of notice of dissolution or withdrawal is not necessary.[62] Against those who had previous knowledge of the partnership,[63] and claim that they were giving credit to all the defendants, but who had not previously given them credit,[64] there must be either evidence of reasonable publicity by advertisement in a newspaper [65] (and this is a matter of law sufficient),[66] or of such circulation of the information, as to fulfill the duty of the retiring partners to put the public on guard.[67] Evidence tending to show a public and notorious disavowal of further re-

partner to another which recites that the grantee assumes certain firm indebtedness does not operate as a dissolution of the firm but is evidence of the fact. Stockhausen *v.* Johnson, 173 Iowa, 413, 155 N. W. Rep. 823.

[62] Paragraph 40 and note; Wade on Notice, 215, § 490.

"No notice of dissolution is necessary as regards persons who have had no knowledge of the fact that the partnership existed." Portal First International Bank *v.* Brown, 130 Minn. 210, 153 N. W. Rep. 522.

[63] The general notoriety of the existence of the firm, does not raise a presumption that the party dealing had knowledge of its existence. Wade on Notice, 215, § 490.

[64] The fact of having had cash dealings does not render evidence of actual notice necessary. Clapp *v.* Rogers, 12 N. Y. 283, affi'g 1 E. D. Smith, 549.

Actual personal notice of the withdrawal of one of the members of a firm need not be given to one who had not been a creditor of the firm prior to the retirement but who thereafter sold goods to it. Skeffington *v.* Daniel, 18 Ga. App. 262, 89 S. E. Rep. 458.

[65] City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240, s. P., City Bank of Brooklyn *v.* Dearborn, Id. 244.

[66] Lansing *v.* Gaine, 2 Johns. 300.

[67] Wardwell *v.* Haight, 2 Barb. 549.

Where a person doing business under a firm name transfers the business to others, he is liable to all persons who, knowing of his former ownership of the business, extend credit to the firm after the transfer, if no public or personal notice of his withdrawal was given, although such persons had not previously transacted business with him. Hendley *v.* Bittinger, 249 Pa. 193, 94 Atl. Rep. 831, L. R. A. 1915, F. 711.

sponsibility, though without newspaper advertisement, is competent,—such as the giving of actual notice to all who had previously dealt, the proper change of the firm name, the general notoriety of the change throughout the trade, and the fact that the firm had never transacted business in the place where the plaintiffs bought their paper.[68] It is not a question of actual notice, but of the reasonable fulfillment of duty and diligence in the public announcement of the change.[69] Where the creditor testifies that he had no notice, the jury may still infer actual notice from circumstances of general publicity.[70]

Against those who had given credit[71] to the firm in previous dealing, there must be evidence of actual no-

[68] Lovejoy *v.* Spafford, 93 U. S. (3 Otto) 441; compare Pitcher *v.* Barnes, 17 Pick. 364; Wade on Notice, 226, §§ 513, 519.

[69] Lovejoy *v.* Spafford (above).

"Where one admits the previous existence of a partnership, the fact that there was a general rumor in the neighborhood where he resided that it continued to exist, is a circumstance to show that he knew of same and held or permitted himself to be held out as a partner." Guin *v.* Grasselli Chemical Co. (Ala.), 72 So. Rep. 413.

[70] Id. The fact of the circulation in the community of a general rumor that one of the partners had retired is admissible in evidence, not as being of itself sufficient to put any particular person on notice of the dissolution of the firm, but as a circumstance proper to be considered by the jury in connection with the other evidence bearing on the question of notice. Askew *v.* Silman, 95 Ga. 678, 22 S. E. Rep. 573.

General reputation of the dissolution in a community where a person sought to be charged with notice resides, or in the business community to which the parties belong, is admissible as tending to show notice. Such general reputation or notoriety is not in itself notice, but is admissible for the consideration of the jury in determining whether there was notice. Mims *v.* Brook, 3 Ga. App. 247, 59 S. E. Rep. 711.

[71] Those who deal on credit, even for small sums, and on a credit not defined in point of time, are entitled to notice. Clapp *v.* Rogers, 12 N. Y. 285, affi'g 1 E. D. Smith, 549.

If, without notice of dissolution, a lender of money extends the loan after dissolution and accepts a new note in the firm name, he may maintain the action against the members of the old firm, including the retired members. Stockhausen *v.* Johnson, 173 Iowa, 413, 155 N. W. Rep. 823.

tice,[72] or of circumstances from which it may be distinctly inferred.[73] Notice to an agent or servant whose business does not extend to the receipt of such communications is not enough, without evidence that it was communicated by him.[74] Proof that written notice was properly mailed to the person sought to be charged with notice, is not enough, even though accompanied by proof that the letter was not returned,[75] if the actual receipt be disproved; [76]

[72] Deering *v.* Flanders, 49 N. H. 225.

A bank on receiving deposits from a partnership, becomes a debtor to the firm, and the checks of the firm are drawn and paid in diminution of the indebtedness, which acts are dealings between the bank and the firm and entitle the bank to actual notice of dissolution. National Shoe, etc., Bk. *v.* Herz, 24 Hun (N. Y.), 260, aff'd in 89 N. Y. 629.

Where a partner notifies a seller not to extend further credit to his firm, and that he will not be liable for goods so sold, such partner is not liable for the price of goods subsequently sold to the firm by the person receiving the notice. St. Louis Brewing Ass'n *v.* Elmer, 189 Mo. App. 197, 175 S. W. Rep. 102.

[73] Austin *v.* Holland, 69 N. Y. 571, affi'g 2 Supm. Ct. (T. & C.) 253. It seems that the fact that the former partners carried on business separately, after dissolution, for years, at different places in the same town with their former dealers, would sustain a finding of notice to the latter. Per Bronson, J., Coddington *v.* Hunt, 6 Hill, 595.

It is the business of a retiring partner to bring notice of his withdrawal home to the persons with whom he has dealt, or it must appear that the fact of the partner's retirements came to the knowledge of those dealing with the firm. Farwell *v.* Cashman, 16 Mont. 393, 41 Pac. Rep. 443.

[74] Stewart *v.* Sonneborn, 49 Ala. 178, Wade on Notice, 220, § 502.

Proof that notice of the retirement of a partner was given to a travelling salesman, is evidence for the jury to consider upon the question of notice to the salesman's principal. Ring Furniture Co. *v.* Bussell, 171 N. C. 474, 88 S. E. Rep. 484.

[75] Kenney *v.* Atwater, 77 Penn. St. 34, Wade on Notice, 220, § 501.

[76] Austin *v.* Holland, 69 N. Y. 571, affi'g 2 Supm. Ct. (T. & C.) 253, where is is said that mailing is presumptive evidence. To the contrary, see Kenney *v.* Atwater (above).

Actual notice, or its equivalent, of the dissolution or the withdrawal of any member of the firm must be shown to protect the retiring member from liability for debts subsequently contracted. Proof of the mailing of the notice of dissolution of the partnership and of

but with slight corroborative evidence of actual receipt or knowledge, it may be enough to go to the jury.[77] Publication of notice in a newspaper is not alone enough,[78] nor is it made sufficient as matter of law by showing that the party sought to be charged took the paper or habitually read it,[79] but this is enough to go to the jury if accompanied by the slightest evidence of knowledge.[80] Information actually brought to the attention of the creditor is enough; if by published notice, it is not essential that the notice be signed by the partners.[81] A change in the firm name, made known to the party, though not conclusive, is sufficient evidence of the dissolution or withdrawal, if the change itself is significant of the retirement of the member in question;[82] otherwise not.[83]

III. RULES PECULIAR TO SURVIVING PARTNERS

43. Actions by Survivor.

At common law, where it was sufficient to allege indebtedness, a surviving partner could prove a debt contracted to the firm, and the death and survivorship, under a declaration alleging indebtedness to himself, without noticing the

the retirement of certain members thereof, properly addressed to persons having had prior dealings with the firm is *prima facie* evidence that the notices have been received by the parties to whom they were addressed, but such presumption may be rebutted by proof that the said notices were never received. Phila. & Reading C. & I. Co. *v.* Kuecken, 191 Ill. App. 161.

[77] Kenney *v.* Atwater (above).

[78] Bank of the Commonwealth *v.* Mudgett, 44 N. Y. 514. Especially if the party testifies that he had no actual notice. Howell *v.* Adams, 68 N. Y. 315, affi'g 1 Supm. Ct. (T. & C.) 425; Austin *v.* Holland (above).

[79] Vernon *v.* Manhattan Bank, 22 Wend. 183, affi'g 17 Id. 524.

[80] Wade on Notice, 221, §§ 504, 507, 1 Whart. Ev. 641, § 675.

[81] Young *v.* Tibbetts, 32 Wisc. 79, S. P., Robinson *v.* Worden, 33 Mich. 316.

[82] Newcomet *v.* Bretzman, 69 Penn. St. 185. A change of partners in a banking house is sufficiently notified to the customers of the house, by a change in the printed checks. Barfoot *v.* Goodall, 3 Camp. 146.

[83] American Linen Thread Co. *v.* Wortendkye, 24 N. Y. 550.

partnership, and the death and survivorship.[84] So far as pleading in the same general form, by alleging defendant to be indebted to plaintiff on on account, etc., is sanctioned under the new procedure,[85] the like evidence is equally admissible now; but if the complaint alleges a contract with plaintiff, or a consideration proceeding from him, proof of one with or from the firm, is a variance,[86] the effect of which depends on whether defendant is prejudiced. An action to recover possession of partnership property may likewise be sustained in the name of the survivor alone.[87] Evidence

[84] Whether the contract was with the firm (Grant *v.* Shorter, 1 Wend. 151); or with the survivor, on a consideration proceeding from the firm. Holmes *v.* D'Camp, 1 Johns. 34.

Where the surviving partner is also sole executor he can account in the surrogate's court as such surviving partner, in connection with his account as executor. In re Hearns, 214 N. Y. 426, 108 N. E. Rep. 816.

[85] Allen *v.* Patterson, 7 N. Y. 476.

[86] See Ditchbum *v.* Sprachlin, 5 Esp. 31; Holmes *v.* D'Camp (above); Hess *v.* Fox, 10 Wend. 436. Unless the firm name and the survivor's name are the same. See Bank of Cooperstown *v.* Woods, 28 N. Y. 545.

[87] Murray *v.* Mumford, 6 Cow. 443.

"The death of a partner dissolves the partnership and, as a general rule, the surviving partner is entitled to possession of the partnership assets to adjust and settle the affairs of the concern." Murray *v.* Keeley Institute, 190 Mich. 295, 157 N. W. Rep. 87.

"The surviving partner is vested with some discretion as to the manner of closing the business and the time to be taken for that purpose. He may continue the business long enough to close it up without sacrificing the assets and long enough to make an advantageous disposition of the stock." The Big Four Implement Co. *v.* Keyser, 99 Kan. 8, 161 Pac. Rep. 592, L. R. A. 1917, C. 166.

On the dissolution of a partnership by the death of one of its members, the control of the assets vests in the surviving partner. Loeb *v.* Huston, 98 Neb. 314, 152 N. W. Rep. 553.

A surviving partner does not continue to carry on the business of the partnership where no business is done by him other than selling the firm property and collecting the accounts. Christian *v.* Heuter, 190 Ill. App. 596.

A deposit in a bank in the name of a firm is *prima facie* proof of the relation of debtor and creditor between the bank and the depositor, but a member of the firm cannot maintain an action in his

tending to show the place of residence and death of one partner, with proof of the death at the same place of a person bearing the same name, establishes, *prima facie* the title of the other partner as survivor.[88] The admissions and declarations of the deceased are not competent in plaintiff's favor to prove the existence and title of the partnership, unless defendant is shown to have been in privity with him.[89] The admissions and declarations of the surviving partner to the effect that he had no equity or interest remaining, but that the personal representatives were entitled, are not relevant, for the legal title is in him, notwithstanding the equities of the parties.[90]

44. Actions against Survivor.

The same principles apply in an action against a survivor. Under an allegation of indebtedness of the survivor, evidence of a contract of the firm, and of death and survivorship may be proved,[91] but if the joint contract, etc., are alleged, they

individual name to recover thereon. Tallapoosa County Bank *v.* Salmon, 12 Ala. App. 589, 68 So. Rep. 542.

[88] Daby *v.* Ericsson, 45 N. Y. 786.

[89] Such evidence would be competent against the administrator of the deceased, but is not as against a stranger, even on an issue raised by him that the title is in the administrator. Brown *v.* Mailler, 12 N. Y. 118, s. p., Hamilton *v.* Summers, 12 B. Monr. (Ky.) 11. Entries by partner since deceased, proven to be in his handwriting and made in the regular course of business, are presumptive proof. Thomson *v.* Porter,. 4 Strobh. Eq. 64.

The declarations of one person as to the existence of a partnership between himself and another person are not admissible in evidence against the latter to prove the fact of partnership, unless they were made in his presence or fall within the exception to the general rule excluding hearsay evidence. Guin *v.* Grasselli Chemical Co., 72 So. Rep. (Ala.) 413.

[90] Daby *v.* Ericsson, 45 N. Y. 786. Receipt by agent of new firm not expressed to be for survivors, held not competent. Adams. *v.* Ward, 26 Ark. 135.

[91] Goelet *v.* McKinstry, 1 Johns. Cas. 405.

Where the surviving partner takes possession of all the assets of the partnership and carries on the business at the same location under a name very similar to the name of the former firm, he is

should be proved;[92] both rules being subject to the present criterion as to variance.

45. Actions against Representatives of Deceased Partner.

To maintain an action against the executor or administrator of the deceased partner, it is enough to show that the survivor is wholly insolvent. This may be shown by any common law proof; exhaustion of the remedy at law is not essential;[93] but, on the other hand, evidence that the remedy

liable as a purchaser, and chargeable in an accounting with a share of the good will. Costa *v.* Costa, 222 Mass. 280, 110 N. E. Rep. 309.

Where, in a partnership agreement provision is made for the purchase by the survivor of the other's interest, the obligation to pay interest must be found in the agreement itself or no interest whatever is payable until the payment becomes due. Matter of Columbia Trust Co., 169 App. Div. 822, 155 N. Y. Supp. 676.

A surviving partner must account to the personal representatives of the deceased partner for any excess of assets over liabilities and he may have an action for contribution against the estate of the deceased if there are insufficient assets of the copartnership to meet its obligations. Keyes *v.* Metropolitan Trust Co., 169 App. Div. 765, 155 N. Y. Supp. 888.

A bill in equity may be maintained by the personal representatives of a deceased partner against the survivors to compel an accounting, and for a discovery of the partnership property which came into their hands. Fried *v.* Burk, 125 Md. 500, 94 Atl. Rep. 86.

A surviving partner is entitled to the exclusive possession and control of the partnership property, with the right to sell and dispose of the same as far at least as is necessary and proper for the purpose of closing the partnership business and discharging the claims of partnership creditors. When this is accomplished, such partner becomes liable to an accounting to the personal representative of the deceased partner, and to him only. An action to compel such an accounting cannot be maintained by an heir of the decedent. Lewis *v.* Lewis, 156 N. W. Rep. (Iowa) 332.

[92] Nelson, J., Mott *v.* Petrie, 15 Wend. 318, and cases cited.

[93] Van Riper *v.* Poppenhausen, 43 N. Y. 68.

It is not proper in an action by one partner for an accounting to make the personal representatives of a deceased copartner parties, where there is no allegation of the insolvency of the firm. Parry *v.* Parry, 155 N. Y. Supp. 1072, 92 Misc. 490.

at law was exhausted by execution returned unsatisfied is enough, although it be shown that the survivor has available property which was not discovered by the sheriff.[94]

IV. ACTIONS BETWEEN PARTNERS

46. Allegation and Burden of Proof of Partnership.

In an action for an accounting, the allegation of partnership is material, and plaintiff cannot recover on proof that he is a creditor,[95] not even on proof of a loan payable with share of profits.[96] And if he could, usury, though not pleaded, would be available as a defense.[97] If the existence of the partnership is denied in the answer, the burden of proof is on the plaintiff.[98]

47. Proof of Partnership.

Where the interest of no third person is involved, stronger proof is required to establish the partnership, than when the question arises as between the alleged partners and third persons.[99] If the agreement was embodied by the parties

[94] Pope *v.* Cole, 55 N. Y. 124, affi'g 64 Barb. 406.

[95] Salter *v.* Ham, 31 N. Y. 321.

[96] Arnold *v.* Angell, 62 N. Y. 508, rev'g 38 Super. Ct. (J. & S.) 27. Compare Marston *v.* Gould, 69 N. Y. 220.

[97] Arnold *v.* Angell (above).

[98] Gatewood *v.* Bolton, 48 Mo. 78; McBride *v.* Ricketts, 98 Iowa, 539, 67 N. W. Rep. 410. In a bill in equity against a partner for an account where the partnership is denied, the declarations of the defendant made prior to any difference between him and the plaintiffs are not admissible to corroborate his testimony. Fraser *v.* Linton, 183 Pa. St. 186, 38 Atl. Rep. 589.

A release of a debt signed by the surviving partner, he having title to all the partnership assets, bars any action against the debtor by the representatives of the deceased partner. Secor *v.* Tradesmen's National Bk., 148 N. Y. App. Div. 141, 133 N. Y. Supp. 197.

[99] Chisholm *v.* Cowles, 42 Ala. 179; Watson *v.* Hamilton, 180 Ala. 3.

Where two persons enter into a joint adventure upon the understanding that each of the parties shall pay an equal amount of all the expenses, the conclusion necessarily follows that they are to share equally in all the proceeds of the enterprise. Galbraith *v.* Devlin,

in a writing, it must be produced or accounted for.[1] If not written, it may be proved by parol,[2] notwithstanding it was to continue for more than a year;[3] and for this purpose the conduct and declarations of the parties,[4] and the entries in the firm books,[5] are competent, subject to the general qualification that the concession of one is not evidence against another.[6] The question of partnership or not, is to be determined chiefly by ascertaining what were the intentions of the parties, as manifested in the transactions shown.[7] Mu-

85 Wash. 482, 148 Pac. Rep. 589.

[1] The attorney who drew the articles is privileged, if he acted for the party claiming the benefit of the privilege, and not for the adverse party (see Yates *v.* Olmstead, 56 N. Y. 632, rev'g 65 Barb. 43); if he acted for both, he is not (see Whiting *v.* Barney, 30 N. Y. 330).

If deceased, his contemporaneous entries in his accounts, and his drafts of the articles and of other papers connected therewith, are competent, for the purpose of corroborating other evidence as to the date and contents of the lost articles. Moffat *v.* Moffat, 10 Bosw. 468, 493.

The intentional destruction of the articles by the interested party, if unexplained, is competent to go to the jury against him in corroboration of evidence of their contents; but the fact of spoliation does not alone raise a legal presumption that their contents were as alleged by the other party. Id. 501.

Before a court is justified in setting aside a written agreement of partnership deliberately executed between two business men, there must be a very clear preponderance of positive and convincing evidence sustaining the charge that one was induced to sign it by fraud or deceit. Lavigne *v.* Coyne, 188 Mich. 382, 154 N. W. Rep. 126.

[2] Randel *v.* Yates, 48 Miss. 685. As to the case of partnership in lands, compare Fairchild *v.* Fairchild, 64 N. Y. 471, affi'g 5 Hun, 407; Levy *v.* Brush, 45 N. Y. 589, rev'g 8 Abb. Pr. N. S. 418, s. c., 1 Sweeny, 653; Smith *v.* Burnham, 3 Sumn. 435.

[3] Smith *v.* Tarleton, 2 Barb. Ch. 336.

[4] Shelmire's Appeal, 70 Pa. St. 281.

Contract of partnership, except, perhaps, one contemplating the purchase and sale of land, may be implied from conduct and circumstances, if significant enough to convince the mind. Watson *v.* Hamilton, 180 Ala. 3, 60 So. Rep. 63.

[5] Frick *v.* Barbour, 64 Pa. St. 120.

[6] See paragraphs 11 and 14, where the principle is more fully stated.

[7] Salter *v.* Ham, 31 N. Y. 321; Phillips *v.* Phillips, 49 Ill. 437;

tual intention and assent to the relation is enough; but the absence of them does not necessarily disprove partnership, because the contract that was entered into may conclusively manifest an intent to create the relation, although they were at the time in fact unaware of the legal effect.[8] Hence, the facts being proved on uncontradicted testimony, the question is one of law for the court.[9] The intention of the parties, together with the facts, must, as between themselves, be decisive of the question as to the existence of the partnership and as to its extent. The parties should not be permitted to testify as to whether they regarded each other as partners, for the reason that the construction of contracts, whether written or verbal, is for the court, and cannot be expounded by witnesses. Parties may become partners without their knowing it, the relation resulting from the terms they have used in their contract, or from the nature of the undertaking; and the testimony of either as to whether he regarded the other as his partner is incompetent as against the other,[10] though competent against himself.

As between the parties, equity allows the admission of parol evidence of the course and business of the partners, either by general acquiescence or positive acts subsequent to the articles, for the purpose of showing the practical construction they have put on the articles, or even of inferring that they have abandoned disused provisions.[11] On the continuance of the business by the same parties after the expiration of the time fixed in the articles, the natural presumption is that the old articles are adopted, except the provisions as to term or termination.[12]

Groves *v.* Tallman, 8 Nev. 178. Agreement to execute a deed of partnership held to constitute a partnership as between the parties. Syres *v.* Syres, L. R. 1 App. Cas. 174, s. c., 15 Moak's Eng. 52.

[8] Lintner *v.* Milliken, 47 Ill. 178.

[9] Chisholm *v.* Cowles, 42 Ala. 179. And see Bitter *v.* Rathman, 61 N. Y. 512.

[10] Lintner *v.* Milliken (above).

[11] Story on Partn. 326, § 192.

[12] U. S. Bank *v.* Binney, 5 Mass. 176, 185; Story on Partn. 332, § 198.

Where one of three partners became insane and another died, it is to be presumed that the partner

48. Order of Proof.

In taking the final accounts, ascertain: 1. How the firm stands as to non-partners (including co-adventurers); 2. What each partner is entitled to charge against the other for everything he has advanced or brought in as a partnership transaction, and also to charge against him what that other has not brought in as he ought, or has taken out in excess of what he ought; and then, 3. Apportion between them the profits to be divided or losses to be made good, and ascertain what, if anything, any partner should pay to another, in order that all cross claims may be settled.[13] Partnership

who continued to carry on the business did so pursuant to the original articles of agreement. Cole *v.* Cole, 119 Ark. 48, 177 S. W. Rep. 915.

[13] Neudecker *v.* Kohlberg, 3 Daly, 410; West *v.* Skip, 1 Ves. Sr. 242.

Partnership debts must be paid out of the partnership assets before the debts due by it to one of the members thereof can be lawfully paid. Whitecloud Milling, etc., Co. *v.* Thomson, 264 Mo. 595, 175 S. W. Rep. 897.

When a member of a solvent copartnership sells in good faith his interest to his copartner, and the latter assumes the payment of the debts, the retiring partner loses his equitable right to require that the partnership assets be applied to the payment of the partnership debts. Rapple *v.* Dutton, 226 Fed. Rep. 430, 141 C. C. A. 260.

The partner that may be forced to pay firm debts has his right of accounting and contribution from his copartners. Webb *v.* Butler, 192 Ala. 287, 68 So. Rep. 369, Ann. Cas. 1916, D. 815.

Partnership creditors are entitled to have the firm assets applied to the payment of the partnership debts in preference to the personal liabilities of the individual parties, where there are not sufficient partnership assets to satisfy both. Springhetti *v.* Hilden, 61 Colo. 591, 157 Pac. Rep. 1162.

Where, on an accounting, each of the former partners claims property as individual property, the court will not ordinarily appoint a receiver to take possession of the property until there has been a determination of the question of title. Bacon *v.* Engstrom, 129 Minn. 229, 152 N. W. Rep. 264, 537.

There is an implied obligation between general partners that on the termination of the partnership they will account to each other and settle and pay any balances due among themselves. To bring about such accounting and settlement an action will lie. Brooks

transactions are not excluded from the accounting because not alleged in the complaint.[14]

49. Evidence of Firm or Individual Transactions.

To bring in the transaction had by a partner, but not in the firm name, it is not enough to show merely that it was in violation of the express or implied agreement of the partner to devote his attention, etc., to firm business;[15] but it is enough to show that it was in a business in rivalry with

v. Campbell, 97 Kan. 208, 155 Pac. Rep. 41.

The appropriate remedy is an equitable action for an accounting. Lobsitz *v.* E. Lissberger Co., 168 App. Div. 840, 154 N. Y. Supp. 556.

Surviving partners have no right to take the partnership property at their own valuation. Fried *v.* Burk, 125 Md. 500, 94 Atl. Rep. 86.

An indebtedness due a partnership is not subject to attachment by a creditor of an individual partner until after final adjustment of all the firm accounts and payment of the firm liabilities. Lacy *v.* Greenlee, 75 W. Va. 317, 84 S. E. Rep. 921.

It is the duty of one partner to disclose to the other any bargains affecting their joint interest entered into with third parties for his own benefit, as well as any matters of business within the scope of their agreement, of which the other, not having means of information, is ignorant. Arnold *v.* Maxwell, 223 Mass. 47, 111 N. E. Rep. 687.

The good will of a business, including the right to use the established firm name, is capable of sale. Barclay *v.* Barclay, 172 App. Div. 548, 158 N. Y. Supp. 1045.

[14] Boyd *v.* Foot, 5 Bosw. 110.

[15] Dean *v.* McDowell, 26 Weekly R. 486; and see Clements *v.* Norris, 38 L. T. N. S. 591.

In ordinary partnerships each partner is an agent for the firm, and has power to bind his copartners by any act or transactions pertaining to the partnership dealings or that is within the scope of the business carried on by the firm. Rocky Mt. Steed Farm Co. *v.* Lunt, 46 Utah, 299, 151 Pac. Rep. 521.

In their dealings with each other partners occupy a position of trust and confidence. A purer and more elevated morality is demanded of partners than the common morality of trade, and the standard by which they are tried in a court of equity is far higher than the ordinary standards of business. Questionable dealings of any kind will not be tolerated. Stem *v.* Warren, 161 N. Y. Supp. 247, 96 Misc. 362.

that of his firm; [16] or that it was by the partnership relation that he was enabled to make the contract [17] (as, for instance, where the consideration was drawn from,[18] or the liability chargeable upon or assumed by,[19] the firm), or by means of use of the firm property or credit,[20] or that he made a secret arrangement for an individual profit from their transactions,[21] or took any unfair advantage of his connection with the firm. And in such cases it is not necessary to prove that any loss accrued to the firm.[22] Assent by the copartner to the carrying on of a transaction in the name of the other is not necessarily an assent to the claim of the other to the profits of the transaction.[23]

[16] Somerville *v.* Mackey, 16 Ves. 382; Locke *v.* Lynam, 4 Ir. Ch. 188.

"There is no general principle of partnership which renders one partner liable to his co-partners for his honest mistakes. So far as losses result to a firm from errors of judgment of one partner not amounting to fraud, bad faith or reckless disregard of his obligations, they must be borne by the partnership. Each partner owes to the firm the duty of faithful service according to the best of his ability. But, in the absence of special agreement no partner guarantees his own capacity." Hurter *v.* Larrabee, 224 Mass. 218, 112 N. E. Rep. 613.

Where a partnership has been wilfully and wrongly broken up by a partner, the other partner, if he has kept his covenants, may bring an action at law and recover damages, the measure being the value to him of the continuance of the agreement during the covenanted term. Kebart *v.* Arkin, 232 Fed. Rep. 454, 146 C. C. A. 448.

[17] Russell *v.* Austwich, 1 Sim. 52; Mitchell *v.* Reed, 61 N. Y. 123, rev'g 61 Barb. 310.

[18] See Cox *v.* McBurney, 2 Sandf. 561; but compare Campbell *v.* Mullett, 2 Swanst. 551; Comegys *v.* Vasse, 1 Pet. 193.

[19] Nichols *v.* English, 3 Brews. 260.

[20] Herrick *v.* Ames, 8 Bosw. 115.

[21] Manuf. Nat. Bank *v.* Cox, 2 Hun, 572; aff'd without further opinion in 59 N. Y. 659.

An action at law will not lie between partners upon a claim growing out of partnership transactions until the business is wound up and the accounts finally settled. Li Sai Cheuk *v.* Lee Lung, 79 Ore. 563, 146 Pac. Rep. 94, 156 Pac. Rep. 254; Commons *v.* Snow, 194 Ill. App. 569.

[22] Id.; Mitchell *v.* Reed (above).

[23] Bast's Appeal, 70 Penn. St. 301.

50. Title to Real Property.

Real property the legal title of which is in a member, is presumed to belong to him, although occupied and used by the firm, until it is shown to be partnership property, either by evidence that there was an agreement to that effect, or that it was acquired with partnership funds for partnership purposes.[24] For this purpose parol evidence is admissible as between the partners and their representatives, to show that a conveyance to a partner was for the benefit of the firm.[25] And where the statute forbids a resulting trust unless the conveyance is so taken without the knowledge of the party paying the consideration, the court will

[24] Hogle *v.* Lowe, 5 Reporter, 118.

Where land is bought by the members of a partnership with the money belonging to the firm, and the legal title is taken in the name of only one member, an implied trust arises in favor of the partnership and the members become equitable owners and equitable tenants in common of the lands. Roach *v.* Roach, 143 Ga. 486, 85 S. E. Rep. 703.

In the absence of evidence indicating an intention to the contrary, a presumption of ownership follows the legal title. To overcome this presumption and warrant the inference that title in the individual partner is held in trust for the firm, the evidence must be clear, satisfactory, and unequivocal. Smith *v.* Smith, 160 N. W. Rep. (Iowa) 756.

It is of little significance by whom title is taken, whether in the name of one of the partners or in the names of all of them, or in the partnership name, as to whether the property constitutes firm assets. The principal and controlling factors are, with what funds the property is purchased, the uses to which it is put, and the intention of the members of the partnership at the time. Sieg *v.* Greene, 227 Fed. Rep. 41, 141 C. C. A. 589.

Equity will convert real estate into personalty, and so treat it in winding up a concern although the legal title may have been vested in one of the partners. Minter *v.* Minter, 80 Oregon, 369, 157 Pac. Rep. 157.

[25] Fairchild *v.* Fairchild, 64 N. Y. 471, affi'g 5 Hun, 407. *Contra*, as against creditors, purchasers, etc., Le Fevre's Appeal, 69 Penn. St. 122; Ebbert's Appeal, 70 Id. 79. The question as to whether real estate is partnership property may be determined on parol evidence, independent of the particular form which the transaction took or the name in which the title was taken. Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. Rep. 228.

not presume knowledge; but in support of a clear equity, the court may, from the fact that those paying intended the conveyance to be taken in the grantee's name, presume that he intended it to recognize his equity, and was ignorant of the fact that it did not.[26] The fact that land is held in the names of the several persons alleged to be partners, or in the name of one for the benefit of all, is not alone evidence of copartnership between them with respect to it.[27] But where partnership is shown to exist, and land is conveyed to the several partners, evidence of actual use for partnership purposes, or of a positive agreement making it partnership property, is not essential. If paid for with partnership funds, it is then a question of intention whether the property is held by the partners as tenants in common, or whether it is partnership property. In the absence of other evidence, the manner in which the accounts are kept, whether the purchase-money was severally charged to the members, or whether the accounts treat it as they do the other firm property, as to purchase-money, income, expenses, etc., are controlling circumstances in determining such intention,[28] and from these circumstances an agreement may be inferred. The same evidence which would make it partnership property, for the purpose of paying debts and adjusting the equity between the copartners, establish it for the purpose of final division.[29]

[26] Fairchild *v.* Fairchild (above).

Where a partnership exists and land is purchased with the money or property belonging thereto, and title taken in the name of one partner, a resulting trust arises in favor of the firm. Lutz *v.* Billick, 172 Iowa, 543, 154 N. W. Rep. 884.

[27] Thompson *v.* Bowman, 6 Wall. 317.

[28] But not necessarily conclusive. Grubb's Appeal, 66 Penn. St. 117, 128.

A deed executed to a firm is valid, and operates to vest the full equitable title in the members of the partnership as tenants in common. Robinson *v.* Daughtry, 171 N. C. 200, 88 S. E. Rep. 252.

[29] Fairchild *v.* Fairchild (above).

"Real estate, upon being acquired by a co-partnership, is to be treated as having been converted into personalty to the extent that it may be required to meet partnership obligations and to pay any balance owing one partner by the other in the settle-

51. Evidence to Charge Member with Assets.

Partners who are not shown to have had exclusive management, are not to be charged with income, etc., without evidence that they actually received it.[30] And those who had exclusive management may be charged with the whole capital; but not with uncollected debts, without evidence of actual receipt or negligence,[31] or of refusal to give account.[32]

52. Evidence to Credit Member with Payments or Share.

The interest of each is presumed equal in the absence of proof.[33] Profits of a continuous enterprise, may for the purpose of equable division, be presumed to have accrued ratably as the work progressed.[34]

53. Partnership Books, etc., as Evidence.

Prima facie the books of a partnership are, as between the partners, evidence for them all and against them all.[35] En-

ment of its affairs." Smith *v.* Smith, 160 N. W. Rep. (Iowa) 756.

"Real estate which belongs to a partnership is treated in equity as personal property only so far as is necessary and as it may be needed to pay the debts of the partnership and adjust the equities of the partners." Sieg *v.* Greene, 227 Fed. Rep. 41, 141 C. C. A. 589.

[30] Richardson *v.* Wyatt, 2 Dess. 471, 481.

[31] See Gunnell *v.* Bird, 10 Wall. 304, 308.

[32] Gillett *v.* Hall, 13 Conn. 426, 435.

[33] Fox Dig. L. of P. 59; Gould *v.* Gould, 6 Wend. 267. *Contra*, as to profits, 3 Bosw. 115. Whether difference in contributions is alone sufficient evidence of intent to share unequally, compare Neudecker *v.* Kohlberg, 3 Daly, 467; Story on Partn. 35, § 24. See also Whitcomb *v.* Convers, 119 Mass. 38, s. c., 20 Am. Rep. 311.

[34] Clark *v.* Gilbert, 26 N. Y. 279, rev'g 32 Barb. 576. The opinion of an expert as to the value of the good will of a partnership is not competent as evidence. Kirkman *v.* Kirkman, 26 App. Div. (N. Y.) 395.

[35] Lodge *v.* Prichard, 3 De Gex, M. & G. 906.

In an action between partners, books of account kept by employees of one of the parties are not evidence against the other without proof that the entries correctly recorded partnership transactions. Sligo Furnace Co. *v.* Quinn, 169 App. Div. 906, 153 N. Y. Supp. 109.

tries made during the continuance of the firm, in the books to which a partner had access when the entries were made, or immediately afterwards, are presumptive evidence against him,[36] in the absence of evidence of his dissent.[37] If it be shown that the account was kept by the partner, in whose favor the entry is, evidence may be required that the book was a partnership book, had been fairly kept, and was accessible to the other.[38] The evidence drawn from the entries may be rebutted, by aid of proof that the partner against whom they are adduced had no knowledge of the entries; and any circumstances, such as distance, course of business, etc., are relevant.[39] "Where some of the books have been lost or destroyed, the existing books may be used, and the proof derived from them may be supplemented by such other competent evidence as the parties can offer.[40] A similar rule applies where the partner, whose duty it is to keep the firm books, has neglected for a time to perform that duty." [41] In case of entries made after dissolution, the party adducing them must show that the other had the books, and an opportunity of examining them at the time, and did not dissent.[42]

[36] Heartt *v.* Corning, 3 Paige, 566; s. P., Caldwell *v.* Lieber, 7 Id. 483; Morris *v.* Haas, 54 Neb. 579, 74 N. W. Rep. 828. But in case of a dormant partner, it should appear or be presumable that he not only had access to the books, but actually inspected them. Taylor *v.* Herring, 10 Bosw. 447.

If a partner who exclusively superintends the business and accounts of the concern, by concealment of the true state of the accounts and business, purchases the share of the other partner for an inadequate price, the purchase will be held void. Guggenheim *v.* Guggenheim, 159 N. Y. Supp. 333, 95 Misc. 332.

[37] Dunnell *v.* Henderson, 23 N. J. Eq. 174.

[38] Adams *v.* Funk, 53 Ill. 219; Wheatley *v.* Wheeler, 34 Md. 62.

[39] U. S. *v.* Binney, 5 Mas. 188.

[40] Robertson *v.* Gibb, 38 Mich. 165; White *v.* Magann, 65 Wis. 86.

[41] Van Name *v.* Van Name, 38 App. Div. N. Y. 451, 455. Where the loss or disappearance of the books of a partnership is proved, parol evidence is admissible to show the contents of the books, and such evidence may properly be given by a person who kept the books in question. Stanfield *v.* Knickerbocker Trust Co., 1 App. Div. (N. Y.) 592.

[42] Pratt *v.* McHatton, 11 La. Ann. 262.

54. Evidence of Voluntary Settlement.

Evidence of an oral agreement for accounting and settlement, executed by a statement and settlement accordingly, though subsequent to a written agreement for dissolution, is competent.[43] But an account rendered and not shown to be acquiesced in, is not enough to bar an action for an account.[44]

[43] Wiggin *v.* Goodwin, 63 Me. 389.

[44] Wood's Coll. 461, § 298.

CHAPTER X

ACTIONS BY AND AGAINST RECEIVERS

1. Allegation of appointment, and right of action.
2. Evidence of appointment.
3. Leave to sue.
4. Evidence of transactions of defendant.
5. Action against receiver.

1. Allegation of Appointment, and Right of Action.

In those jurisdictions where a receiver sues in his own name, as such, an allegation of his due appointment is necessary, if the right of action was vested in him by the appointment; and the allegation, if not admitted, must be proved.[45] If, on the other hand, the right of action is not derived through his appointment,—as, for instance, where he sues on a contract with him as receiver,—he need not allege his appointment, but he may sue, simply describing himself as receiver.[46] And in those States where a foreign

[45] Bangs *v.* McIntosh, 23 Barb. 591; and see Manley *v.* Rassiga, 13 Hun, 288.

If a receiver sues in his own name, a general denial will put the burden upon him to prove his right to sue. Homer *v.* Barr Pumping Engine Co., 180 Mass. 163, 61 N. E. Rep. 883, 91 Am. St. Rep. 269; Kirby Lumber Co. *v.* Cunningham, 154 S. W. Rep. (Tex. Civ. App.) 288.

An allegation that a receiver was "duly" appointed is sufficient to admit proof of his due appointment. Morgan *v.* Bucki, 30 N. Y. Misc. 245, 61 N. Y. Supp. 929.

[46] White *v.* Joy, 13 N. Y. (3 Kern.) 83, rev'g 11 How. Pr. 36.

A receiver must allege in his petition enough facts to show his appointment was legal. Rhorer *v.* Middlesboro Town, etc., Co., 103 Ky. 146, 44 S. W. Rep. 448, 19 Ky. Law Rep. 1788.

It is not necessary for a defendant corporation which is in the hands of a receiver to set forth the order appointing such receiver; it is sufficient to allege the fact that he was appointed. Ohio, etc., R. Co. *v.* Anderson, 10 Ill. App. 313.

Where the title of the action designates the plaintiff as receiver it is not necessary to allege his appointment in the complaint. Nelson *v.* Nugent, 62 Minn. 203, 64 N. W. Rep. 392.

A petition which alleges that

receiver is not recognized by the courts,[47] he may still sue if he can prove a cause of action not directly dependent on his title as receiver. Thus any action which may be sustained by proof of possession without proof of title,[48] or by proof of a contract made with himself,[49] or a transfer to him,[50] he may maintain; and the fact that he is named on

the applicant was appointed a receiver is sufficient, without pleading each step in the proceeding to show his appointment was valid. Matter of O'Connor, 65 Hun (N. Y.), 620, 19 N. Y. Supp. 971, 47 N. Y. St. 415.

In an action against a receiver his appointment, as well as leave to sue him, must be alleged. Malott *v.* State, 158 Ind. 678, 64 N. E. Rep. 458.

[47] See Willits *v.* Waite, 25 N. Y. 584; Cagill *v.* Woolridge, 4 Centr. L. J. 6, and note; High on Rec. 156, § 239.

But a receiver of a bank located in a sister state, who was appointed by the comptroller of the currency, was said to be neither a foreign receiver nor one appointed by the court of a sister state. He, therefore, had the right to maintain an action in the state courts against shareholders of the bank to recover assessments levied upon them and the doctrine of comity did not apply. Peters *v.* Foster, 56 Hun, 607, 10 N. Y. Supp. 389, 18 N. Y. Civ. Proc. 380.

[48] Graydon *v.* Church, 7 Mich. 36. So his assignee may sue. Hoyt *v.* Thompson, 5 N. Y. 338.

[49] Helme *v.* Littlejohn, 12 La. Ann. 298.

Though a party to whom stock has been transferred without his consent or knowledge has the right to repudiate the transaction, he is presumed to be the owner of the stock when his name appears upon the books of the bank as such owner, and the burden of proof is upon him to show that he is not in fact the owner. Finn *v.* Brown, 142 U. S. 56, 12 S. Ct. 136, 35 L. ed. 936.

It was held that the one in whose name stock appeared on the books of an insolvent bank was presumptively the owner thereof, the burden being upon him to prove that he did not purchase the stock, especially as it appeared that at the time of the bank's failure he had certificates of the stock in his safe deposit box and the books of the bank showed a credit to him of several past dividends. Alsop *v.* Conway, 188 Fed. Rep. 568, 110 C. C. A. 366.

But see Foote *v.* Anderson, 123 Fed. Rep. 659, 61 C. C. A. 5, where it was held that the mere entry of stock on the bank's books in the defendant's name, without any proof of his knowledge, assent or any act of dominion over it, was not evidence of his ownership.

[50] Palmer *v.* Clark, 4 Abb. New Cas. 25.

the record in his official capacity should not alone defeat the suit.

2. Evidence of Appointment.

If appointed by a court of general jurisdiction, it is enough to produce the decree,[51] (when appointed in a cause), or the petition and order (when appointed in a special proceeding), with his bond or other qualification, without producing the proceedings at large. The appointment of a receiver of a national bank is proved by a certificate of the comptroller of the currency, approved and concurred in by the secretary of the treasury, and reciting the existence of all the statutory facts.[52] The record, while it remains a subsisting order or decree, is conclusive.[53]

3. Leave to Sue.

Leave to sue need not usually be proved,[54] but in those

[51] Id. It seems that the oath and bond may be presumed. See Dayton *v.* Johnson, 69 N. Y. 419. Compare Rockwell *v.* Merwin, 45 Id. 168.

The order appointing the receiver is admissible when a question of his authority is in issue. Harding Paper Co. *v.* Allen, 65 Wis. 576, 27 N. W. Rep. 329.

"The comptroller had authority to make the assessment against the stockholders, and . . . such assessment is conclusive as to the amount to be collected, (and) cannot be questioned." Christopher *v.* Norvell, 201 U. S. 216, 26 S. Ct. 502, 50 L. ed. 732, 5 Ann. Cas. 740.

It is for the comptroller to determine the amount to be collected in enforcing the stockholders' liability and his judgment upon the question is conclusive and cannot be controverted by the stockholders. Rankin *v.* Miller, 207 Fed. Rep. 602.

[52] Platt *v.* Beebe, 57 N. Y. 339.

[53] Vermont & Canada R. R. Co. *v.* Vermont Central R. R. Co., 46 Vt. 792.

A certified copy of the decree is proof of the appointment of a receiver. Person *v.* Leary, 126 N. C. 504, 36 S. E. Rep. 35.

Where a receiver has been appointed by a competent court, there is a presumption that such appointment is valid. Keokuk Northern Line Packet Co. *v.* Davidson, 13 Mo. App. 561.

[54] 4 Abb. N. Y. Dig., 2d ed. 423.

A receiver who brings a suit must allege his authority to sue. Hatfield *v.* Cummings, 152 Ind. 280, 50 N. E. Rep. 817, 53 N. E. Rep. 231.

Where a receiver institutes an

jurisdictions where an allegation and proof of it is required, the court may, after long delay to object, presume that it was duly had, from the making by the court of orders facilitating the progress of the suit.[55]

action in his own name he must allege that the court in appointing him gave him permission to do so. Garver *v.* Kent, 70 Ind. 428.

In an action against a receiver it is necessary to allege that leave of court has been obtained. Keen *v.* Breckenridge, 96 Ind. 69; St. Louis, etc., R. Co. *v.* Hamilton, 158 Ill. 366, 41 N. E. Rep. 777.

A complaint against a receiver, which fails to allege leave of court to sue, is demurrable. Burk *v.* Muskegon Mach., etc., Co., 98 Mich. 614, 57 N. W. Rep. 804.

In an action by a receiver leave to sue need not be alleged. Allen *v.* Baxter, 42 Wash. 434, 85 Pac. Rep. 26; aff'd 46 Wash. 967, 89 Pac. Rep. 151.

In order to maintain an action a receiver must prove authority to do so. Darner *v.* Gatewood, 2 Neb. (Unoff.) 561, 89 N. W. Rep. 603.

Before a receiver can sue he must show that he has been given authority by the court appointing him to bring the action. Peabody *v.* New England Water Wks. Co., 80 Ill. App. 458, rev'd in 184 Ill. 625, 56 N. E. Rep. 957, 75 Am. St. Rep. 195; St. Louis, etc., R. Co. *v.* Vandalia, 103 Ill. App. 363.

Where a receiver brings the action, failure to prove authority to sue is fatal to the case. Screven *v.* Clark, 48 Ga. 41.

[55] Jerome *v.* McCarter, 94 U. S. (4 Otto) 734, 737.

A court which has granted leave to bring suit against a receiver who was appointed by it need not be informed by pleading or proof of such authority to sue. Fox River Paper Co. *v.* Western Envelope Co., 109 Ill. App. 393.

If a receiver has failed to obtain leave of the court to bring an action, he may enter an order *nunc pro tunc* granting him leave to bring it. De La Fleur *v.* Barney, 45 N. Y. Misc. 515, 92 N. Y. Supp. 926; Washington Trust Co. *v.* Local, etc., Distance Tel. Co., 73 Wash. 627, 132 Pac. Rep. 398.

The rule requiring leave to be obtained of the court before the receiver can either sue or be sued, prevents any unnecessary waste of the assets in the receiver's hands in unnecessary litigation, and contemplates at least some investigation by the court as to the propriety of the commencement of such suits before permission is granted. Witherbee *v.* Witherbee, 17 N. Y. App. Div. 181, 45 N. Y. Supp. 297.

Where a receiver sues upon a contract which he has made as receiver he need not allege authority to sue. Pouder *v.* Catterson 127, Ind. 434, 26 N. E. Rep. 66.

In an action against a receiver, the fact that plaintiff has failed to

4. Evidence of Transactions of Defendant.

In general, the same evidence is admissible that would be admissible in an action between the defendant and the corporation or person of whose property plaintiff is receiver. In an action by the receiver of a corporation against its stockholders, the fact that the name of defendant appears on the stock-book as a holder of stock, raises a presumption that he is its owner, and throws on him the burden of giving evidence to the contrary.[56] In the case of a national bank, the certificate of the comptroller of the currency is, as against stockholders, conclusive evidence of the regular organization and existence of the corporation,[57] and of the extent to which the individual liability of stockholders shall be enforced.[58] But the ordinary account books of the corporation, containing their entries of the dealings of the defendant with the corporation, are not competent against defendant,[59] any more than those of an individual, except on some special ground such as would make them competent if the action were by the corporation,—as, for instance, that defendant actually had access to the books so as to raise an implied admission of the correctness of entries not objected to at the time.[60]

5. Action against Receiver.

A receiver, acting within his authority, is not liable per-

allege that he has obtained leave of court is not a ground for demurrer, but the receiver may apply for a stay of proceedings or for punishment of the plaintiff for contempt. Hirshfeld *v.* Kalischer, 81 Hun (N. Y.), 606, 30 N. Y. Supp. 1027.

[56] Turnbull *v.* Payson, 95 U. S. (5 Otto) 418, 421, and cases cited.

[57] Casey *v.* Galli, 94 U. S. (4 Otto) 673.

[58] Id.

[59] White *v.* Ambler, 8 N. Y. 170. See Chapter on CORPORATIONS.

[60] See Rockwell *v.* Merwin, 8 Abb. Pr. N. S. 330, 45 N. Y. 166.

In an action by a corporation a ledger containing the account against the defendant was held admissible when considered in connection with the plaintiff's testimony that the defendant had seen the entries and admitted their correctness. Wilkins-Ricks Co. *v.* McPhail, 169 N. C. 558, 86 N. E. Rep. 502.

sonally, except on proof of personal misconduct, even if he do not object that leave to sue him was not sought;[61] but when sued for interfering with property which the decree by which he was appointed did not authorize him to meddle with, plaintiff need not show leave to sue, for in such case the receiver is merely a trespasser.[62] A foreign receiver may, if jurisdiction be acquired, be sued here, and without leave, if it be shown that he would, by the law of the State where appointed, be held liable in its courts, on the facts of the case.[63]

[61] Camp *v.* Barney, 4 Hun, 373. See further p. 162 of this vol.

"A personal judgment and execution cannot properly be awarded against a receiver, but it should be against him in his official capacity, to be paid in due course of the administration of his trust." Malott *v.* Howell, 111 Ill. App. 233.

[62] Hills *v.* Parker, 111 Mass. 508.

A receiver who took possession of property, not in fact part of the receivership assets, even though under a court order, was a mere trespasser, and the plaintiff, in such case, is not required to obtain leave to sue prior to bringing his action. Kirk *v.* Kane, 87 Mo. App. 274. See also Dec. Digest Receivers, Key No. 174.

If the plaintiff's animals were killed by a railroad while operating under a receiver, no leave of the court which appointed the receiver is necessary prior to bringing suit against him. Robinson *v.* Kirkwood, 91 Ill. App. 54.

[63] Paige *v.* Smith, 99 Mass. 395.

An action may be brought in the state court against a receiver appointed by the United States Circuit Court for the district of Massachusetts without leave to sue. Wall *v.* Platt, 169 Mass. 398, 48 N. E. Rep. 270.

CHAPTER XI

ACTIONS BY AND AGAINST TRUSTEES

1. Express trusts.
2. Demand before suit, and notice.
3. Trustees' receipts.
4. Compromises.
5. Justification of dealings with the estate.
6. Admissions and declarations of the *cestui que trust*.
7. —of the trustee.
8. Judgments.
9. Presumption of conveyance by trustee.
10. Constructive and resulting trusts.

1. Express Trusts.

Under the statute of frauds,[64] a trust need not be created by writing, but it must be manifested and proved by writing, and where there is no explicit declaration, the nature of the trust, and the terms and conditions of it, must sufficiently appear so that the court may not be called upon to execute the trust in a manner different from that intended.[65] Such

[64] 2 N. Y. Real Property Law, § 242; Personal Property Law, § 31.

While a trust may be created by parol it can only be proved by writing under the Maryland statute of frauds. Gordon *v.* McCulloh, 66 Md. 245, 7 Atl. Rep. 457.

The declarations made by the grantor of real estate long after he has parted with the title are not competent to establish a trust therein. Todd *v.* Munson, 53 Conn. 579, 4 Atl. Rep. 99.

The declarations of a person holding title to land are admissible for the purpose of proving an express trust in such land. Columbus, etc., Ry. Co. *v.* Braden, 110 Ind. 558, 11 N. E. Rep. 357.

[65] Steere, 5 Johns. Ch. 1, 11. Parol evidence is not admissible to establish an express trust where the answer to the bill of complaint raises the defense of the statute of frauds. Dick *v.* Dick, 172 Ill. 578, 50 N. E. Rep. 142.

An express trust in real estate cannot be proved by parol. McVay *v.* McVay, 43 N. J. Eq. 47, 10 Atl. Rep. 178.

In Texas it may be proved by parol. Osterman *v.* Baldwin, 6 Wall. 116, 18 L. ed. 730; Todd *v.* Munson, 53 Conn. 579, 4 Atl. Rep. 99.

One who alleges that the title to property is held in trust has the burden of proving the trust. Scott

a trust manifested by writing not intended for the purpose, cannot be established by resorting to parol evidence to supply defects or omissions in the written evidence.[66] No

v. Crouch, 24 Utah, 377, 67 Pac. Rep. 1068.

Parol evidence is admissible to prove that a member of a firm holds title to real estate as trustee for the firm. Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. Rep. 1084.

After a trustee has conveyed the lands to the beneficiaries the trust may be proved by parol as against the creditors of the trustee who claim that the conveyance was to defraud them. Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. Rep. 584.

It seems that a trust evidenced only by parol testimony and written receipts was valid at common law and in equity. Arbury *v.* De Niord, 152 N. Y. Supp. 763.

In an action to cancel a deed of land conveyed by the plaintiff's alleged trustee, the court held that a parol trust could not be fastened upon a prior deed, absolute in form and made to the trustee at a time when the law did not recognize a parol trust in land. Chandler *v.* Roe, 46 Okl. 349, 148 Pac. Rep. 1026.

[66] Cook *v.* Barr, 44 N. Y. 156, 161. *Contra*, Kingsbury *v.* Burnside, 58 Ill. 310, s. c., 11 Am. Rep. 67, where it is held that if the writing affords evidence of the existence of a trust, the terms may be supplied *aliunde*. If there be written evidence of the existence of the trust, the danger of parol declarations, against which the statute was directed is effectually removed. Whether a deed to one as "trustee," but without declaring for whom or what purpose, can be aided by parol, compare Dillaye *v.* Greenough, 45 N. Y. 438; Railroad Co. *v.* Durant, 95 U. S. (5 Otto) 576, 579.

An express trust cannot be proved by oral evidence. Dowling *v.* DeWitt, 96 S. C. 435, 81 S. E. Rep. 173.

Parol evidence may be introduced to show that the grantee of a deed holds the title not as an individual but as a trustee. Gale *v.* Harby, 20 Fla. 171.

Parol evidence cannot be introduced to vary or aid a written document alleged to create a trust. Martin *v.* Baird, 175 Pa. 540, 34 Atl. Rep. 809; Gale *v.* Sulloway, 62 N. H. 57.

A deed which is absolute on its face cannot by parol evidence be varied into one of trust, unless there was fraud, accident or mistake. Jones *v.* Van Doren, 18 Fed. Rep. 619; Mescall *v.* Tully, 91 Ind. 96; Morall *v.* Waterson, 7 Kan. 199; Pillsbury-Washburn Flour-Mills Co. *v.* Kistler, 53 Minn. 123, 54 N. W. Rep. 1063; Salisbury *v.* Clarke, 61 Vt. 453, 17 Atl. Rep. 135.

An express trust cannot be engrafted upon a deed absolute in form by parol evidence. Louisville, etc., R. Co. *v.* Ramsay, 134 Ga. 107, 67 S. E. Rep. 652; Veasey

particular form of words is necessary. It is enough if the creator, having the property, conveys it to another in trust,[67] or admits the trust in a writing, whether addressed to the *cestui que trust* or to a third person,[68] or, the property being personal, if he unequivocally declares either orally or in writing, that he holds it *in præsenti* in trust, or as a trustee for another;[69] and the creation of a trust in writing, if otherwise unequivocal, is not affected by the fact that the creator of the trust retains the instrument declaring it.[70] Knowl-

v. Veasey, 110 Ark. 389, 162 S. W. Rep. 45; Ryder *v.* Ryder, 244 Ill. 297, 91 N. E. Rep. 451.

If parol evidence is admitted for the purpose of establishing a trust it must also be admitted for the purpose of defeating it. Newhall *v.* Le Breton, 119 U. S. 259, 7 Sup. Ct. 225, 30 L. Ed. 381.

Parol evidence to prove a trust must be received with great caution. Cooper *v.* Skeel, 14 Iowa, 578.

[67] Ray *v.* Simmons, 11 R. I. 266, s. c., 23 Am. Rep. 447, and cases cited.

"No particular words are necessary to create a trust, and trust relations will be implied when it appears that such was the intention." Stone *v.* National City Bank, 126 Md. 231, 94 Atl. Rep. 657. See also Rousseau *v.* Call, 169 N. C. 173, 85 S. E. Rep. 414.

[68] Any writing may be used for the purpose, though not intended as a declaration of trust. Kingsbury *v.* Burnside, 58 Ill. 310, s. c., 11 Am. Rep. 67. Thus, admissions in a pleading in an action with third persons will be sufficient. Cook *v.* Barr, 44 N. Y. 156.

It was held that a valid trust was created by a will which provided that property should be held in trust for the maintenance and support of the testator's son, free from all attacks by the latter's creditor, and that it should be conveyed to the son whenever he became free and clear of all his indebtedness. Siemers *v.* Morris, 169 App. Div. 411, 154 N. Y. Supp. 1001.

[69] See Walker *v.* Walker, 9 Wall. 754.

A trust may be created by parol where the subject matter is personal property. Holbrook *v.* Fyffe, 164 Ky. 435, 175 S. W. Rep. 977; Stone *v.* National City Bank, 126 Md. 231, 94 Atl. Rep. 657.

A trust in personalty may be created by parol and will be recognized when the purpose, *i. e.*, the disposition of the property, and the beneficiaries are designated with reasonable certainty. Rousseau *v.* Call, 169 N. C. 173, 85 S. E. Rep. 414.

[70] Especially where he himself is the trustee. Ray *v.* Simmons, 11 R. I. 266, s. c., 23 Am. Rep. 447,

edge in the *cestui que trust*, at the time, need not be proved. If the writing in which the parties embodied the declaration is clear and positive as to the terms of the trust, it cannot be varied or altered by parol evidence,[71] but if loose and ambiguous, parol evidence is competent to show what was their understanding.[72] In ascertaining the purposes of a trust, the language of the conveyance, if clear and unequivocal, is conclusive.[73] If the language is indefinite, extrinsic evi-

and cases cited; Witzel *v.* Chapin, 3 Bradf. 386.

Declarations and statements made by the creator of a trust after it has been carried out are not competent to vary the terms of the trust, unless such statements were made in the presence of or with the knowledge and consent of the beneficiaries. Richardson *v.* Adams, 171 Mass. 447, 50 N. E. Rep. 941.

[71] Steere *v.* Steere, 5 Johns. Ch. 1. So held even where the writings were merely accounts and letters. Compare Brabrook *v.* Boston Five Cents Savings Bank, 104 Mass. 228, s. c., 6 Am. Rep. 222.

A trust deed, which is free from ambiguity cannot be varied or controlled by extrinsic evidence. Crawford *v.* Nies, 224 Mass. 474, 113 N. E. Rep. 408.

But see Shield *v.* Adkins, 117 Va. 616, 85 S. E. Rep. 492, where it was held that an express trust with respect to real estate could be created by parol, and therefore the rule forbidding the admission of parol evidence to vary, contradict, add to, or explain the terms of a written instrument did not apply.

[72] Steere *v.* Steere (above). The tendency of later decisions is to insist on clear and cogent evidence. See Lantry *v.* Lantry, 51 Ill. 458, s. c., 1 Am. Rep. 310, and U. S. Dig. tit. Trust.

One who seeks to read a parol trust into a deed has the burden of proof thereof. Neyland *v.* Bendy, 69 Tex. 711, 7 S. W. Rep. 497.

Parol evidence to impress a trust upon a deed which is absolute on its face must be clear and cogent. Henslee *v.* Henslee, 5 Tex. Civ. App. 367, 24 S. W. Rep. 321; McFarland *v.* La Force, 119 Mo. 585, 25 S. W. Rep. 520, 27 S. W. Rep. 1100.

[73] Miller *v.* Gable, 2 Den. 492, 548.

If a trust deed is ever actually delivered to a grantee, the rights of the *cestuis que trustent* attach, and the effect of the delivery cannot be impaired by any mental reservation, or any oral condition attached to the delivery, which would be repugnant to the terms of the deed. Wallace *v.* Berdell, 97 N. Y. 13.

Clear and convincing proof is necessary to establish a trust in a husband in the property of his deceased wife, after the death of both, based upon an oral agree-

dence, such as the tenets held by the donor, or the faith then actually taught by the donees, and the circumstances under which the gift was made, and the denominational name of a religious corporation or society to which a donation is made, and the doctrines actually taught therein at the time of the gift, may be resorted to in order to limit and define the trust in respect to doctrines usually considered fundamental, but not as to lesser shades or points of doctrine not deemed fundamental.[74] To prove the acceptance of a trust, any act of the trustees under the instrument creating the trust is competent evidence.[75] Parol evidence is equally competent

ment between them. Townsend *v.* Crowner, 125 N. Y. Supp. 329.

A bank book designating the depositor as trustee for another is not conclusive proof of a trust. Parkman *v.* Suffolk Sav. Bk., 151 Mass. 218, 24 N. E. Rep. 43.

Where the instrument by which a trust is sought to be established is insufficient, parol evidence cannot be introduced in aid of it. Kimball *v.* De Grauw, 9 N. Y. St. Rep. 339; Dyer's App., 107 Pa. 446.

A trust in personal property may be established by circumstantial evidence. Gadsden *v.* Whaley, 14 S. C. 210; Lamb *v.* Girtman, 26 Ga. 625.

[74] Hale *v.* Everett, 53 N. H. 9, s. c., 16 Am. Rep. 82. Compare Happy *v.* Morton, 33 Ill. 398, 413; see also, rules as to extrinsic evidence to interpret wills, chapter V, paragraphs 81–116, of this vol.

Where the donor subsequently claims that the trust was to be binding in only certain contingencies he has the burden of proving it. Irvine *v.* Dunham, 111 U. S. 327, 4 Sup. Ct. 501, 28 L. Ed. 444.

[75] Lewis *v.* Baird, 3 McLean, 56; and see 3 Wms. Exr. 6 Am. ed. 1896, and note.

"The general rule is that every voluntary interference with the trust property will stamp a person as an acting trustee, unless such interference can be plainly referred to some other ground of action than the acceptance of the trust." 1 Perry on Trusts, § 261, quoted in Kennedy *v.* Winn, 80 Ala. 165.

Where a party either with or without his consent, was appointed as trustee with notice of the trust, and thereafter voluntarily so acted with respect to the trust fund that his dealings therewith could not be accounted for in any other light than as trustee, it was held that he would be conclusively presumed to have accepted the trust. Freeman *v.* Brown, 115 Ga. 23, 41 S. E. Rep. 385.

Where no distinction was made by a testator between executors and trustees and property was de-

to disprove acceptance by the one named as trustee, or by one of several so named.[76] But if it was accepted, though for a moment, parol proof of a release is not competent.[77]

Where the action is not against the trustee, but brought by him against those who have dealt with him, or strangers, much slighter evidence is enough to show him a trustee of an express trust within the statute allowing such an one to sue in his own name.[78]

vised to the executors to be held in trust, the latter were held to have accepted the trust by accepting and qualifying as executors under the will. Rowe *v.* Rowe, 103 App. Div. 100, 92 N. Y. Supp. 491.

The fact that executors under a will which set aside a sum of money for the benefit and support of an incompetent gave their receipt for this money was held to constitute an acceptance of the trust. Elizalde *v.* Elizalde, 137 Cal. 634, 66 Pac. Rep. 369, 70 Pac. Rep. 861.

[76] Armstrong *v.* Morrill, 14 Wall. 139; Burritt *v.* Silleman, 13 N. Y. 93, rev'g 16 Barb. 198.

See Perry on Trusts and Trustees (6th Ed.), Ch. IX, § 270.

[77] Id. and cases cited.

"An oral declaration of an intention not to accept a trust, made contemporaneously, would not defeat an express acceptance in writing, unless shown to have been procured by fraud or surprise." And the giving of a receipt is, in legal effect, the equivalent of an express acceptance which an adverse parol disclaimer would not obviate. Kennedy *v.* Winn, 80 Ala. 165.

[78] Any declaration, however informal, which evinces the intention of the party with sufficient clearness, will have that effect as to personalty. Chew *v.* Brumagen, 13 Wall. 497, and cases cited.

See also West *v.* Crawford, 80 Cal. 19, 21 Pac. Rep. 1123.

An agent of an undisclosed principal was allowed to maintain an action in his own name. Holliston *v.* Ernston, 124 Minn. 49, 144 N. W. Rep. 415; Higgins *v.* Sowards 159 Ky. 783, 169 S. E. Rep. 554.

By § 449 of the N. Y. Code of Civil Procedure, it is provided that "every action must be prosecuted in the name of the real party in interest, except . . . a trustee of an express trust . . . may sue without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

An insured, whose children were his beneficiaries, brought an action to reform the contract of insurance. The beneficiaries assigned all their interests and rights to their mother. It was held that the insured, under § 449 of the Code of Civil Procedure, was the trustee of an express

2. Demand before Suit, and Notice.

Before a suit can be brought against a trustee, he must have had notice of the duty he is required to perform, and must have had an opportunity to perform it.

But where the trustee is himself an actor in the transaction, and has full knowledge of his duties, such notice and demand are not required.[79] If there are several trustees, a demand on the one against whom personal recovery is sought should be proved.[80] Where the trustees are not chosen by nor the agents of the *cestui que trust*, notice to one of several co-trustees is not notice to the *cestui que trust* for the purpose of depriving him of the character of *bona fide* holder.[81]

3. Trustees' Receipts.

All of several trustees of an express trust must join in receipts, conveyances and actions,[82] and the receipt of one is not alone competent evidence to charge or bar the others. If two trustees join in a receipt for money, it is presumptive evidence that the money came equally into the possession or under the control of both; and there must be direct and positive proof to rebut the presumption.[83] In such case the burden is on the trustee to prove that his acknowledgment of the receipt of the money was merely for conformity, and that in fact he received none of the money, and that his co-trustee received it all. If there is no evidence upon this point, all the trustees who join in signing the receipt will be held responsible *in solido*, on the ground that the acknowledgment in the receipt is *prima facie* evidence of the facts stated. At common law the receipt was *conclusive*, and estopped the trustee from denying that he received any of the

trust. Hunt *v.* Provident Savings Life Assur. Society, 77 App. Div. 338, 79 N. Y. Supp. 74.

[79] Brent *v.* Maryland, 18 Wall. 430, and cases cited.

[80] Jessop *v.* Miller, 2 Abb. Ct. App. Dec. 449.

[81] Commissioners of Johnson County *v.* Thayer, 94 U. S. (4 Otto) 631, 644.

[82] 6 Abb. N. Y. Dig. 25, 35.

[83] Monell *v.* Monell, 5 Johns. Ch. 283.

money; but equity rejects the estoppel, and will determine according to the fact. But if a trustee, signing a receipt, receives any part of the money, and it does not appear how much, he will be answerable for the whole.[84]

4. Compromises.

If the trustee has compromised a claim, without leave of court had on notice to the *cestui que trust*,[85] the burden is on him of showing that by the situation existing at the time he made the compromise, it was properly judged advantageous for the estate.[86] If he shows this he is not made liable by the result's proving disadvantageous.[87] If he obtained leave under a statute authorizing the court to grant it, and not requiring notice, or under the general power of a court of equity to direct a trustee, on notice to the *cestui que trust*,[88] the order of the court protects him[89] irrespective of the

[84] 2 Perry on Trusts, 501, § 416. Where the consideration in a deed by a trustee is stated to be $12,500, he will be held accountable for such amount unless he can prove that a less amount was received. Smith *v.* Perry, 197 Mo. 438, 95 S. W. Rep. 337.

If in violation of his duty a trustee continues a business instead of winding it up, the burden is upon the *cestuis* who claim the profits of such continuance of the business to show the amount of the profits. Matter of U. S. Mortgage, etc., Co., 114 N. Y. App. Div. 532, 100 N. Y. Supp. 12, 19 N. Y. Ann. Cas. 111.

In order to show whether property was purchased with trust funds it is competent to produce evidence as to the financial condition of the purchaser. Gale *v.* Harby, 20 Fla. 171.

[85] Sollee *v.* Croft, 7 Rich. Eq. 34, 43, 45; Anon *v.* Gelpcke, 5 Hun 245.

[86] "The Chancellor is the only safe and secure counsellor to trustees." NASH, J., Freeman *v.* Cook, 6 Ired. Eq. (N. C.) 373, 378.

[87] Murray *v.* Blatchford, 1 Wend. 583, 616; Bacot *v.* Hayward, 5 Rich. (S. C.) 441.

[88] If the court has equity powers only by express statute, the rule is the same. Treadwell *v.* Cordis, 5 Gray 341.

[89] Alike on the compromise of a legal (Talbot *v.* Earl of Radnor, 3 Mylne & K. 252; Wheeler *v.* Perry, 18 N. H. 307) as of an equitable claim. Jones *v.* Stockett, 2 Bland Ch. (Md.) 409, 425.

The burden of proof is upon the trustee to show the justification for encroaching upon the principal amount of the trust. Green *v.*

result, and throws upon a *cestui que trust* who assails the compromise, the burden of proving fraud or bad faith.

5. Justification of Dealings with the Estate.

If a trustee purchases of the *cestui que trust*, or accepts a benefit from him, the burden is on the trustee to vindicate the transaction from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect.[90] If he alleges the consent of the *cestui que trust*, the presumption is against the fairness of the transaction, and the burden is on him to show it affirmatively, and to establish all the conditions necessary to its validity.[91] If the trustee deals with the trust fund for his own benefit, the *cestui que trust*, on calling him to account, need not show that there was any

Wooldridge, 89 Va. 632, 16 S. E. Rep. 875.

[90] 2 Perry on Trusts, 516, § 428. Held otherwise where the trustee acts in the hostile attitude of an urgent creditor. 11 Moak's Eng. 112, note.

The trustee has the burden of proving that he has complied with all equitable requirements, where he obtains a benefit from a trust transaction. Clough *v.* Dawson, 69 Ore. 52, 133 Pac. Rep. 345, 138 Pac. Rep. 233.

Where one removes trust funds out of the state the court may apply the presumption in *odium spoliatoris* and draw any fair inferences and not permit the wrongdoer to profit from his fraud. McCrum *v.* Lee, 38 W. Va. 583, 18 S. E. Rep. 757.

Where a trustee drew a check on trust funds to the order of his wife, nothing else appearing, the presumption is that the check was given in payment of a debt from the trust estate. Nay *v.* Curley, 113 N. Y. 575, 21 N. E. Rep. 698.

In an action to compel a trustee to account, it was held that he had the burden of proving his contention that the *cestui que trust* had loaned him a sum of money, thus changing their relations to that of debtor and creditor. Walker's App., 140 Pa. St. 124, 21 Atl. Rep. 311.

[91] Cumberland Coal Co. *v.* Sherman, 30 Barb. 553, 572.

"The burden rests upon a trustee seeking to sustain a business transaction with his *cestui que trust* to show not simply that it has been free from any affirmative actual fraud, but that it has been entered upon knowingly and intelligently and is fair and equitable." Smith *v.* Howlett, 21 Misc. 386, 390, 47 N. Y. Supp. 1002.

inequality or disadvantage in the transaction.[92] He is absolutely entitled to have it set aside, unless, being *sui juris*, he has ratified the act or waived the objection.[93] Silent acquiescence, without facts constituting an estoppel, does not affect the right of action,[94] unless unreasonably prolonged.[95]

6. Admissions and Declarations of the Cestui Que Trust.

To let in the admissions and declarations of the *cestui que trust* against the trustee, being the party on the record, it must clearly appear that the action is brought for the benefit of the declarant or those claiming under him.[96] The admissions of one of several *cestuis que trustent* in a formal trust are not generally competent for the purpose of defeating the title of trustee, especially in an express trust of real property.[97] But where the *cestuis que trustent* are really principals, their admissions are competent, and their rela-

[92] Jewett *v.* Miller, 10 N. Y. 402.

"No actual fraud need be shown on the part of a trustee, to make him personally liable, where he deals for his own benefit with the trust funds." And in this case a general guardian and his ward were held to come within the rule enunciated. Matter of Terry, 31 Misc. 477, 65 N. Y. Supp. 655.

[93] Boerum *v.* Schenck, 41 Id. 182.

A trustee because of his relation to the trust property could not, it was held, purchase the same on his own account; but where he did so, the *cestui que trust* could either ratify the purchase and hold the trustee for any excess of the value of the property over his purchase price, or he could have the sale set aside and return to the trustee the amount paid on the purchase. Archer *v.* Archer, 164 App. Div. 81, 149 N. Y. Supp. 426.

[94] 14 Moak's Eng. 85, note. *Contra*, 15 Id. 19.

[95] Twin-lick Oil Co. *v.* Marbury, 91 U. S. (1 Otto) 587.

Granting that a corporation has the right to impeach a trustee's purchase of its property at a receiver's sale, the court held that the shareholders lost this right by their laches. Buchler *v.* Black, 226 Fed. Rep. 703, 141 C. C. A. 459. See also Sunny Brook Zinc, etc., Co. *v.* Metzler, 231 Fed. Rep. 304.

[96] May *v.* Taylor, 7 Jur. 512, s. c., 6 Mann. & G. 261, 6 Scott N. R. 974.

[97] Pope *v.* Devereaux, 5 Gray (Mass.), 409, 413.

tion may involve an agency, in which case the admissions of one will be competent against the other.

7. Admissions and Declarations of the Trustee.

In the case of a formal express trust the admissions and declarations of a sole trustee, if made while he was trustee,[98] and relating to matters within the scope of his duty and authority, are competent evidence against him or his *cestui que trust*,[99] when adduced in favor of third persons. If his trust partook of the nature of an agency, his admissions and declarations within the scope of the agency are competent. In any case, his admissions and declarations made at whatever time, if relevant to the issue, are competent evidence against himself personally. If there are several co-trustees, the admissions of one are competent against himself, but not against his co-trustee,[1] nor, alone, against their *cestui que trust*.[2]

[98] Beatty *v.* Davis, 9 Gill (Md.), 211.

The declarations of a trustee are competent as to the purposes of the trust. Drew *v.* Corliss, 65 Vt. 650, 27 Atl. Rep. 613.

[99] Maxwell *v.* Harrison, 8 Geo. 61, 67; Helm *v.* Steele, 3 Humph. (Tenn.) 472. *Contra*, Graham *v.* Lockhart, 8 Ala. N. S. 9; 2 Perry on Trusts, 522, § 433; Thomas *v.* Bowman, 30 Ill. 84, 29 Id. 426. Compare Thompson *v.* Drake, 32 Ala. 99.

The acts and declarations of a trustee in reference to the trust may be considered by the jury together with all the surrounding circumstances of the trust agreement where the action is brought to establish the trust. Haxton *v.* McClaren, 132 Ind. 235, 31 N. E. Rep. 48.

[1] Davies *v.* Ridge, 3 Esp. 101.

[2] Walker *v.* Dunspaugh, 20 N. Y. 170. If a father deposits money in bank in the name of his son, designating himself as trustee, his subsequent declarations are not admissible for the purpose of showing that he did not intend to create a trust in favor of his son. Connecticut River Sav. Bk. *v.* Albee, 64 Vt. 571, 33 Am. St. Rep. 944, 25 Atl. Rep. 487.

A trustee cannot make any admission to the prejudice of the trust fund and against the *cestui que trust*. Bragg *v.* Geddes *et al.*, 93 Ill. 39.

An unsigned written statement, partly in the trustee's own handwriting, which apparently was an inventory of the trust estate, was held admissible to charge his estate as a declaration against in-

8. Judgments.

A judgment or verdict against one individually does not estop him as trustee.[3] But an adjudication against him as trustee estops him in respect to his private right as a *cestui que trust* held at the time of the former action, or acquired from persons then holding it.[4] An adjudication against him in the capacity of trustee does not estop him from bringing, as trustee for a different purpose, or in a different right, another action against the same defendant, and hence it does not estop the defendant in favor of the trustee.[5]

9. Presumption of Conveyance by Trustee.

A presumption of fact that a conveyance has been made by a trustee to those entitled to a conveyance, in conformity to the trust, arises after a considerable lapse of time.[6] So where the object of a trust has entirely failed, a reconveyance from the grantee to the grantor, or if there were several, to that one who had the exclusive beneficial right, will be presumed, both in equity and at law.[7] Three things must

terest, although, in order to be binding upon the estate of the *cestui que trust*, it was necessary to show that she had, in some way, acquiesced in it as an inventory of the securities constituting the trust estate. Putnam *v.* Lincoln Safe Deposit Co., 191 N. Y. 166, 185, 83 N. E. Rep. 789.

[3] Rathbone *v.* Hooney, 58 N. Y. 463.

"A suit against one sued as an individual does not bind him as a trustee, and, conversely, judgment against one sued in a representative capacity does not conclude him in a subsequent action brought by or against him as an individual, although the same identical issue is involved, and the decision in the first action was on the merits." Fisher *v.* Johnson, 90 Misc. 46, 152 N. Y. Supp. 944, 947.

See also Amsterdam First Nat. Bk. *v.* Shuler, 153 N. Y. 173, 47 N. E. Rep. 262, 60 Am. St. Rep. 601.

[4] Corcoran *v.* Chesapeake, etc., Canal Co., 94 U. S. (4 Otto) 741, 745.

Where suit is brought against one as trustee judgment cannot be obtained against him individually. Vason *v.* Gardner, 70 Ga. 517.

[5] Leggott *v.* Great Northern Railway Co., 1 Q. B. Div. 599, s. c., 17 Moak's Eng. 238.

[6] See Jackson *v.* Moore, 13 Johns. 513; Jackson *v.* Cole, 4 Cow. 587.

[7] Lade *v.* Holford, Bull. N. P. 110; England *v.* Slade, 4 T. R. 682.

occur to warrant this presumption: 1. A duty on the part of the trustee to convey; 2. A reason for the presumption, not necessarily sufficient to induce conviction of a conveyance in fact, but a reason of justice; 3. The object must be the support of a just title. The case must be such that equity would decree a conveyance.[8] But a conveyance which would be a breach of their trust cannot be presumed,[9] even after great lapse of time.

10. Constructive and Resulting Trusts.

Parol evidence is competent for the purpose of charging a grantee as trustee *ex maleficio*, or as a constructive trustee, where the application of the statute requiring written evidence would operate as a fraud.[10] Evidence of a parol agree-

[8] French *v.* Edwards, 21 Wall. 150.

[9] Brewster *v.* Striker, 2 N. Y. 19, affi'g 1 E. D. Smith, 321, 7 N. Y. Leg. Obs. 140.

[10] This is the better opinion amid much conflict in the authorities. Dodge *v.* Wellman, 1 Abb. Ct. App. Dec. 512; Ryan *v.* Dox, 34 N. Y. 307, rev'g 25 Barb. 440; Carr *v.* Carr, 52 N. Y. 251; Sandford *v.* Norris, 4 Abb. Ct. App. Dec. 144.

A resulting trust may be proved by parol. Lofton *v.* Sterrett, 23 Fla. 565, 2 So. Rep. 837; Hudson *v.* White, 17 R. I. 519, 23 Atl. Rep. 57; Richardson *v.* Taylor, 45 Ark. 472; Seiler *v.* Mohn, 37 W. Va. 507, 16 S. E. Rep. 496; Polk *v.* Boggs, 122 Cal. 114, 54 Pac. Rep. 536; Brooks *v.* Union Trust, etc., Co., 146 Cal. 134, 79 Pac. Rep. 843; Booth *v.* Lenox, 45 Fla. 191, 34 So. Rep. 566.

Parol evidence to establish a resulting trust must be clear and undoubted. Reynolds *v.* Caldwell, 80 Ala. 232; Philpot *v.* Penn, 91 Mo. 38, 3 S. W. Rep. 386; Logan *v.* Johnson, 72 Miss. 185, 16 So. Rep. 231; Cottonwood County Bk. *v.* Case, 25 S. D. 77, 125 N. W. Rep. 298.

A trust *ex maleficio* can only result from some act of bad faith, and a mere refusal to perform a parol contract to hold or convey land is not sufficient to create such a trust. Braun *v.* First German Evangelical Lutheran Church, 198 Pa. 152, 47 Atl. Rep. 963.

Where one purchases real estate with funds of another and takes title in his own name, he is a trustee, and the trust may be proved by parol evidence. Branstetter *v.* Mann, 6 Idaho, 580, 57 Pac. Rep. 433.

Where a husband purchases real estate in his wife's name the presumption is that it is an advancement and not a trust. Deu-

ment is competent to show that defendant made advances and took title to plaintiff's property for his benefit as to any surplus. A stranger is not to be made a constructive trustee merely because he acts as agent of the trustee. It should be shown that he received and became chargeable with some part of the trust property, or knowingly assisted in a fraudulent transaction on the part of the trustee.[11]

A resulting trust, even in real property, in the cases in which the statute allows such trusts,[12] may be proved by

ter *v.* Deuter, 214 Ill. 308, 73 N. E. Rep. 453; Rowe *v.* Johnson, 33 Colo. 469, 81 Pac. Rep. 268.

Parol evidence was held competent to show that one who took title in his own name improperly refused to reconvey to the plaintiff thus establishing a constructive trust. O'Brien *v.* O'Brien, 21 Cal. App. 620, 132 Pac. Rep. 612.

A parol agreement by a legatee to hold in trust *certain* personal property received under a will was held valid and parol evidence was competent to prove such oral trust. People *v.* Schæfer, 266 Ill. 334, 107 N. E. Rep. 617.

In May *v.* May, 161 Ky. 114, 170 S. W. Rep. 537, the court said that though a constructive trust could be established by parol evidence such proof must be of the strongest and most convincing character.

[11] Barnes *v.* Addy, L. R. 9 Ch. App. 244, s. c., 8 Moak's Eng. 848.

Constructive trusts "have their roots in actual or legal fraud, and generally arise in cases when there is no intention to create a trust." Alexander *v.* Spaulding, 160 Ind. 176, 66 N. E. Rep. 694.

In Harlop *v.* Cole, 85 N. J. Eq. 32, 95 Atl. Rep. 378, it was held that, where an agent was verbally commissioned to purchase lands for another, and in violation of his agency, took title thereto in his own name, paying therefor with his own money, a constructive trust for the principal would be decreed.

[12] 6 Abb. N. Y. Dig. 10, 11.

The fraud by which a person buys real estate in his own name instead of in that of his principal is not provable by parol. Barrow *v.* Grant, 116 La. 952, 41 So. Rep. 220.

Where one purchases real estate and takes title in the name of another, the acts and declarations of the parties before and after the transaction are admissible to rebut the presumption of a resulting trust. Warren *v.* Steer, 112 Pa. 634, 5 Atl. Rep. 4.

A purchase of land by a husband in the name of his wife will be presumed to be an advancement and not a trust, but the presumption may be rebutted. McKey *v.* Cochran, 262 Ill. 376, 104 N. E. Rep. 693; Shotwell *v.* Stickle,

parol evidence [13] to explain a conveyance from a third person. But if a written agreement between the parties appears, manifesting an intent to make an absolute conveyance, parol evidence is not competent between them to prove that a trust was intended, unless fraud or mistake is shown; [14]

83 N. J. Eq. 188, 90 Atl. Rep. 246.

When a husband purchases land and takes title in his wife's name the presumption is that it is a gift, but when a wife purchases and takes title in her husband's name the presumption is that of a resulting trust. Fagan *v.* Troutman, 25 Colo. App. 251, 138 Pac. Rep. 442, rev'g 24 Colo. App. 473, 135 Pac. Rep. 122.

A constructive trust is established where an agent who is hired to purchase land for his principal takes title in his own name; it may be established by parol evidence. Boswell *v.* Cunningham, 32 Fla. 277, 13 So. Rep. 354, 21 L. R. A. 54.

Where a corporation seeks to establish a trust in lands purchased by one of its employees with money stolen from the corporation, it is competent to show that the property purchased was far in excess of the salary paid the employee. New York & B. Ferry Co. *v.* Moore, 18 Abb. N. C. 106.

[13] Swinburne *v.* Swinburne, 28 N. Y. 568. The statute of frauds does not apply. 6 Abb. N. Y. Dig. 8. To establish a resulting trust *pro tanto* in favor of one claiming to have paid a part of the purchase money of certain land, where title was taken in an other, it is incumbent upon the former to show by evidence full, clear and convincing what part of the purchase price of the land was paid by him. Camden *v.* Bennett, 64 Ark. 155, 41 S. W. Rep. 854. Under the statute of frauds the existence of a direct or express trust in lands cannot be established by parol: but, when there is some written evidence of the existence of a trust, parol evidence is admissible to show the truth and nature of the transaction. Johnson *v.* Calnan, 19 Col. 168, 41 Am. St. Rep. 224, 34 Pac. Rep. 905.

A resulting trust in land may be proved by oral evidence. Herriford *v.* Herriford, 78 Wash. 429, 139 Pac. Rep. 212.

Parol evidence to prove a resulting trust must be clear and convincing. Berla *v.* Strauss, 74 N. J. Eq. 678, 75 Atl. Rep. 763.

[14] St. John *v.* Benedict, 6 Johns. Ch. 111; Sturtevant *v.* Sturtevant, 20 N. Y. 39.

A resulting trust may be proved by the declarations of the one holding the nominal title made during the time of his ownership. Traylor *v.* Hollis, 45 Ind. App. 680, 91 N. E. Rep. 567.

The declarations of a grantee made subsequent to the taking of title are not admissible to establish a resulting trust, but they are

but it is competent for the purpose of proving that the conveyance was a mere security.[15] To establish a resulting trust by plaintiff's payment of the consideration for a title taken by defendant, it must appear that the consideration, or a definite fractional part, was paid at or before the time of the conveyance. Parol proof of intent to pay is not enough, nor is proof of subsequent payment, unless in pursuance of an agreement made at or before the time of conveyance.[16]

competent on the question of what he agreed to do at the time the deed was delivered. Cooney *v.* Glynn, 157 Cal. 583, 108 Pac. Rep. 506.

Where a father purchases land in the name of his son there is a presumption that it was an advancement to the son which cannot be rebutted by showing that the father had the conveyance made to the son for a fraudulent purpose. McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. Rep. 612, 2 L. R. A. 816.

[15] Even though there was no personal debt. Horn *v.* Keteltas, 46 N. Y. 605.

Where an assignment and a collateral agreement to reassign did not on their face constitute a mortgage, it was held that in equity the plaintiff could show by parol that the assignment was in fact given as security for a debt. Reich *v.* Cochran, 213 N. Y. 416, 107 N. E. Rep. 1029.

A bill of sale, absolute on its face, could be shown by parol to have been intended merely as security for the payment of a debt and to be in effect a mortgage. Sheldon *v.* McFee, 216 N. Y. 618, 111 N. E. Rep. 220.

[16] 6 Abb. N. Y. Dig. 8, 9.

Where a deed recites a consideration, want of consideration cannot be proved, in an action to establish a resulting trust. Weiss *v.* Heitkamp, 127 Mo. 23, 29 S. W. Rep. 709.

The testimony of the grantors in a deed is admissible on the issue of a resulting trust, where such testimony shows that one half was held in trust. Boyd *v.* Boyd, 163 Ill. 611, 45 N. E. Rep. 118.

In order to impose a resulting trust upon land to the extent of the consideration paid, the exact amount paid and the total consideration must be proved. Woodside *v.* Hewel, 109 Cal. 481, 42 Pac. Rep. 152; Jones *v.* Hughey, 46 S. C. 193, 24 S. E. Rep. 178.

PART II

EVIDENCE AFFECTING PARTICULAR CAUSES OF ACTION

CHAPTER XII

ACTIONS FOR MONEY LENT

1. Grounds of Action.

Under modern practice, to sustain an action for money lent, an actual loan should be proved; that is, it must appear that money or its representative [17] passed between the parties, or was advanced by plaintiff to a third person on the

[17] Compare Glyn *v.* Hertel, 8 Taunt. 208; Howard *v.* Danbury, 2 C. B. 803; Litchfield *v.* Irwin, 51 N. Y. 51.

Where two checks are exchanged, one of which is honored and the other not, an action for money lent will lie against the party receiving the money. Beal *v.* American Diamond Rock Boring Co., 16 N. Y. Misc. 540, 38 N. Y. Supp. 743.

Where the plaintiff loans his check to the defendant who treats and uses it as money, the defendant is chargeable for it as money loaned even though there were not funds enough in the bank to meet

request of defendant, and on his express or implied promise to repay it.[18]

2. Delivery of Money not Enough.

Proof of the delivery by plaintiff of money or checks to the defendant is not enough without something to characterize the act as a loan.[19] Delivery of money is presumed, in the

the check when presented. Hilliard *v.* Bothell, 64 N. H. 313, 8 Atl. Rep. 826; Currier *v.* Davis, 111 Mass. 480.

[18] At common law a count for money lent was often sustained by proof of a note in the hands of an indorsee, or by other evidence not showing a loan between the parties. Under the Code the question is, does the pleading correctly state the essential legal elements in the transaction; and if there be a variance, has defendant been misled to his prejudice. See Briggs *v.* Vanderbilt, 19 Barb. 222; and paragraph 10 (below).

The essential allegations of the complaint in an action for money loaned are (1) the loan, (2) the promise to repay, and (3) nonpayment. If no agreement is alleged as to the time for the repayment of the loan, it must be inferred that the loan was made, as many loans are, without such an agreement. In such a case the loan is repayable at once, or whenever the lender chooses to demand it, and the case is not one in which a demand must be made before suit, since the bringing of the action is itself a sufficient demand. Wallach *v.* Dryfoos, 140 N. Y. App. Div. 438, 125 N. Y. Supp. 305; Clute *v.* McCrea, 1 N. Y. Supp. 96; Wagoner *v.* Wilson, 108 Ind. 210, 8 N. E. Rep. 925.

Where there is no express contract to repay the law implies one. Levy *v.* Gillis, 17 Del. 119, 39 Atl. Rep. 785.

Where one man loans money to another, if nothing is said about the time of payment, the presumption is that it is due on demand. Duke *v.* Southern Hardware, etc., Co., 163 Ala. 477, 50 So. Rep. 892.

In a complaint in an action for money loaned, it is not necessary to allege a demand of payment; the complaint is of itself a demand. Samuels *v.* Larrimore, 11 Cal. App. 337, 104 Pac. Rep. 1001.

[19] Welch *v.* Seaborn, 1 Stark. 474.

A check is not *prima facie* evidence of a loan. Morrow *v.* Frankish, 27 Del. 534, 89 Atl. Rep. 740.

The giving of a check is presumptively the payment of a debt, and to raise the presumption that it was a loan additional proof is required to be given. Nay *v.* Curley, 113 N. Y. 575, 21 N. E. Rep. 698.

In the absence of explanation, the presumption arising from the delivery of a check is that it was delivered in payment of a debt or

absence of other evidence, to be in payment of an obligation.[20] But very slight evidence indicating that defendant received it as a borrower is enough to go to the jury and sustain a finding that the transaction was a loan.[21]

else was a gift and not a loan. Leask *v.* Hoagland, 205 N. Y. 171, 98 N. E. Rep. 395, Ann. Cas. 1913, D. 1199; Levy *v.* Friedman, 83 N. Y. Misc. 445, 145 N. Y. Supp. 89; Russell *v.* Amlot, 132 N. Y. App. Div. 584, 116 N. Y. Supp. 1080; Kilmer *v.* Quackenbush, 125 N. Y. App. Div. 352, 109 N. Y. Supp. 444; Poucher *v.* Scott, 33 Hun (N. Y.) 223, affirmed in 98 N. Y. 422; Koehler *v.* Adler, 78 N. Y. 287; Gutman *v.* Wolfsohn, 107 N. Y. Supp. 546; People *v.* Mershon, 43 N. Y. App. Div. 541, 60 N. Y. Supp. 115.

The mere showing that money was remitted by check does not of itself create a presumption that the remittance was intended as a loan, or create an implied promise on the part of the recipient to repay the money. Pyle *v.* Starbird, 72 Wash. 386, 130 Pac. Rep. 477.

[20] Fleming's Ex'r *v.* McLain, 13 Penn. St. 177, and cases cited; Fish *v.* Davis, 62 Barb. 122; Bogert *v.* Morse, 1 N. Y. 377; Sayles *v.* Olmstead, 66 Barb. 590. As to the evidence of distinction between a loan or advancement, see Chapter V., paragraph 117, of this vol.

When one delivers a sum of money to another, if there is nothing else to explain the transaction, the legal presumption is that the money belonged to the one who received it and not that he thereby became the debtor of the other. Matter of Brown, 77 N. Y. Misc. 507, 137 N. Y. Supp. 978; Manchester *v.* Braedner, 107 N. Y. 346; 14 N. E. Rep. 405, 1 Am. St. Rep. 829; Matter of Delaney, 27 N. Y. Misc. 398, 58 N. Y. Supp. 924.

"Where one pays money or delivers a check for money to another and there is no explanation of the cause of such payment, and if business relations only exist between the parties, the ordinary presumption is that the money was paid because it was due and owing." Miller & Graves *v.* Pratz, 179 Ill. App. 204. See also Lowrey *v.* Robinson, 141 Pa. St. 189, 21 Atl. Rep. 513.

[21] Thus the testimony of a witness that defendant several times "got money and checks" of plaintiff's decedent, is not enough to sustain a verdict that they were got by way of loan. Fleming's Ex'r *v.* McLain (above). Nor is the admission of defendant that "he had had money" of the plaintiff. Bogert *v.* Morse (above). But where, after defendant had made such admission to the witness, the witness said plaintiff "told me to speak to you about it," and defendant turned away without replying, this was held sufficient evidence that it was a loan to sustain the verdict. Id.

3. Direct Testimony to Loan.

A witness may testify directly to the fact that he lent, or made a loan,[22] subject of course to cross-examination as to the details; but the facts being brought out, the opinion of the witness is not competent for the purpose of proving that it was a loan. He cannot testify that he "considered it" such.[23]

4. Delivery to Third Person.

It is not necessary to show that the money was paid into defendant's hand.[24] Proof that it was disbursed as he directed will suffice. Thus evidence that he, being indebted, requested plaintiff to pay the creditor, and promised if he would do so to repay him, is appropriate,[25] although it

So where plaintiff and defendant were at the races, and defendant having lost a bet, plaintiff handed him money in reply to his request for money, a verdict finding a loan was sustained. Lawton *v.* Sweeney, 8 Jur. 964. As to evidence of the *res gestæ* for this purpose, see paragraph 15.

The plaintiff refused to accept an overdue note of a third person as security for a loan until the defendant had promised to make it good if the maker failed. It was held that the defendent's liability was not that of an indorser but that of one receiving a loan, and that the note was only collateral security. Jonas *v.* Hughes, 64 Or. 24, 128 Pac. Rep. 998.

In Ball *v.* James, 158 N. W. Rep. (Iowa) 684, it was held that the receipt of certain money gave rise to the inference that an offer to lend it had been accepted.

[22] Cole *v.* Varner, 31 Ala. 244.

The plaintiff was held to have made out a *prima facie* case of money lent where she introduced in evidence her check drawn to the defendant's order and collected by him, and testified that she gave the money as a loan from funds credited to her by the bank upon which the check was drawn. Siebrecht *v.* Siebrecht, 153 App. Div. 227, 137 N. Y. Supp. 1073.

[23] Saltmarsh *v.* Bower, 34 Ala. 613, 620.

[24] Wade *v.* Wilson, 1 East, 195.

[25] Hamilton *v.* Starkweather, 28 Conn. 138.

It was held to be error to refuse to admit in evidence bills of a cable company which had been paid by the company's bank as if checks, charged to the latter's account and returned to the company to be entered in its books, where it appeared that the company's general manager had O. K.'d the bills and directed the holders

would equally well sustain in action for money paid to defendant's use. So money paid in pursuance of defendant's request to pay it to a third person, or his request to advance such sums to his wife as she might call for, is recoverable as a loan to defendant, if the credit was given to him.[26] But proof of a loan made to the third person exclusively, though at the request of the defendant, is not enough to sustain an averment of a loan to defendant.[27]

5. To which of Several was Credit Given.

When there is uncertainty on the evidence as to whether the loan proved was made to one or other of several persons, that is to say, whether credit was given to one or another, a witness who was present and an actor in the transaction may be asked on whose credit [28] it was made; or, in other words, what was the purpose and intent of the payment; subject, of course, to cross-examination as to the elements involved in his answer.[29] So the lender may, in connection

thereof to present them to the bank for payment. Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. Rep. 29, 48 Am. St. Rep. 98.

[26] Stevenson *v.* Hardy, 3 Wils. 388, s. c., 2 W. Blackst. 872, modifying in effect Marriott *v.* Lister, 2 Wils. 141.

[27] Butcher *v.* Andrews, 1 Salk. 23.

[28] Bank *v.* Kennedy, 17 Wall. 19. But the authorities are not uniform. See chapter on MONEY PAID.

There is no merit in the contention that money can only be loaned to the party who actually receives it and pursuant to the agreement uses it. It may be loaned to two or more although pursuant to the agreement under which the loan is made it is delivered to one of them only or even to a third person. It may be immaterial to the lender who is benefited by the loan; but he is vitally interested in the question as to who become liable primarily to repay it and they are those to whom it is agreed that the loan is made regardless of what becomes of the money. Isaacson *v.* Etkin, 148 N. Y. App. Div. 219, 132 N. Y. Supp. 1044.

Under a general denial, it was held competent for the defendant to show that a loan was not made to him individually but to the plaintiff and himself as partners. Bolanos *v.* Zumeta, 108 N. Y. Supp. 1014.

[29] To make an exception to such a question available the grounds should be stated—as that the witness is not shown to have the

with the facts, testify to his intent to give credit to defendant.[30] But in either case the witness's opinion, as distinguished from a statement of the fact, is not competent.[31] The entry made by him in his check book, at the time of drawing his check for the money to be lent, may be proved by him as part of the *res gestæ*.[32] After his death the entry is admissible without his testimony.[33]

6. Request.

The request relied on to characterize the transaction as a

means of knowledge; and that the question is framed so as to call for a mental conclusion instead of a fact. 57 N. Y. 651. See also Chapter XIV, paragraph 19.

[30] Danforth *v.* Carter, 4 Iowa, 230; and see Chapter XIII, paragraph 19.

[31] Id.

[32] Stark *v.* Corey, 45 Ill. 431. Compare Peck *v.* Von Keller, 76 N. Y. 604.

An entry made in his check book by the lender cannot be introduced as part of the *res gestæ*.

Declarations made by the lender to third persons at the time of drawing his check, in the absence of the borrower, are not admissible as part of the *res gestæ*. Mills *v.* McMullen, 4 N. Y. App. Div. 27, 38 N. Y. Supp. 705.

Where the testimony shows that the borrower came to the bank of a river and called to the lender who was on the other side of the river, that the lender took a boat and went across to him, and that they held some conversation; that the lender 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 the borrower; that he took the money with him and immediately went back across the river, where he was seen to hand something to the borrower; that he came back and told his wife and daughter to remember that the borrower had the $500, and added "Get the book and I will charge it," the testimony is admissible as part of the *res gestæ*, and sufficient to sustain a verdict that the loan was made. Mayes *v.* Power, 79 Ga. 631, 4 S. E. Rep. 681.

Stub entries in the alleged lender's check book, made by his secretary, were, in the absence of proof of the secretary's knowledge of the purpose for which the checks were issued, held incompetent to establish a loan, even though the secretary was no longer living. Leask *v.* Hoagland, 205 N. Y. 171, 98 N. E. Rep. 395, Ann. Cas. 1913, D. 1199; Reversing Leask *v.* Hoagland, 144 App. Div. 138, 128 N. Y. Supp. 1017.

[33] N. Y. Dyeing &c. Establ. *v.* Berdell, 68 N. Y. 613.

loan, must be proved to have come from the defendant, or his authorized agent. Proof of the actual application of the fund to his use, without anything tending to show recognition or ratification on his part, is not enough.[34] The one making the payment may testify that it was made in consequence of the request.[35] Evidence of the request may be corroborated by evidence of defendant's contemporaneous declarations of intent to make the request.[36]

7. Authority of Agent.

Where the request was made by an alleged agent, the authority of the agent cannot be proved by his declarations made to the plaintiff on obtaining the loan.[37] Nor where a loan is obtained by a husband upon promissory notes made by his wife can his authority to pledge her separate estate for their payment be proved by his declarations.[38]

Testimony, in general language, that the one who borrowed was agent of the defendant and acted as such, is not enough to prove his authority to bind his principal by borrowing.[39] Even proof of special authority to buy goods,

[34] Kelley *v.* Lindsey, 7 Gray (Mass.), 287; Henry *v.* Wilkes, 30 N. Y. 562. Compare Perkins *v.* Dunlap, 5 Greenl. 268, which is sustainable as an action for money paid to defendant's use rather than for money lent. So if a lender agrees to take and does take the express written promise of A., the fact that the money was applied to the joint use of A. & B. will not establish their joint liability for a loan. Underhill *v.* Crawford, 29 Barb. 664.

[35] See Sweet *v.* Tuttle, 14 N. Y. 465. But the authorities are not uniform. See Chapter on MONEY PAID.

[36] Clark *v.* McGraw, 14 Mich. 139, 149.

[37] Starin *v.* Town of Genoa, 23 N. Y. 489, s. P., Deck *v.* Johnson, 4 Abb. Ct. App. Dec. 315. For rules applicable to master's borrowing for ship in foreign port, see The Grapeshot, 9 Wall. 138, and cases cited; The Emily Souder, 17 Id. 666.

[38] Deck *v.* Johnson, 1 Abb. Ct. App. Dec. 497; Second Nat. Bank *v.* Miller, 2 N. Y. S. Ct. (T. & C.) 104.

[39] Perkins *v.* Stebbins, 29 Barb. 523; and see Kent *v.* Tyson, 20 N. H. 121.

An association cannot be bound

is not sufficient evidence of authority to borrow the money with which to buy.[40] But if the money has been actually mingled with defendant's funds, or applied to his use, very slight evidence of recognition and adoption on his part will suffice.[41] Evidence that the money actually and beneficially went into defendant's possession, and was retained after demand, dispenses with necessity of other evidence of special authority in the agent.[42] If the agent had authority to borrow, the misapplication of the money by him is not relevant,[43] unless plaintiff was connected with it. Where the

by a loan made to its treasurer on his personal promissory note, where the evidence does not show that the money borrowed ever came to the association or was used for its benefit. Pelchat *v.* Société des Artisans, 67 Atl. Rep. (R. I.) 362.

[40] Bank of Indiana *v.* Bugbee, 1 Abb. Ct. App. Dec. 86; Martin *v.* Peters, 4 Robt. 434.

Where one is a mere agent to purchase land he is not by any implication authorized to pledge the credit of his principal for the satisfaction of a prior lien. Blass *v.* Terry, 156 N. Y. 122, 50 N. E. Rep. 953.

An agent who had authority to buy and ship horses had no authority to borrow money for his principal, except that needed to purchase feed for the animals after their purchase and before shipment to the defendant. Rider *v.* Kirk, 82 Mo. App. 120.

[41] See Gill *v.* Gillingham, 1 F. & F. 284; Hearne *v.* Keene, 5 Bosw. 579. Especially now that parties can testify. 1 Daly, 327. Approval of an advance to pay duties for an agent does not imply authority in the agent to borrow. Tucker *v.* Woolsey, 6 Lans. 482.

Mere retention of money received of an agent was deemed a ratification of a loan negotiated by the agent for the principal, though the fact that the money was borrowed was not discovered until after its receipt from the agent. Fitch *v.* Lewiston Steam-Mill Co., 80 Me. 34, 12 Atl. Rep. 732.

[42] Merchants' Bank *v.* State Bank, 10 Wall. 644; Gold Mining Co. *v.* National Bank, 96 U. S. (6 Otto) 640, 644.

The books of the plaintiff showing loans to "Adolph Rosenthal, Special" are not competent evidence to establish a loan made to defendant I. B. Rosenthal, even though the plaintiff testifies that I. B. Rosenthal requested that his account be kept in that form to prevent commercial agencies from ascertaining his indebtedness to plaintiff. Sonnenfeld *v.* Rosenthal, 247 Mo. 238, 152 S. W. Rep. 321.

[43] City Bank of New Haven *v.* Perkins, 4 Bosw. 420.

question is whether the agent's authority extended to borrowing, defendant may be held liable by evidence that he had held out the agent as authorized by previously ratifying repeated transactions of the same sort.[44]

8. Parties to Joint Adventure.

In respect to the power of one to borrow for all, there is a distinction between a firm (where the power depends on familiar principles of the law of partnership) and a combination of persons having merely a joint ownership of property, or even an interest in a joint adventure or enterprise. Proof of joint ownership of property does not alone suffice to establish authority in one of the owners to borrow money on the credit of the others, even for the benefit of the property.[45] Nor does proof that several were engaged together

[44] Kelley *v.* Lindsey, 7 Gray (Mass.), 287; Bank of Auburn *v.* Putnam, 1 Abb. Ct. App. Dec. 80; Hammond *v.* Varian, 54 N. Y. 398. Where such transactions came to the knowledge of the lender before the loan, and he acted on the faith of them, the defendant is liable also on the ground of estoppel. The cases where it has not appeared that the lender had any knowledge of such transactions, are not in harmony. It depends somewhat on the nature of the agency, and sometimes, in part, on the usages of business. See, for instance, 8 N. Y. 167, 41 Me. 382, 56 N. Y. 583, rev'g 1 N. Y. S. Ct. (T. & C.) 247. As to whether, where a son borrows in his father's name, and there is no direct proof of agency, the fact of the father's having paid other debts contracted by his son is admissible for the purpose of charging him—compare 56 N. Y. 336, rev'g 7 Lans. 381; and 54 N. Y. 398.

The authority can be conferred by a long course of dealing, as well as by express permission. National Park Bk. *v.* American Exch. Nat. Bk., 40 N. Y. Misc. 672, 83 N. Y. Supp. 249.

Evidence that the plaintiff's intestate made prior loans to the defendant on terms similar to those of the transaction sued on is admissible. Mayes *v.* Power, 79 Ga. 631, 4 S. E. Rep. 681.

Evidence as to the conditions on which plaintiff loaned money to others is admissible on the question of the conditions on which he made the loan to the defendant. Perrin *v.* Carbone, 1 Cal. App. 295, 88 Pac. Rep. 222.

[45] See Mumford *v.* Brown, 6 Cow. 475.

Under a general denial of a com-

in a joint adventure, as distinguished from a partnership, suffice.[46] In such cases there must be express authority, or circumstances from which authority may be inferred, or ratification.[47]

9. Joint Debtors.

The request of one of several joint debtors who are apparently all principals, although it may suffice to sustain an action for money paid,[48] will not suffice to sustain an action for money lent; for one of several joint debtors, who is a principal as between himself and the others, has no implied authority to borrow money for all jointly to pay the debt.[49]

10. Written Evidence.

The law recognizes the general usage of men, in lending money, to take written evidence of it [50] and this is one reason why proof of the mere delivery of money without writing is presumed to be payment of an obligation, not a loan. Under modern procedure, the question whether the action

plaint for money loaned, the defendant may prove that the transaction was not a loan or payment to him individually, but was an incident merely to the partnership existing between him and the plaintiff. Bolanos *v.* Zumeta, 108 N. Y. Supp. 1014.

[46] Moss *v.* Jerome, 10 Bosw. 220; Alger *v.* Raymond, 7 Id. 426.

[47] See Chapter VII.

[48] Elmendorf *v.* Tappen, 5 Johns. 176.

[49] Ib.; Rolfe *v.* Lamb, 16 Vt. 514.

[50] Veiths *v.* Hagge, 8 Iowa, 187. But the peculiar habit of the lender is not primarily competent without something to show that the other party dealt with knowledge of it. Sugart *v.* Mays, 54 Geo. 554. Where, however, plaintiff testified that he lent the money sued for on a credit of six months, without taking a note—*Held*, that, as unfavorable inference might be drawn against this statement, from the length of time, it was competent to allow him to testify that he had frequently before made such loans to other persons. Stolp *v.* Blair, 68 Ill. 541.

Thus it has been held "that the lending of money . . . and taking notes or other securities, whether it be for the purpose of discount or to secure a debt, is a part of the legitimate business of a banking corporation." Fawcett *v.* Mitchell, 133 Ky. 361, 117 S. W. Rep. 956.

should be for money lent or on the written contract, is not vital; and if the defendant is not surprised, the court should disregard a variance.[51] If plaintiff took an express written agreement, and it is void for reasons not inherent in the loan itself, or if it has been rescinded, he may sue for money lent, ignoring the express agreement.[52] But if the plaintiff relies on a written promise to repay, he cannot resort to parol evidence to enable himself to recover otherwise than according to its tenor; nor against other parties than those bound by the writing; [53] except that if the agreement is non-negotiable and not under seal, he may give parol evidence to charge the undisclosed principal of the signer,[54] or to show himself the real party in interest though not named in the paper. If the agreement is to pay according to the terms of another

[51] Wright *v.* Hooker, 10 N. Y. 58; and see 54 N. Y. 686, affi'g 4 Daly, 92, 3 N. Y. S. Ct. (T. & C.) 443. But a promissory note is not evidence of money lent, except as between the original parties to it. Rockfeller *v.* Robinson, 17 Wend. 206, limiting 4 Id. 411. Nor as against one signing expressly as surety. Balcom *v.* Woodruff, 7 Barb. 13.

[52] Thus, on a loan which was in itself valid, the lender may recover, although he took a security which the borrowers were forbidden by law to issue. Curtis *v.* Leavitt, 15 N. Y. 9, 95, 96, 246, 296; Vanatta *v.* State Bank, 9 Ohio St. 27. So where the security given has been surrendered by mistake. Baxter *v.* Paine, 16 Gray (Mass.), 273. Void securities are admissible in evidence for the purpose of proving that they are worthless. Enthoven *v.* Hoyle, 16 Jur. 272.

Where a declaration contained counts both for money loaned and on a note, it was held that the plaintiff might recover on the first count if he should fail on his count on the note. Councilman *v.* Towson Nat. Bank, 103 Md. 469, 64 Atl. Rep. 358.

[53] See note 2 (below). But a deposit with bankers, for which the depositor took the banker's certificate payable on presentation and indorsement, is recoverable as a loan, and without indorsement before suit; but it should be in possession ready for surrender. Umbarger *v.* Plume, 26 Barb. 461.

[54] Briggs *v.* Partridge, 64 N. Y. 362, 7 M. & G. 590. As to negotiable paper, compare 1 Wall. 234.

Only parties named in and who executed an instrument under seal can enforce its covenants. Williams *v.* Magee, 76 N. Y. App. Div. 550, 78 N. Y. Supp. 53; Henricus *v.* Englert, 137 N. Y. 488, 33 N. E. Rep. 550.

writing referred to without reciting its terms, the other writing must be produced or accounted for,[55] but its execution need not be proved.[56] A written agreement, if any, is the best evidence, and should be produced or accounted for. Where, however, the writing was not made as embodying the contract or promise, but was merely a signature or entry for an incidental purpose,[57] it is not the primary evidence, but the transaction may be proved by parol.

11. Due Bill.

An "I. O. U." and a due bill (*e. g.*, Due A. B. $80 on demand) are competent as evidence of a loan; [58] but they are, if unexplained, quite as appropriate in support of an allegation of an account stated.[59] Evidence identifying the plaintiff with "U." or "the bearer," is not necessary in the first instance.[60] It is for defendant to show that the paper was given to some one else.[61]

12. Defendant's Check in Favor of Plaintiff.

A check drawn by defendant on his banker, in favor of plaintiff, and produced by plaintiff, is not by itself evidence of a loan by plaintiff, but rather of a payment to him;[62] but with evidence, for instance, that it was drawn on a bank where defendant had no funds, and was not intended to be

[55] Alabama, etc., R. R. Co. *v.* Nabors, 37 Ala. 489.

[56] Smith *v.* N. Y. Central R. R. Co., 4 Abb. Ct. App. Dec. 262.

[57] As where the clerk procured the borrower to write his name in the cash book, so as to know the correct spelling. Keene *v.* Meade, 3 Pet. 1, 7.

[58] Hinsdale *v.* Eells, 3 Conn. 377; Hay *v.* Hide, 1 D. Chip. (Vt.) 214, s. p., 12 Ad. & E. 641. So is a memorandum check. Turnbull *v.* Osborne, 12 Abb. Pr. N. S. 200. Otherwise of a mere conditional promise to pay a sum of money, without importing any consideration. Morgan *v.* Jones, 1 C. & J. 162.

[59] See Fessenmayer *v.* Adcock, 16 M. & W. 449, 1 Esp. Cas. 426; and see L. R. 1 C. P. 297, L. J. 10 Q. B. 43.

[60] Fessenmayer *v.* Adcock (above).

[61] Curtis *v.* Rickards, 1 M. & G. 46.

[62] Pearce *v.* Davis, 1 Moody & Rob. 365.

presented, but given as a memorandum, it will support the action.[63] Unless some circumstances are shown to excuse the omission,[64] there must be evidence of demand and notice; [65] but delay therein is not material, unless the drawee has failed or the drawer otherwise sustained injury by the delay.[66]

13. Defendant's Checks on Plaintiff.

Checks drawn by the defendant upon the plaintiffs, his bankers, and paid by them, are not alone evidence of money lent by them.[67] There must be proof of such a state of the accounts as to show that the checks represent money lent.[68]

[63] Cushing *v.* Gore, 15 Mass. 69; Currier *v.* Davis, 111 Id. 480; and see Carter *v.* Hope, 10 Barb. 180.

Where a borrower gives a check with the understanding that it is to be held as a memorandum of the loan and not to be presented in the regular way, the check is evidence of the loan. Currier *v.* Davis, 111 Mass. 480.

[64] As that the drawer had no funds there. Reddington *v.* Gilman, 1 Bosw. 235.

[65] Pearce *v.* Davis, 1 Moody & Rob. 365.

[66] Murray *v.* Judah, 6 Cow. 484.

One who receives a check assumes the obligation to present it within a reasonable time, and failing to perform his duty operates to discharge the endorsers and the drawer after a failure of the bank upon which the check was drawn. Martin *v.* Home Bank, 160 N. Y. 190, 54 N. E. Rep. 717.

[67] White *v.* Ambler, 8 N. Y. 170, S. P., Reddington *v.* Gilman, 1 Bosw. 235.

[68] The bank books are not competent for the purpose. White *v.* Ambler (above). And the testimony of a clerk, speaking in general terms and from recollection, without the production of the books, that at the time they were drawn the defendant's account was greatly overdrawn, is not enough. Fletcher *v.* Manning, 12 Mees. & W. 571.

Producing and proving drafts of the defendant on the plaintiffs cannot alone make a cause of action for money loaned; the plaintiffs are bound to show as indispensable to their recovery the terms and conditions of the contract. Doyle *v.* Unglish, 143 N. Y. 556, 38 N. E. Rep. 711, affirming 66 Hun (N. Y.), 635, 21 N. Y. Supp. 650.

Where a bank paid an overdraft, it was held that the amount in excess of the deposit which the bank paid was a loan to the depositor for which the bank could recover upon an implied promise to repay. People's Nat. Bk. *v.*

14. Defendant's Receipt.

Upon the same principle defendant's simple receipt for money, without indicating it as a loan, is competent, but by itself wholly insufficient to support the action.[69]

15. Plaintiff's Check.

Where a check drawn by plaintiff in favor of defendant is relied on as evidence of the payment, the check being produced from plaintiff's custody, though with marks of cancellation by the bank, is not alone evidence that the money was received by the defendant, unless it was payable to his order, and indorsed by him. If it be payable to bearer, it is necessary to give some evidence tending to show that defendant received the money.[70] If the books of the bank or a pass-book are relied on, they should be proved by their production (or by the production of a copy of the entries, where that is allowed by law),[71] and by producing the clerk who made the entries,[72] or accounting for his absence, and

Rhoades, 28 Del. 65, 90 Atl. Rep. 409.

[69] McFailand *v.* Strip, 17 Ark. 41, and see 3 J. J. Marsh. 37.

[70] Patton *v.* Ash, 7 Serg. & R. 125; Fleming's Ex'r *v.* McLain, 13 Penn. St. 177. See also Beasley *v.* Crossley, 3 Bing. 430. The entry in the check book that it was drawn to defendant, is not alone enough. Freeman *v.* Kelly, Hoffm. 90, and see 3 Pick. 96.

Where the defendant contended that the loan was not made to him personally but to a corporation of which he was treasurer, it was held that the plaintiff's check made payable to the defendant's order corroborated the former's testimony that he was not aware and was not informed of the defendant's connection with the corporation at the time the loan was made. Holmes *v.* Smith, 25 Colo. A. 88, 135 Pac. Rep. 759.

[71] As in case of a foreign corporation, see p. 163, n. 53, of this vol. Compare Merrill *v.* Ithaca R. R. Co., 16 Wend. 586.

Allegations by an executrix that the decedent delivered his check, the proceeds of which were received by the defendant, and that the decedent was not at the time indebted to the defendant, were held sufficient without a direct allegation of a loan. De Cordova *v.* Sanville, 165 App. Div. 128, 150 N. Y. Supp. 709.

[72] Patton *v.* Ash (above). See 7 Gray 191, and Chapter on PAYMENT.

Where the bookkeeper of the plaintiff testifies as to a book in

proving his handwriting. Proof that the money was actually paid to the defendant on plaintiff's check will not, however, alone support the action; for, like a receipt, it is only evidence of the payment of money which presumptively is in satisfaction of a debt, and not a loan.[73]

which the entries are in his handwriting the book will be admitted in evidence. Wallabout Bank *v.* Peyton, 123 N. Y. App. Div. 727, 108 N. Y. Supp. 42.

[73] Cary *v.* Gerrish, 4 Esp. Cas. 9; Aubert *v.* Walsh, 4 Taunt. 293; Fleming's Ex'r *v.* McLain (above). Proof of a check drawn by plaintiffs, and payable to and indorsed by defendant, and paid and produced by plaintiffs, who are bankers, together with an envelope indorsed by defendant with a memorandum describing the note, and enumerating securities, is sufficient evidence to go to the jury to establish a loan. Union Trust Co. *v.* Whiton, 9 Hun, 657.

There is some conflict in the cases as to whether the rule of *res gestæ* will not justify the admission of declarations of the plaintiff, made at the time of delivering the money or drawing the check, as evidence that he intended a loan and not a payment, although made in the absence of the defendant. In some cases such declarations have been excluded, on the ground that, defendant being absent, they did not bind him. But the better view is that such declarations are competent for the purpose of characterizing the act on the part of the plaintiff, it being understood that proof that he intended a loan is not sufficient to support the action without additional evidence proper to bind the defendant. Huntziger *v.* Jones, 60 Penn. St. 170.

The effect of such declarations, like the effect of the act itself, may depend upon evidence yet to be given. This principle is fully sustained in Beaver *v.* Taylor (1 Wall. 637), where plaintiff was allowed to give in evidence the letters of his correspondent who made payments on his behalf, and the entries which plaintiff thereupon made in his own books, not as matters binding the defendant, but as part of the *res gestæ* necessary to the complete proof of the act of the plaintiff in making the payment.

"The giving of a check is presumptively the payment of a debt, and, to raise the presumption that it was a loan, additional proof is required to be given." Mills *v.* McMullen et al., 4 N. Y. App. Div. 27, 38 N. Y. Supp. 705.

To overcome the presumption that a check was given to pay a debt and not as a loan, it was held competent to show the business relations and transactions between the parties. Russell *v.* Amlot, 132 N. Y. App. Div. 584, 116 N. Y. Supp. 1080.

For further cases on this point

16. Plaintiff's Account Books.

The plaintiff's accounts are not in general admissible as independent evidence that money was paid,[74] much less that a payment was a loan. Where plaintiff himself testifies to the loan, his own entry of the fact of payment, made contemporaneously with the fact, and as part of the *res gestæ*, is admissible upon that ground.[75] Where the plaintiff or other person making the entry is not examined as a witness, the entries in plaintiff's books are not in general competent evidence of the payment.[76] In some States, however, the parties' own books are admissible for small sums, with certain suppletory proof.[77] The reason why the parties' own

see the long list of citations in Amer. & Eng. Ann. Cases, 1913, D. p. 1203.

[74] Unless the defendant is shown to have had access, and assented. Himes *v.* Barnitz, 8 Watts (Penn.), 39, 47. "A man's book is not testimony in his own favor touching the receipt of money by him. By immemorial usage, a person's own books have, for certain defined purposes, become legal evidence, recognized by repeated decisions of the courts of this state. They are legitimately *prima facie* evidence to show the sale and delivery, in the usual course of business, of personal property and its price, and of work and labor performed, and the sums due for such services. Thus far the rule that a man cannot put in evidence his own written memoranda has been abrogated, the reason of such infringement of the common-law principle being that it was a necessity in the transaction of certain classes of business. It has, however, never been authoritatively declared in this state that these entries have any evidential force beyond these functions." Oberge *v.* Breen, 50 N. J. Law, 145, 7 Am. St. Rep. 779, 12 Atl. Rep. 203.

Text cited in Textile Pub. Co. *v.* Smith, 31 N. Y. Misc. 271, 64 N. Y. Supp. 123.

Plaintiff's books showing loans to "Adolph Rosenthal, Special," were held incompetent to establish loans to I. B. Rosenthal, the defendant. Sonnenfeld *v.* Rosenthal, 247 Mo. 238, 152 S. W. Rep. 321.

[75] The law making parties competent does not exclude their books.

[76] Low *v.* Payne, 4 N. Y. 247; Veiths *v.* Hagge, 8 Iowa, 184; Maine *v.* Harper, 4 Allen (Mass.), 115.

[77] See the chapter on Sales of Goods, &c. A book kept by a loan agency showing the date and number of each loan, the name and address of the lender, and the place where the loan is to be paid, a description of the property mort-

books are not admitted to prove loans is, that they are not the usual method of preserving evidence of loans, and an exception, therefore, to the rule excluding them has recently been recognized in the case of the books of bankers and others, where there is evidence that the payment of money constituted, at the time the charges were made, the ordinary business of the party, and that the charges in question were made in the ordinary course of that business.[78]

17. Character in which the Parties Dealt.

Where the action is by a person suing in his individual right, and the proof is of a debt due him in his representative capacity or conversely, the plaintiff cannot recover without an amendment in this respect, unless the case is such that a payment to the plaintiff will protect the defendant irrespective of the variance.[79]

18. Connected and Collateral Agreements.

Where the loan was made upon a promise to repay or give security for repayment, which is void by the statute of

gaged as security, the time when the loan is paid, and date of remitting of the proceeds of the principal, is not a book of account, and is, therefore, not admissible in evidence in favor of the borrower for the purpose of proving the payment of the loan. Security Co. *v.* Graybeal, 85 Iowa, 543, 39 Am. St. Rep. 311, 52 N. W. Rep. 497.

[78] Cummings *v.* Hill's Adm'r, 35 Iowa, 253. See People's Nat. Bk. *v.* Rhoades, 28 Del. 65, 90 Atl. Rep. 409. But in the courts where such evidence is received, it should appear that, from the nature of the transactions or course of dealing, or other circumstances, that the case falls within the general principle which justifies the admission of the party's own books in other cases, namely, that better evidence is not obtainable. Young *v.* Jones, 8 Iowa, 219.

[79] Thus, defendant cannot defeat a recovery by showing that the funds were held by the lender in a trust capacity, and that he had no power to loan them, unless defendant shows also that by reason of a successor in the trust having already been appointed, or otherwise, a payment to the plaintiff will not protect the defendant. See also chapters on EXECUTORS AND ADMINISTRATORS, OFFICERS, RECEIVERS, AND TRUSTEES.

frauds,[80] as well as where a stipulation for a term of credit was obtained by fraud of the borrower,[81] or upon a condition which remains unperformed (as distinguished from an alternative contract),[82] or upon a special agreement for security which has been wholly rescinded by the parties,[83] the loan may be recovered without regard to the special agreement, and plaintiff may prove the fraud, etc., though not alleged, as part of the *res gestæ*.[84] If the lender received a collateral security, this fact does not suspend his remedy;[85] and, he need not prove an offer to return it before suit; it is enough that he holds it ready to be surrendered;[86] but, if it be negotiable paper, and indorsers or other parties contingently liable have been discharged, it must appear that they were not discharged by neglect, or at least that defendant has lost nothing by such neglect.[87] If the lender has entered into an agreement for satisfaction or payment which has failed by default of the borrower to fulfill it, or was vitiated by fraud on his part, the lender may recover in disregard of such agreements.[88]

19. Mortgage.

Where a mortgage of real or personal property is taken to secure payment, if a written acknowledgment of a debt on the part of the defendant is embodied in it or taken with it, the lender may recover thereon without first enforcing the mortgage.[89] But where the only writing expresses that the

[80] Swift *v.* Swift, 46 Cal. 266; Binion *v.* Browning, 26 Mo. 270.

[81] Nelson *v.* Hyde, 66 Barb. 59.

[82] Bristow *v.* Needham, 9 Mees. & W. 729.

[83] James *v.* Cotton, 7 Bing. 266.

[84] Nelson *v.* Hyde (above). Compare Peck *v.* Root, 5 Hun, 547; French *v.* White, 5 Duer, 254.

[85] Brengle *v.* Bushey, 40 Md. 141, s. c., 17 Am. R. 586; Lewis *v.* U. S., 92 U. S. (2 Otto) 623, and cases cited.

[86] Scott *v.* Parker, 1 Q. B. 809; Lawton *v.* Newland, 2 Stark. 73.

[87] Marston *v.* Boynton, 6 Metc. (Mass.) 127.

[88] Westcott *v.* Keeler, 4 Bosw. 564; Arnold *v.* Crane, 8 Johns. 79.

[89] Elder *v.* Rouse, 15 Wend. 218.

If the mortgage expressly acknowledges an existing debt, then the personal liability of the mortgagor is implied from the execution of the mortgage. Consumers' Brewing Co. *v.* Braun, 147 N. Y.

mortgage was for the purpose of securing a sum specified, not indicated to be a debt, the mortgagor is presumptively not personally liable.[90]

20. Medium of Repayment.

Where there is an express promise to repay in a particular currency—*e. g.*, to pay so many "dollars"—parol evidence is not admissible to prove that any other than lawful money of the country was intended, unless the contract is shown to have been made in a country where another currency or currency using that designation for coin of a different value, was authorized. In such case parol evidence is admissible to explain what was intended,[91] and to prove the equivalent value.[92]

21. Defenses; Disproving Loan.

If the making of any loan whatever by plaintiff is denied,[93]

App. Div. 171, 132 N. Y. Supp. 87.

Even if the acknowledgment of the debt be insufficient to constitute a covenant, it is still a good admission, and if it be the only evidence on the subject it will be sufficient to support a decision. Hunt *v.* Patten, 33 N. Y. App. Div. 613, 53 N. Y. Supp. 1042.

[90] Culver *v.* Sisson, 3 N. Y. 264; Weed *v.* Covill, 14 Barb. 242; and see 1 Duer, 390. To the contrary, Coor *v.* Grace, 10 Smedes & M. (Miss.) 434; and see 4 Q. B. 182. And in such case it has been held that parol evidence that the transaction was a loan is inadmissible. Waite *v.* Dimick, 10 Allen, 364. See 1 N. Y. R. S. 738, § 139.

[91] Thorington *v.* Smith, CHASE, Ch. J., 8 Wall. 1.

[92] As to what kind of evidence of intention would suffice, see Confederate Note Case, 19 Wall. 548, 559. Proof of promise to pay in Indian currency, no variance, under declaration alleging promise to pay in lawful money of Great Britain. Harrington *v.* MacMorris, 5 Taunt. 228. See, as to valuation, Story Confl. of L., § 310; Rice *v.* Ontario Steamboat Co., 56 Barb. 384; Gunther *v.* Colin, 3 Daly, 125; Colton *v.* Dunham, 2 Paige, 267; Stranaghan *v.* Youman, 65 Barb. 392; R. S. of U. S., §§ 3564, 3565; Schmidt *v.* Herfurth, 5 Robt. 124.

Within the spirit of the law the borrower is bound to return the amount he received, with lawful interest, and no more. Hall *v.* Eagle Ins. Co., 151 N. Y. App. Div. 815, 136 N. Y. Supp. 774.

[93] As to distinction between loan

evidence of his poverty at the time is competent as tending to disprove it.[94] But upon the question whether the loan was made to the defendant or another person, evidence of the insolvency or poverty of the defendant is not competent for the purpose of showing that the credit was probably not given to him,[95] unless it appears that something passed be-

and gift, see Hick *v.* Keats, 4 B. & C. 71; Hill *v.* Wilson, L. R. 8 Ch. 888, and chapter V, paragraphs 117 to 124, of this vol. as to advancements.

Where a defendant denied that he had received money as a loan, it was held that the fact that he was a stranger to the plaintiffs, was young and inexperienced in business, and that the plaintiffs delayed for five years in bringing an action on short-time notes which they contended were security for the loan, was evidence of material weight in favor of the defendant. Meguiar *v.* Rainey, 70 Ill. App. 447.

[94] Dowling *v.* Dowling, 10 Ir. C. L. 236; Darling *v.* Westmoreland, 52 N. H. 401, s. c., 13 Am. Rep. 55, and cases cited. Whether the alleged borrower may support his denial by proof that he had no need to borrow is disputed; but where he has been allowed to do so, the other party may rebut it. Thus where defendant testified he had no need to borrow, he had received money from A., proof that, on the contrary, after the alleged loan he remitted money to A. is competent. Stolp *v.* Blair, 68 Ill. 541. On the question whether the money used to pay off an incumbrance on defendant's property was lent to him or to the person who assumed to act as his agent in receiving and applying it, defendant may prove that, as between them the debt was the debt of such agent. Henry *v.* Wilkes, 31 N. Y. 562.

Testimony of the defendant that at the time the loan was alleged to have been made his financial circumstances were such that he did not need money was held competent. Sager *v.* St. John, 109 Ill. App. 358.

[95] See chapter on Money Paid. To make an exception on this point available it should be specific. 61 N. Y. 630.

In determining whether or not the defendant borrowed any money evidence as to his financial circumstances at the time is admissible. Sager *v.* St. John, 109 Ill. App. 358.

The fact that the defendant had a bank account is not admissible to show that a loan was made on his credit. Ford *v.* McLane, 131 Mich. 371, 91 N. W. Rep. 617.

Evidence that the defendant had funds in bank at the time he was alleged to have taken the loan is not admissible. Burke *v.* Kaley, 138 Mass. 464; Agat *v.* Apfelbaum, 155 Ill. App. 572.

Where the plaintiff is the stepfather of the female defendant,

tween the parties on the subject of pecuniary responsibility.[96] Where, however, such evidence has been admitted as a circumstance tending to show that he borrowed it, is competent for him to show in rebuttal that he borrowed for his wants from another person.[97] Evidence of the defendant's

having married her mother, and at the time of making the loans for which he sues he was living in their household, the relations of the parties might be presumed to be those of members of the same family, wherein friendly offices were exchanged, gifts and other gratuities made and received, without expectation of repayment or reward. This presumption must yield to evidence that he loaned them the money which they claim he gave them, and that they regarded him as a boarder rather than as a member of the family. Whether a mere boarder would be likely to be making gifts of large sums of money to the persons with whom he was boarding is a fair question for argument at the trial. Musk *v.* Hall, 34 R. I. 126, 82 Atl. Rep. 593.

The borrower cannot prove repayment by showing that he has considerable sums of money in his possession. Experience is not sufficiently uniform to raise a presumption that one who has the means of paying a debt will actually pay it. Atwood *v.* Scott, 99 Mass. 177, 96 Am. D. 728.

For the purpose of showing that a check drawn to the order of an officer of the defendant college was in fact a loan to the college, it was not permissible to prove that the officer was a priest who had taken the vows of poverty and could not, therefore, possess property. Reiner *v.* Augustinian College, 250 Pa. St. 188, 95 Am. Rep. 395.

[96] Second Nat. Bank *v.* Miller, 2 N. Y. S. Ct. (T. & C.) 107; and see 63 N. Y. 639; Green *v.* Disbrow, 56 N. Y. 336, rev'g 7 Lans. 381.

General proof as to man's habits in regard to the use of money, *e. g.*, that he was a spendthrift, is not relevant upon the question whether he made a particular promissory note or not. It deals with probabilities or possibilities too remote from the issue. Roe *v.* Nichols, 5 N. Y. App. Div. 472, 38 N. Y. Supp. 1100.

[97] Burlew *v.* Hubbell, 1 Supm. Ct. (T. & C.) 235.

Under a general denial of a complaint in an action for money loaned defendant may introduce testimony that the money was paid as a gift and not as a loan. Jenning *v.* Rohde, 99 Minn. 335, 109 N. W. Rep. 597.

Where the plaintiffs claim that the defendant borrowed the money for her individual use, she is entitled to show not only that it was advanced to her for household expenses but that it was used for household expenses. Hawley *v.*

declarations at about the time of the transaction, as to his pecuniary affairs, are not admissible;[98] nor is the fact that he made no entry in his books.[99]

22. Illegality.

To defeat the action on the ground that the loan was made in execution or in furtherance of an illegal purpose, it is not enough to show that the lender knew of an illegal purpose of the borrower in respect to the application of the money when borrowed, unless the lender shared the intent.[1] For the purpose of establishing such intent, parol evidence is competent in contradiction or variance of a writing.[2]

The borrower's abandonment of the purpose, without any change or act on the part of the lender, does not render the illegal loan valid so that the lender can recover.[3] Where the loan was made by transferring a thing in action, founded on a consideration illegal or contrary to public policy as between the original parties, or a fund which was the proceeds of an illegal transaction in which the borrower and the lender were previously engaged, the plaintiff may nevertheless recover, if the loan was a new transaction the assent to which did not involve assent to the previous illegal contract.[4]

Levee, 139 N. Y. App. Div. 569, 124 N. Y. Supp. 24.

[98] Douglass *v.* Mitchell, 35 Penn. St. 440, 445.

[99] Id.

[1] Bond *v.* Perkins, 4 Heisk. (Tenn.) 364; and see Gregory *v.* Wilson, 36 N. J. 315, s. c., 13 Am. Rep. 448; Earl *v.* Clute, 2 Abb. Ct. App. Dec. 1.

It has been held that it was not enough to defeat a recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. Jackson *v.* City Nat. Bank, 125 Ind. 347, 25 N. E. Rep. 430, 9 L. R. A. 657. See also 9 L. R. A. 657, note.

Money which was loaned to pay for losses suffered in connection with dealing in "futures" was recoverable where the lender was in no way connected with the speculation. Ballard *v.* Green, 118 N. C. 390, 24 S. E. Rep. 777.

[2] 1 Greenl. Ev. 330, note.

[3] Kingsbury *v.* Fleming, 66 N. C. 524.

[4] Wintermute *v.* Stimson, 16 Minn. 468; Hamilton *v.* Canfield, 2 Hall. 526; Planters' Bank *v.* Union Bank, 16 Wall. 483; and see Brooks *v.* Martin, 2 Wall. 81.

CHAPTER XIII

MONEY PAID TO DEFENDANT'S USE

1. Grounds of Action.[5]

Plaintiff must show his payment[6] of money or its representative, to the use of defendant; and an express or implied assent on the part of defendant to the making of the pay-

[5] The action was often resorted to at common law, as a substitute for a bill in equity, and was encouraged wherever equity would compel defendant to repay to plaintiff money the latter had been compelled to pay for his benefit. Chan. WALWORTH, Wright *v.* Butler, 6 Wend. 290.

[6] Under a complaint for money paid, evidence to charge defendant as indorser or guarantor cannot be received. Cottrell *v.* Conklin, 4 Duer, 45.

As the action is for money paid to defendant's use actual payment must be shown. Tibbet *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. Rep. 815.

A mere agreement to pay on the part of the plaintiff is not enough. Schofield *v.* State Nat. Bk., 97 Fed. Rep. 282, 38 Cir. Ct. App. 179.

ment;[7] which is usually proved by either (1) a previous request, or (2) a subsequent promise to reimburse, or (3) legal compulsion on plaintiff to pay what defendant ought to have paid, or (4) other circumstances showing that he did not officiously volunteer, but was justified in making the payment without express assent; and then the law is said to imply a request or promise.[8] If the facts which thus

[7] Thus, if an officer holding process against a defendant, voluntarily pays it himself, he cannot recover the amount from defendant (Jones *v.* Wilson, 3 Johns. 434; Beach *v.* Vandenburgh, 10 Id. 361); but, if he pays it at the request of the defendant, he may recover it. Leonard *v.* Ware, 4 N. J. L. (1 South.) 150; Moseley *v.* Boush, 4 Rand. (Va.) 392.

"There can be no recovery for the voluntary payment of the debt of a third party without request and without promise of repayment by the party whose debt is paid." McGlew *v.* McDade, 146 Cal. 553, 80 Pac. Rep. 695, quoted in Sessions *v.* Miller, 24 Cal. App. 13, 140 Pac. Rep. 44. See also McIntyre Bros. & Co. *v.* South Atlantic Steamship Line, 12 Ga. App. 399, 78 S. E. Rep. 347.

Where the defendants' agent embezzled the plaintiff's money and used it to pay the defendants' taxes, it was held that there was no cause of action since no promise on the part of the defendant was shown nor a knowledge of the agent's unauthorized act upon which a ratification could be predicated. Foote *v.* Cotting, 195 Mass. 55, 80 N. E. Rep. 600, 15 L. R. A. N. S. 693. See also Andrews *v.* Sibley, 220 Mass. 10, 107 N. E. Rep. 395; Kiendl *v.* Cochrane, 153 App. Div. 802, 138 N. Y. Supp. 630.

Where the defendant in a telegram promised to reimburse the plaintiff, for the payment of "freightcharges," it was held that there was an implied promise to pay the expenses of demurrage and unloading, but, if not, the plaintiff was nevertheless entitled to recover on the express promise the amount of the freight charges so paid. Meneffe *v.* Bering Mfg. Co. 166 S. W. Rep. (Tex. Civ. App.) 365.

[8] For instance, a party met to dine at a tavern, and after dinner all but one left without paying, whereupon he paid for all, and he was allowed to recover. 8 East, 614. So where a wife dies in the absence of her husband, one who humanely pays the necessary funeral expenses may recover them of the husband. Bradshaw *v.* Beard, 12 C. B. N. S. 344, and cases cited. See also Exall *v.* Partridge, and England *v.* Marsden, paragraph 6, first note. The rule forbidding recovery by an officious volunteer has lost much of its intended efficacy to prevent one man from constituting another his

debtor without the latter's consent, since, in most cases, of pre-existing liability, one may now take an assignment and sue as assignee. In that case the action will not be for *money paid*, but on the original demand. The rule still applies (1) where the demand was not assigned but satisfied, (2) where it was not assignable in its nature, (3) where it was contracted or created only by plaintiff's act. Where the demand was assignable, and the evidences of it were delivered up to plaintiff, an assignment may be presumed, in furtherance of justice, if there was any privity between plaintiff and defendant. See p. 2 of this vol.; and, for instances, Duffy *v.* Duncan, 32 Barb. 587; Mills *v.* Watson, 1 Sweeny, 374.

One cannot recover for a voluntary payment made for another. Matter of Hotchkiss, 44 N. Y. App. Div. 615, 60 N. Y. Supp. 168; Matter of Rider, 68 N. Y. Misc. 270, 124 N. Y. Supp. 1001; Mings *v.* Griggsby Cons. Co., 106 S. W. Rep. (Tex. Civ. App.) 192; Brown *v.* Fales, 139 Mass. 21, 29 N. E. Rep. 211; Donovan-McCormick Co. *v.* Sparr, 34 Mont. 237, 85 Pac. Rep. 1029; McGlew *v.* McDade, 146 Cal. 553, 80 Pac. Rep. 695; Little Bros. Fertilizer, etc., Co. *v.* Wilmott, 44 Fla. 166, 32 So. Rep. 808; Trippensee *v.* Braun, 104 Mo. App. 628, 78 S. W. Rep. 674; Morley *v.* Carlson, 27 Mo. App. 5; Allen *v.* Bobo, 81 Miss. 443, 33 So. Rep. 288; Helm *v.* Smith-Fee Co., 76 Minn. 328, 79 N. W. Rep. 313; Manning *v.* Poling, 114 Ia. 20, 83 N. W. Rep. 895, 86 N. W. Rep. 30; Kiendl *v.* Cochrane, 153 N. Y. App. Div. 802, 138 N. Y. Supp. 630; Louisville, etc., R. Co. *v.* Central Kentucky Traction Co., 147 Ky. 513, 144 S. W. Rep. 739; Hilliard *v.* Douglas Oil Fields, 20 Wyo. 201, 122 Pac. Rep. 626; Illinois, etc., R. Co. *v.* Cleveland, etc., R. Co., 157 Ill. App. 102; Holly St. Land Co. *v.* Beyer, 46 Wash. 422, 93 Pac. Rep. 1065; Briggs *v.* Barnett, 108 Va. 404, 61 S. E. Rep. 797.

One who makes a voluntary payment, without a previous request or a subsequent promise, cannot recover. Boyer *v.* Richardson, 52 Neb. 156, 71 N. W. Rep. 981.

No one can make himself the creditor of another by the unsolicited payment of his debts. Kelly *v.* Linsey, 7 Gray, 287; Owen Creek Presbyterian Church *v.* Taggart, 44 Ind. App. 393, 89 N. E. Rep. 406; Trippensee *v.* Braun, 104 Mo. App. 628, 78 S. W. Rep. 674; Iowa Homestead Co. *v.* Des Moines Nav., etc., R. Co., 17 Wallace, 153, 21 L. ed. 622.

There must be an express or implied request by the defendant or his agent, otherwise the action will not lie. Oliver *v.* Camp, 6 Ala. App. 232, 62 So. Rep. 469; McIntyre *v.* South Atlantic S. S. Line, 12 Ga. App. 399, 78 S. E. Rep. 347; Newell *v.* Hadley, 206 Mass. 335, 92 N. E. Rep. 507, 29 L. R. A. N. S. 908.

A stranger who pays the debt of another, without his knowledge and authority, cannot sue the debtor for the money paid for his

use, unless the debtor has ratified the act of the stranger by promising to repay him the amount, or in some other manner. Neely *v.* Jones, 16 W. Va. 625, 37 Am. Rep. 794.

Where a city pays for the repairing of a street which it had no authority to repair, such payment is voluntary and not recoverable. Chicago *v.* Pittsburg, etc., Ry. Co., 242 Ill. 30, 89 N. E. Rep. 648.

The action, being an equitable one, lies only when in equity the defendant should return the money. Foresters' Bldg., etc., Ass'n. *v.* Quinn, 119 Ill. App. 572; Langdon *v.* Hughes, 113 Ill. App. 203.

An action for money paid out for the benefit of another is founded upon equitable principles. No privity of contract between the parties is required except that which results from circumstances showing an equitable obligation. Commercial Nat. Bk. *v.* Sloman, 121 N. Y. App. Div. 874, 106 N. Y. Supp. 508; Roberts *v.* Ely, 113 N. Y. 128, 20 N. E. Rep. 606.

Unless there is an agreement to repay there can be no recovery. Bloom *v.* Gourlay, 35 Pa. Super. Ct. 116; Helm *v.* Smith-Fee Co., 76 Minn. 328, 79 N. W. Rep. 313.

Where the plaintiff does not officiously interfere with the affairs of the defendant but acts in fulfillment of a supposed obligation with the result that it relieves the defendant's land from an assessment lien thereon, and aids the defendant to perform a contract to convey free and clear of encumbrances, the plaintiff is entitled to the equitable relief of being subrogated to the lien of the assessments. Title Guarantee, etc., Co. *v.* Haven, 196 N. Y. 487, 89 N. E. Rep. 1082, 1085, 25 L. R. A. N. S. 1308, 17 Ann. Cas. 1131.

An insurance agent has a good cause of action against a policyholder whose premium he paid at his request. Baum *v.* Parkhurst, 26 Ill. App. 128.

Where a creditor insures the life of his debtor, the debtor cannot be made to pay the premiums unless there was an agreement that he should pay them. Stacy *v.* Parker, 132 S. W. Rep. (Tex. Civ. App.) 532.

Where one pays the premiums on an insurance policy as to which she has been wrongly informed by the insurance agent that she is the beneficiary, she may recover the premiums paid from the true beneficiary who has collected the proceeds of the policy. Monast *v.* Marchant, 72 Atl. Rep. (R. I.) 820.

One who contracts with an undertaker to pay for the funeral of a deceased cannot recover from the executor the full amount of the funeral bill where such bill exceeds the reasonable funeral expenses; and having contracted with the undertaker he is liable to him for the excess. Ruggiero *v.* Tufani, 54 N. Y. Misc. 497, 104 N. Y. Supp. 691.

Where the conduct of one who arranges and pays for a funeral is inconsistent with an intention to seek repayment, the action will

raise an implied request or promise are alleged, an allegation of the request or promise is not necessary.[9]

2. Previous Request, or Previous Promise to Reimburse.

It is not necessary to prove that the request or promise was formally expressed; it may be inferred from circumstances,[10] and the relation of the parties (principal and agent, for instance) [11] often supplies the place of a specific request.

If the request or promise was made by a third person,

not lie. Matter of Moran, 75 N. Y. Misc. 90, 134 N. Y. Supp. 968.

It is essential that a request on the part of the person benefited to make such payment, either expressed or fairly implied from the circumstances of the case, should be shown. Sterling *v.* Chelsea Marble Works, 62 N. Y. Misc. 626, 115 N. Y. Supp. 1096.

[9] Farron *v.* Sherwood, 17 N. Y. 227; Cobb *v.* Charter, 32 Conn. 358; Pomeroy on Rem., § 517, &c., and cases cited.

To sustain a recovery for money paid for defendant's use, it must be alleged and proved that the money was paid upon the defendant's request, express or implied. Huff *v.* Simmers, 114 Md. 548, 79 Atl. Rep. 1003; Hathaway *v.* Delaware County, 103 N. Y. App. Div. 179, 93 N. Y. Supp. 436, modified in 185 N. Y. 368, 78 N. E. Rep. 153, 113 Am. St. Rep. 909, 13 L. R. A. N. S. 273; Savage *v.* McCorkle, 17 Ore. 42, 21 Pac. Rep. 444; Contoocook Fire Precinct *v.* Hopkinton, 71 N. H. 574, 53 Atl. Rep. 797.

If the plaintiff paid the money at the defendant's request the action will lie. McNerney *v.* Barnes, 77 Conn. 155, 58 Atl. Rep. 714; Chamberlain *v.* Lesley, 39 Fla. 452, 22 So. Rep. 736.

Circumstantial evidence is competent to prove that the plaintiff paid the money at the defendant's request, express or implied. Priest *v.* Hale, 155 Mass. 102, 29 N. E. Rep. 197.

[10] Thus, where the plaintiff accompanied the defendant when the latter was making a purchase, and said in his presence, to the shopkeeper, "if he does not pay for it I will," and defendant was silent, it was held that, although the promise was void for not being in writing, yet plaintiff having paid, as in honor bound, on defendant's default, his payment might be deemed made at defendant's request. Alexander *v.* Vane, 1 M. & W. 511.

Where the money was paid with the intention of its being a loan, the law implies an agreement to repay. Hall *v.* O'Connell, 52 Ore. 164, 95 Pac. Rep. 717, 96 Pac. Rep. 1070.

[11] Paragraph 5.

there must be something to show that he was authorized to bind the defendant.[12] Where several persons are associated for a common purpose, but not being partners, a request made by one to advance money for the benefit of all is enough, if there be circumstances from which his agency for the others may be inferred.[13]

Where a previous request is proved, it is not necessary to prove that the payment was beneficial to the defendant; he is equally liable whether it discharged a debt of his or constituted a loan or gift to a third person.[14] The evi-

[12] Burdick *v.* Glass Co., 11 Vt. 19; McElroy *v.* Melear, 7 Coldw. (Tenn.) 140; Martin *v.* Peters, 4 Robt. 434. See last chapter.

If the request was made by some one who had no authority to bind the defendant the action will not lie. Little Bros. Fertilizer Co. *v.* Wilmott, 44 Fla. 166, 32 So. Rep. 808; Allen *v.* Bobo, 81 Miss. 443, 33 So. Rep. 288.

The burden of proof is on the plaintiff to show the promise to repay. Fallon *v.* Vandesand, 136 Wis. 246, 116 N. W. Rep. 176.

[13] Whether the mere relation of joint contractors in an enterprise is enough to make the request of one support an action for money paid for all is not agreed. Tradesman's Bank *v.* Astor, 11 Wend. 87; Porter *v.* McClure, 15 Id. 191; Chrisman *v.* Long, 1 Ind. 212; and see Bassford *v.* Brown, 22 Me. 9; Moss *v.* Jerome, 10 Bosw. 220. The true principle seems to be that, among persons who have consented to share a common responsibility, there is *prima facie* authority in each from each other to di charge the common burden. Add. on Contr. bk. 2, ch. 8, § 2. The distinction is between authority to incur liability—which is not presumed—and authority to discharge any liability duly assumed. See Chapter VII, paragraphs 5 and 6, of this vol. and notes. Thus, where several persons *jointly* employ attorney or counsel (Edger *v.* Knapp, 6 Scott N. R. 713), or agree on an arbitrator without fixing the liability for expenses, and one pays the expenses in order to take up the award, he may recover one-half. Marsack *v.* Webber, 6 Hurls. & N. 1.

Where the assignee of part of a lease pays the whole rent there is an implied promise on the part of the owners of the balance of the lease to refund the proportionate amount paid. Johnson *v.* Zufeldt, 56 Wash. 5, 104 Pac. Rep. 1132.

[14] Brittain *v.* Lloyd, 14 M. & W. 762; Emery *v.* Hobson, 62 Me. 578, s. c., 16 Am. Rep. 513. But if the payment was solely for the benefit of the plaintiff himself, as where A. promised B. to share the costs of a suit on behalf of B.

dence must bring the payment within the scope of the request.[15]

3. Parol Evidence to Vary a Writing.

If the plaintiff proves a written contract with defendant, which expressly or in effect required plaintiff to bear the expense in question, plaintiff cannot prove a parol agreement made at the same time, that the defendant would pay it; [16] but he may prove such an agreement made prior to the written obligation, unless it be such as was merged in the latter.[17] So he may prove a parol request or promise not

if B. would bring it, as it did not appear that A. could have had any interest in the result—*Held*, that B. could not recover on the promise without proof that his bringing the suit was induced by the promise. Knox *v.* Martin, 8 N. H. 154.

Where money has been paid for the use of the defendant, the request necessary may be either express or implied. It will be implied as well as the promise, where the defendant has adopted and enjoyed the benefit of the consideration. Lee *v.* Virginia, etc., Bridge Co., 18 W. Va. 299.

The fact that the plaintiff was benefited by the expenditure of his own money is immaterial. Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. Rep. 464, 9 Am. St. Rep. 422; Meyer *v.* Livesley, 56 Ore. 383, 107 Pac. Rep. 476, 108 Pac. Rep. 121.

[15] Thus to charge defendant on a promise to pay what may be needed for the support of a minor, beyond his wages, there must be proof that he needed the money paid. Merritt *v.* Seaman, 6 N. Y. 168.

Where plaintiff testifies that he expended moneys at defendant's request, and the defendant denies it and so testifies, and the defendant also produces witnesses who testify that plaintiff's general reputation for truth and veracity is bad and that he is not to be believed under oath, a judgment in favor of the plaintiff will be reversed as against the preponderance of evidence. Enright *v.* Seymour, 4 N. Y. Misc. 597, 24 N. Y. Supp. 704.

[16] Thus where builders, in order to complete work they had contracted in writing to do, paid a license fee—*Held*, that they could not give parol evidence of a contemporaneous promise of the employer to pay it. They must perform their written contract. If they were not bound to make the payment, they would be justified in ceasing work because of his neglect to pay it. Thorp *v.* Ross, 4 Abb. Ct. App. Dec. 416, WOODRUFF, J.

[17] Thus one of several jointly bound, or one of several co-sureties,

contradicting or varying the legal effect of the instrument, though it formed the consideration,[18] or a usage which adds another term to the agreement.[19] In other words, the entire agreement may be proved, notwithstanding a part of it was reduced to writing.[20] So he may prove a parol request or promise made as a condition of delivering the instrument.[21] Where an express promise is proved, the fact that, at the time of making it, the parties agreed to reduce it to writing, but never did so, does not defeat the action.[22]

4. Subsequent Promise to Reimburse.

Where the plaintiff's payment was wholly voluntary or officious, he may recover on proof of a promise [23] to reim-

suing another for indemnity, may prove a parol agreement made at or prior to their written obligation, that defendant would indemnify him. Barry *v.* Ransom, 12 N. Y. 462; Robinson *v.* Lyle, 10 Barb. 512.

[18] See Unger *v.* Jacobs, 7 Hun, 220, and cases cited.

[19] See, for this principle, Broom's Phil. of the Law, 83, etc., and cases cited; Seago *v.* Deane, 4 Bing. 459.

[20] See Hope *v.* Balen, 58 N. Y. 380, affi'g 35 Super. Ct. (J. & S.) 458. Compare Johnson *v.* Oppenheim, 55 N. Y. 280, affi'g 35 Super. Ct. (J. & S.) 440; Brewers' Fire Ins. Co. *v.* Burger, 10 Hun, 58, and cases cited.

[21] See Remington *v.* Palmer, 62 N. Y. 31, rev'g 1 Hun, 619, s. c., 4 Supm. Ct. (T. & C.) 696.

Likewise, a plaintiff was allowed to prove an oral promise, made by the defendants, to pay him a certain sum of money on the condition that he convey his land to a corporation which the defendants were interested in having locate in their town. Birch *v.* Baker, 85 N. J. Law, 660, 90 Am. Rep. 297, L. R. A. 1916, D. 485.

[22] Stover *v.* Flack, 30 N. Y. 64.

Where the plaintiff relies upon an authorization expressed in a telegram, which the defendant denies having sent, the burden is upon the plaintiff to either produce the original message signed by the defendant, or to prove by one of the operators that such message (now lost) was signed and directed by the defendant to be sent. Fox *v.* Pedigo, 19 Ky. Law Rep. 271, 40 S. W. Rep. 249.

[23] An express promise, made not to the plaintiff, but to another person who was privy to the transaction, is enough. Hassinger *v.* Solms, 5 S. & R. 4. But a mere admission to a stranger is not.

If there is a request, express or implied, from that the law implies the requisite promise to repay; and if there was a subsequent express promise to repay, from that

burse, founded on sufficient consideration. There is sufficient consideration within this rule, if the precedent payment was beneficial to defendant,[24] or if it discharged a legal obligation against him, or if it discharged what the law recognizes as a moral obligation.[25] It is not essential to show an express promise, except where the only consideration was a moral obligation; but the promise may be inferred by the jury from an account rendered to which no objection was made.[26] A promise made by one of several former partners after dissolution is not enough as against the others.[27] In the case of joint debtors not partners, a promise by one is not

the law implies the requisite previous request. North *v.* North, 63 Ill. App. 129, aff'd in 166 Ill. 179, 46 N. E. Rep. 729.

[24] Thus if one by mistake pays his neighbor's tax, this is a good consideration for a promise by the latter to repay. Nixon *v.* Jenkins, 1 Hilt. 318; but plaintiff must prove a legal tax. Weinberger *v.* Fauerbach, 14 Abb. Pr. N. S. 91. The defendant's promise to repay one who volunteered to pay an execution may be implied from the defendant's insisting on the payment as satisfaction, and having the execution quashed in consequence. Roundtree *v.* Holloway, 13 Ala. N. S. 357.

But see Massachusetts Mut. Life Ins. Co. *v.* Green, 185 Mass. 306, 70 N. E. Rep. 202, where the plaintiff paid the defendant's taxes believing that he was paying taxes upon his own land. It was held that a subsequent promise by the defendant to reimburse the plaintiff was without consideration and hence unenforceable.

[25] As to what constitutes a moral obligation, see Goulding *v.* Davidson, 26 N. Y. 604, rev'g 28 Barb. 438, and cases cited; Freeman *v.* Robinson, 9 Vroom, 383, s. c., 20 Am. Rep. 399. If the original consideration was beneficial, and plaintiff was legally liable to pay, defendant's subsequent promise to repay will sustain an action, although it was made after he had once been wholly exonerated. Hassinger *v.* Solms, 5 S. & R. 4.

To maintain an action for money paid for the defendant it was held necessary for the plaintiff to show the defendant's liability on the debt which was paid. Mobile Light & R. Co. *v.* S. D. Copeland & Son, 73 So. Rep. (Ala.) 131.

[26] See Quincey *v.* White, 63 N. Y. 370, and cases cited; Coe *v.* Hutton, 1 Serg. & R. 398; McLellan *v.* Longfellow, 34 Me. 552.

[27] Baker *v.* Stackpoole, 9 Cow. 420; Van Keuren *v.* Parmelee, 2 N. Y. 523; McElroy *v.* Melear, 7 Coldw. (Tenn.) 140. But see, for authorities *contra*, notes to paragraphs 33 and 34 of chapter IX, of this vol.

enough as against the others to revive a legal obligation once barred.[28]

5. Agent's Action against Principal.

A request or agency is not presumed from the mere fact that plaintiff paid defendant's debt;[29] and agency being shown,[30] the agent must show payments pursuant to his instructions or within his authority. In an action for money paid he cannot recover for property bought by himself as his own, and afterward transferred to account of his principal.[31] On the question whether the act of the agent was

[28] Lewis *v.* Woodworth, 2 N. Y. 512. Whether it is enough in any other case, see chapter VII, paragraph 6, of this vol.

[29] Stephens *v.* Broadnax, 5 Ala. N. S. 258.

[30] As to how far circumstantial evidence of agency is competent,—see Richards *v.* Millard, 56 N. Y. 574, rev'g 1 Supm. Ct. (T. & C.) 247. The agency, though it be in the purchase of land, may be proved by parol. Baker *v.* Wainwright, 36 Md. 336. Compare Levy *v.* Brush, 45 N. Y. 589, rev'g 8 Abb. Pr. N. S. 418. The fact that plaintiff acted as ship's husband is sufficient *prima facie* evidence of his appointment; and if an owner relies on his refusal to be answerable for expenses incurred, he must show that his notice was given before the work was commenced. Chappell *v.* Bray, 6 H. & N. 145.

"An agency to pay the debts of a principal with the resources of the agent is not one greatly to be desired by the agent, nor one which should be imposed on an unwilling victim of such an undertaking, on doubtful and conflicting testimony." Angle *v.* Manchester, 3 Nebr. (Unoff.) 252, 91 N. W. Rep. 501.

Where a stranger indorses the individual note of an agent and then sues the principal for money paid to the latter's use, parol evidence may be introduced to show that the agent was acting in his representative capacity when he obtained the indorsement. Sauer *v.* Brinker, 77 Mo. 289.

[31] Field *v.* Syms, 2 Robt. 35, S. P., Beck *v.* Ferrara, 19 Mo. 30. Not even on proof of a usage of his trade to do so, not shown to be known to defendant. Day *v.* Holmes, 103 Mass. 306.

According to Hoy *v.* Reade, 1 Sweeny 626, an agent employed to purchase goods, and suing to recover his advances and charges, makes a *prima facie* case by proof of a purchase pursuant to principal's direction, the amount expended therefor, and the disbursements, charges and commissions, and that the same were necessary

done in good faith in pursuance of his supposed duty, the information and advice upon which he acted is competent as part of the *res gestæ*.[32] For the purpose of showing the manner of executing the defendant's order, the plaintiff's instructions to those by whom he carried it out, his letters to a sub-agent, etc., are competent in his own favor as part of the *res gestæ*.[33] If it is shown that he acted in good faith,

and usual; and if, before action brought by the agent, he has wrongfully converted the goods purchased, such conversion does not defeat the action, unless the principal, if he still remain the owner of the property, counterclaims the value. According to the opinion of MILLER, J., in Rosenstock *v.* Tormey, 32 Md. 169, s. c., 3 Am. Rep. 125, in a stockbroker's action to recover deficiency on resale by him, on his principal's default, of stock bought on his order, plaintiff must prove actual purchase and notice to defendant thereof given at a time when he or his agents had the stock or the proper *indicia* of title actually in hand and ready to be delivered; and that, upon such notice and request for payment of price and commissions, the defendant did not pay for the stock, and that, after reasonable time and giving notice of intent to resell, the stock was actually sold, either at public auction or at a sale publicly and fairly made at the stock exchange or board where such stocks were usually sold, at its fair market price on the day of sale. It is not necessary to prove a tender, nor to prove a resale at a *public* stock board [citing 25 Md. 242]; but while evidence of the usage of dealers in stocks is admissible, (if the broker was not limited to a specified authority), to show the manner in which the order may be performed, it is not admissible to set up against one not shown to be cognizant of the usage, a usage which the law deems unreasonable; *e. g.*, a fictitious purchase or sale. Id. The plaintiff need not show affirmatively that those from whom he purchased were actually in possession of the stock at the time of the purchase, in order to prevent the stock-jobbing act from rendering the contract void. Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213.

Likewise, where, after an agent had secured a loan for its principal with which to pay off the latter's mortgages, it neglected to pay off one mortgage before it was foreclosed, it was held that it could not recover, in an action for money paid to the defendant's use, the foreclosure costs and expenses of redemption. Veltum *v.* Koehler, 85 Minn. 125, 88 N. W. Rep. 432.

[32] See Law *v.* Cross, 1 Black 533, 539.

[33] Rosenstock *v.* Tormey, 32 Md. 169, s. c., 3 Am. Rep. 131. See Tyng *v.* Woodward, 121 Md. 422, 88 Am. Rep. 243. But his sub-agent's

supposing that he was acting under the instructions and for the interest of his principal, the latter, if he received the benefit of the transaction, must show that, when he was informed of the act, he gave notice of his repudiation of it within a reasonable time.[34] What is a reasonable time is a question for the court, if the facts are undisputed; but if the evidence is conflicting, it is a mixed question of law and fact, and the court should instruct the jury upon the several hypotheses insisted on by the parties.[35] Costs and expenses for which the agent has been held liable to third persons, when acting in good faith and without fault, on behalf of his principal, he may pay and recover from the latter without proof of a special request or authority to pay them.[36] The fact of advances having been shown, an account rendered by plaintiff to the defendant stating their amount and not

letters to him are not competent primary evidence of the making the purchase. Id. Compare, however, Beaver *v.* Taylor, 1 Wall. 637; and see 3 Wall. 149; Kahl *v.* Jansen, 4 Taunt. 565; Fairlie *v.* Hastings, 10 Ves. 128; Betham *v.* Benson, 1 Gow. 45; Langhorn *v.* Allnutt, 4 Taunt. 511.

[34] Law *v.* Cross, 1 Black, 533; Hoyt *v.* Thompson, 19 N. Y. 218.

[35] Wiggins *v.* Burkham, 10 Wall. 129.

[36] Stocking *v.* Sage, 1 Day, 522, SWIFT, Ch. J.; Powell *v.* Trustees of Newburgh, 19 Johns. 284, SPENCER, Ch. J.; and see Douglas *v.* Moody, 9 Mass. 548. If the liability arose by reason of the agent's mistake of law and consequent error in duty in a matter which the employer properly trusted to him, he can ot recover. Capp *v.* Topham, 6 East 392. Otherwise it was imposed by law on him, and it was by his delay that the principal became directly liable. Hales *v.* Freeman, 4 Moore, 21; Bate *v.* Payne, 13 Ad. & E. N. S. (Q. B.) 900.

Where, under a general authority the plaintiff was an agent of the defendants, there can be no objection to the plaintiff's introducing in evidence testimony as to amounts actually expended by him for labor and materials. Radel *v.* Lesher, 137 Fed. Rep. 719, 70 Cir. Ct. App. 411.

The defendant bank in whose hands the plaintiff had placed certain valuable papers was allowed to retain out of the amount the plaintiff had on deposit with it the sum which the bank had expended as attorney's fees in fighting an attachment levied on the said papers. Bacon *v.* Fourth Nat. Bank, 9 N. Y. Supp. 435.

objected to by the defendant, is *prima facie* evidence of the amount,[37] and throws on defendant the burden of proving that the advances were less or the fund on hand greater.[38]

6. Obligation to Pay what Defendant Ought Rather to have Paid.

Neither a previous request to pay, nor a subsequent promise to reimburse, need be proved, where plaintiff shows that, either by compulsion of law, or to relieve himself from liability, or to protect himself from damage, he has been obliged to pay what defendant himself ought to have paid.[39] The

[37] Mertens *v.* Nottebohms, 4 Gratt. (Va.) 163, 168, 173. So an account of sales made, and rendered to one of the parties to a joint adventure, by the consignee and common agent of both parties to sell, is admissible in the action of the former against the other party, for money paid, to prove the loss. Peltier *v.* Sewall, 12 Wend. 386.

[38] Ledoux *v.* Porche, 12 Rob. 543.

[39] Bailey *v.* Bussing, 28 Conn. 455. The leading case on the general principle is Exall *v.* Partridge, 8 T. R. 314. There plaintiff, at defendant's request, left his coach in defendant's possession, and while there it was lawfully distrained by defendant's landlord for non-payment of rent, and plaintiff paid the rent to secure his carriage, and recovered it of defendant. But in England *v.* Marsden, L. R. 1 C. P. 529, the owner of furniture, for his own advantage in letting it, left it on the defendant's premises, and it was distrained in the same manner—*Held*, that his payment of the rent was not compulsory within the rule. So, where a part owner of lands is obliged to pay the tax on the whole, to protect his share, he may recover from the other owners their just proportion, without showing any assent on their part. Graham *v.* Dunnigan, 2 Bosw. 516; but if the tax collector pays a man's tax, he cannot recover it without some evidence of the assent of the latter. Overseers of Wallkill *v.* Overseers of Mamakating, 14 Johns. 87.

Where the plaintiff has been compelled to pay what the defendant ought to have paid, plaintiff can recover on an implied promise to repay. Volker *v.* Fisk, 75 N. J. Eq. 497, 72 Atl. Rep. 1011.

Where the plaintiff has paid defendant's debt in order to protect the plaintiff's property he may recover from the defendant. Weiss *v.* Guerineau, 109 Ind. 438, 9 N. E. Rep. 399.

Where the plaintiff could protect himself from damage by procuring an injunction or restraining order instead of paying the money he cannot recover. Manning *v.* Pol-

most common instances of this kind are where a surety or one entitled to indemnity [40] pays the obligation of the de-

ing, 114 Ia. 20, 83 N. W. Rep. 895, 86 N. W. Rep. 30.

One who is compelled to pay a debt, or whose property is made liable for a debt, which another in good conscience ought to pay, is entitled to recover against that other the amount so paid. Finnell *v.* Finnell, 159 Cal. 535, 114 Pac. Rep. 820.

Where the plaintiff owner of real estate pays money to subcontractors of the defendant who has abandoned his contract, it is incumbent on the plaintiff in his action against the defendant to show (1) the amount which was due defendant on the contract, (2) the amount and value of the work done by the lienors, and (3) a valid lien upon his premises for the value or agreed price of such work. Stevens *v.* Smith, 112 N. Y. Supp. 361.

Where the plaintiff, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money not officiously, which the defendant ought to have paid, the law implies a request on the defendant's part, and a promise to repay, and the plaintiff has the same right of action as if he had paid the money at the defendant's express request. San Gabriel Valley Land, etc., Co. *v.* Witmer, 96 Cal. 623, 29 Pac. Rep. 500, 31 Pac. Rep. 588, 18 L. R. A. 465, 470; Nutter *v.* Sydenstricker, 11 W. Va. 535; Atlantic, etc., R. R. *v.* Atlantic, etc., Co., 147 N. C. 368, 61 S. E. Rep. 185, 125 Am. St. Rep. 550, 23 L. R. A. N. S. 223, 15 Ann. Cas. 363; Nichols *v.* Bucknam, 117 Mass. 488; Bailey *v.* Bishop, 152 N. C. 383, 67 S. E. Rep. 968.

If a tenant covenants in a lease to make certain payments the landlord may recover where he, instead of the tenant, has made such payments. Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. 640, 64 Atl. Rep. 398.

[40] If there is a written obligation to indemnify, the action will usually be upon that, and not an action merely for money paid to defendant's use.

"We think it clear that a cosurety, who has been obliged to satisfy the joint liability of the several sureties, may recover at common law and under the common counts the amount due by way of contribution from a cosurety." Porter *v.* Horton, 80 Ill. App. 333.

"The right of contribution does not arise out of any contract or agreement between co-sureties to indemnify each other, but on the principle of equity, which courts of law will enforce, that where two persons are subject to a common burden, it shall be borne equally between them. In such cases the law raises an implied promise from the mutual relation of the parties." Warner *v.* Morrison, 3 Allen, 556, quoted with approval in Weeks *v.*

fendant and sues for reimbursement, or where one of several joint obligors, having paid the whole debt, sues his co-obligors for contribution. In this class of cases, the fact that plaintiff was legally required to pay defendant's debt, stands in the place of request or promise. But it not enough to prove that plaintiff paid under the mistaken supposition that he was legally liable.[41]

7. Surety's Action against Principal or Co-surety.

If the instrument in which several persons are bound to another describes some of them as sureties for others, or if the signatures of some state that they are sureties for others, this is *prima facie* evidence, as between the obligors, of their

Parsons, 176 Mass. 570, 58 N. E. Rep. 157.

"When a surety pays the debt of his principal, an implied promise arises on the part of the principal to reimburse the surety, and that promise will support an action at law." Bauer *v.* Gray, 18 Mo. App. 164, 170.

A surety who made a payment on his principal's account was presumed to have done so at the latter's request. Blanchard *v.* Blanchard, 61 Misc. 497, 113 N. Y. Supp. 882.

[41] Bancroft *v.* Abbott, 3 Allen (Mass.) 524; Whiting *v.* Aldrich, 117 Mass. 582. But one who, under the mistaken supposition that he is a trustee, pays money for the estate, may be entitled to reimbursement. Morrison *v.* Bowman, 29 Cal. 337. And one who by mistake or ignorantly pays defendant's debt, may recover it, if defendant had notice and suffered it to be done. Ely *v.* Norton, 2 Abb. Ct. App. Dec. 19.

In Foot *v.* Cotting, 195 Mass. 55, 60, 80 N. E. Rep. 600, 15 L. R. A. N. S. 693, it was stated that the plaintiff could maintain an action to recover money paid in taxes on the defendant's property only when the claim was "founded upon a request to the plaintiff to advance the money, either actually made or arising out of the legal relations of the parties, or if voluntarily advanced, then on subsequent ratification."

A principal contractor was held to be under no legal duty to pay claims against his subcontractor until liens for such claims were filed and actions commenced thereon, and in the absence of a request by the subcontractor or a subsequent promise to pay, such payments were merely voluntary. Trippensee *v.* Braun, 104 Mo. App. 628, 78 S. W. Rep. 674.

relation.[42] If the signature of one does not indicate for which of several signing absolutely he is a surety, it may be presumed, in the absence of other evidence, either in the tenor of the instrument or in the extrinsic circumstances, that he was surety for all previously signing.[43] But between the parties who are either principals or sureties, the question of suretyship in a written instrument is open to parol proof.[44] Such evidence does not vary the instrument, but is collateral to it, simply showing the relation of the parties.[45] Hence,

[42] Harris *v.* Warner, 13 Wend. 400.

Where one pays money as surety for another it is recoverable in an action for money paid to defendant's use. Teter *v.* Teter, 65 W. Va. 167, 63 S. E. Rep. 967.

[43] See Sisson *v.* Barrett, 6 Barb. 199, 2 N. Y. 406.

Where a father and son signed a note with others as a joint obligation which one of the signers thereafter paid, the son, in an action for contribution, was not allowed to set up an agreement that he had merely signed as surety for his father, where such agreement was unknown to the other obligors on the note. Greene *v.* Anderson, 19 Ky. Law, 1187, 43 S. W. Rep. 195.

In Sayles *v.* Sims, 73 N. Y. 551, where three parties signed a note and the word 'surety' was affixed to the last signature, the court stated that the word 'surety' attached to defendant's name would indicate that he was surety for both the other signers (and not co-surety with one of them, the plaintiff,) but that it was not conclusive. The circumstances were held, however, to show that the defendant intended to become surety for both. See also Houck *v.* Graham et al., 106 Ind. 195, 200, 6 N. E. Rep. 594, 55 Am. Rep. 727, where it is stated that "the rule is that where parties appear to be sureties they will be presumed to be co-sureties."

[44] Sisson *v.* Barrett, 6 Barb. 200, 2 N. Y. 406.

It is a general rule, and one well established, that the relation the parties occupy on the paper, whether as principal or surety, may be shown by parol, and this rule applies also as between those of the obligors who are sureties, the liability of each to be determined by any contract they may have entered into with each other. Chapeze *v.* Young, 87 Ky. 476, 9 S. W. Rep. 399.

The undertaking of a co-maker (of a note) may be that of a principal or a surety, and the obligation intended to be assumed may be shown by parol as between the signors. Clement Nat. Bank *v.* Connelly, 88 Vt. 55, 90 Atl. Rep. 794.

[45] Blake *v.* Cole, 22 Pick, 97; Barry *v.* Ransom, 12 N. Y. 462; Apgar *v.* Hiler, 4 Zabr. 812; Hub-

parol evidence is competent to show that one who signed without qualification was in fact surety, and for whom;[46] and that one who signed with qualification was in fact a principal;[47] and that one who signed as surety generally was a co-surety with one who signed without qualification,[48] or that he signed under promise of indemnity.[49] Such evidence is admissible alike in support of an action by one claiming to be surety, for reimbursement; or by one claiming to be co-surety, for contribution; and in defense of one sued as principal, for contribution, and claiming to be surety; or sued as co-surety, and claiming to be indemnified.[50] The promise to indemnify may be proved by parol, for it is not a promise to answer for the debt, etc., of a third person,

bard *v.* Gurney, 64 N. Y. 457; and see 11 Moak's Eng. R. 41, n.; Monson *v.* Blakely, 40 Conn. 552, s. c., 16 Am. Rep. 94. The reason of the rule forbidding parol evidence to vary a writing,—viz., that the parties may be presumed to have embodied all the terms of their contract in the writing,—cannot justly apply to the arrangements between several parties upon one side as to how they will bear the resulting liability, as among themselves, unless the contract manifest an intention to define their relation toward each other.

The apparent rights of the indorser on the face of a note as well as the contract of indorsement can be qualified and changed by parol evidence. Witherow *v.* Slayback, 158 N. Y. 649, 53 N. E. Rep. 681, 70 Am. St. Rep. 507.

[46] Robison *v.* Lyle, 10 Barb. 512, HARRIS, J.; Mohawk & Hudson R. R. Co. *v.* Costigan, 2 Sandf. Ch. 306.

Though the defendant's agent appeared as principal on a bond which the plaintiff paid, parol evidence was held admissible to show that the defendant was an undisclosed principal. City Trust, etc., Co. *v.* American Brewing Co., 70 App. Div. 511, 75 N. Y. Supp. 140.

An indorser of a promissory note is not to be presumed to be the co-surety of one who signs as maker, but parol evidence is admissible to prove that he did sign as co-surety. Knopf *v.* Morel, 111 Ind. 570, 13 N. E. Rep. 51.

[47] Robison *v.* Lyle (above); see also Sisson *v.* Barrett, 6 Barb. 199.

[48] Sisson *v.* Barrett (above).

And similarly parol evidence was held competent to show that successive indorsers of a note were co-sureties. Weeks *v.* Parsons, 176 Mass. 570, 58 N. E. Rep. 157.

[49] Barry *v.* Ransom, 12 N. Y. 462.

[50] Same cases.

within the meaning of statute of frauds.[51] For this purpose evidence of declarations made either at the time of negotiating the loan, or at the time of signing the obligation are equally competent as part of the *res gestæ*.[52] It is not enough for a surety to show that he became surety voluntarily without the request or assent of the alleged principal.[53] Evidence of defendant's admission that plaintiff was his surety is competent; but to charge several defendants (not partners), such admission or declaration of one made in the absence of the others is not competent against the others,

[51] Barry *v.* Ransom, 12 N. Y. 462; Horn *v.* Bray, 51 Ind. 555, s. c., 19 Am. Rep. 742, and cases cited. *Contra*, Bissig *v.* Britton, 59 Mo. 204, s. c., 21 Am. Rep. 379. So, an agreement between two separate indorsers that if one will pay in goods the other will reimburse him, may be proved by parol. Sanders *v.* Gillespie, 59 N. Y. 250, affi'g 64 Barb. 628.

Where the promisee, under the promisor's agreement to indemnify and save him harmless, becomes jointly liable as co-surety with him for the same obligor, such agreement is held to be an original undertaking, and not within the statute. Rose *v.* Wollenberg, 31 Or. 269, 44 Pac. Rep. 382, 39 L. R. A. 378, 65 Am. St. Rep. 826. See also Peterson *v.* Creason, 47 Or. 69, 81 Pac. Rep. 574. The same rule obtained where the promisee became a guarantor. Jones *v.* Bacon, 145 N. Y. 446, 40 N. E. Rep. 216; O'Brien *v.* Donnelly, 169 App. Div. 709, 155 N. Y. Supp. 790.

An oral promise made by one party to indemnify another for becoming a co-surety on a third person's obligation was held to be an original and enforceable undertaking, not within the statute. Hartley *v.* Sanford, 66 N. J. Law, 40, 48 Atl. Rep. 1009. See also Clark *v.* Toney, 17 Ga. App. 803, 88 S. E. Rep. 690.

[52] Robinson *v.* Lyle, 10 Barb. 512, Harris, J., 1851; s. p., 12 N. Y. 462, Denio, J.

[53] Gager *v.* Babcock, 48 N. Y. 154; McPherson *v.* Meek, 30 Mo. 345; Carter *v.* Black, 4 Dev. & B. L. 425. But tacit assent is enough. Alexander *v.* Vane, 1 M. & W. 511. The requirement of the law that a creditor should give security for the support of a debtor imprisoned on his execution, if the debtor make oath of his own inability, has been held sufficient to enable a creditor, paying pursuant to security so given, to recover of the debtor. Plummer *v.* Sherman, 29 Me. 555.

A voluntary guaranty of a note payable to a third party gave the guarantor no right to recover the amount which he had been obliged to pay. Ricketson *v.* Giles, 91 Ill. 154.

unless there is something to show that the declarant had authority to speak for them.[54]

When the relation of suretyship or of co-suretyship is shown the law implies the promise to reimburse [55] or to contribute.[56] A co-surety may recover full indemnity, but not without proof of an agreement,[57] or a request and benefit raising an equity which, under the circumstances, is equivalent.[58] Mere evidence that plaintiff became co-surety at defendant's request is not enough.[59]

[54] Warner *v.* Price, 3 Wend. 397, and see chapter VII, paragraph 5, of this vol.

[55] Holmes *v.* Weed, 19 Barb. 128; Vartie *v.* Underwood, 18 Id. 561. If there are several principals, the liability of either to the surety is not qualified by evidence that, as between the principals, the one was not liable for the whole debt. Westcott *v.* King, 14 Barb. 32.

There is an implied obligation on the principal to reimburse the surety who has paid the principal's debt. Mosely *v.* Fullerton, 59 Mo. App. 143, 150.

A surety company which had paid a sum of money on an employee's indemnity bond for the latter's misconduct brought an action against the employee's administrators to recover the amount paid. It was held that the law implied a promise on the part of the employee to save the company harmless. U. S. Fidelity & Guaranty Co. *v.* Gray's Admrs., 97 Atl. Rep. (Del.) 425.

[56] Norton *v.* Coons, 3 Den. 130, and cases cited.

One of the three joint and several guarantors of payment, who has paid the full amount due under the guaranty has a right to recover contribution of one-third of the amount paid against the estate of one of his co-guarantors, and no short statute of limitations available to the obligee can be availed of to destroy such right of contribution. Hard *v.* Mingle, 141 N. Y. App. Div. 170, 126 N. Y. Supp. 51.

The law implies an obligation on the part of co-sureties to pay their proportionate amount of the entire liability which one surety has paid. Mosely *v.* Fullerton, 59 Mo. App. 143, 150.

[57] McKee *v.* Campbell, 27 Mich. 497.

A surety alleging a promise by a co-surety to indemnify him for anything paid in excess of one-third of the principal obligation was held to have the burden of proving either an express agreement to that effect or one implied from the conduct of the parties. Rose *v.* Wollenberg, 36 Or. 154, 59 Pac. Rep. 190.

[58] See Daniel *v.* Ballard, 2 Dana (Ky.) 296.

[59] McKee *v.* Campbell (above). *Contra*, see Byers *v.* McClanahan, 6 Gill. & T. 499.

It is enough for the surety to prove that his payment was under a fixed legal liability; he need not prove legal compulsion to pay, as by suit brought; [60] nor need he show, to charge a co-surety for contribution, that the principal is unable to pay.[61] The implied promise may be rebutted by circumstances.[62] The mere fact that the defendant became surety at the request of plaintiff is not, however, sufficient to rebut the presumption of a promise to contribute; [63] nor is the fact that he did not sign till a long time after the other parties were bound; [64] but evidence that the plaintiff, upon requesting the defendant to join, expressly promised to indemnify him,[65] or that he should be put to no loss,[66] or evidence that plaintiff received a personal benefit from the execution of the obligation, as where the money raised went into his hands,[67] is sufficient to exonerate the defendant from liability to contribute.

8. Implied Promise to Indemnify.

If plaintiff incurred the liability by innocently complying with the request or direction of the defendant, (whether he

[60] Mauri *v.* Heffernan, 13 Johns. 58; compare Stone *v.* Hooker, 9 Cow. 154.

"We think it clear that a surety, who is in law bound to pay an obligation, has an undoubted right to pay the same, and to proceed against his principals or co-sureties for indemnity or repayment," without having a suit instituted against himself or his principal, and judgment rendered. May *v.* Ball 108 Ky. 180, 56 S. W. Rep. 7.

[61] Goodall *v.* Wentworth, 20 Me. 322. *Contra,* Atkinson *v.* Stewart, 2 B. Monr. 348.

The insolvency of the principal need not be alleged or proved. Mosely *v.* Fullerton, 59 Mo. App. 143. See also Boutin *v.* Etsell, 110 Wis. 276, 85 N. W. Rep. 964.

[62] Bagott *v.* Mullen, 32 Ind. 332, s. c., 2 Am. Rep. 351.

[63] Id. (disapproving Chit. on Cont. 669. and see chapter XIII, paragraph 7, and notes thereto, of this vol.).

[64] In this case, eight months. McNeil *v.* Sandford, 3 B. Monr. (Ky.) 11.

[65] Thomas *v.* Cook, 8 B. & C. 728; Cutter *v.* Emery, 37 N. H. 567. See Garner *v.* Hudgins, 46 Mo. 399, s. c., 2 Am. Rep. 520.

[66] Apgar *v.* Hiler, 4 Zabr. 812.

[67] Daniel *v.* Ballard, 2 Dana (Ky.), 296, s. p., 21 Pick. 196, 32 Ind. 332, s. c., 2 Am. Rep. 355.

was the agent [68] of defendant, or not),[69] in an act which would have been lawful if plaintiff had the right or authority which he claimed or assumed, the law implies a promise on defendant's part to indemnify plaintiff. No such promise is implied when plaintiff knew the act was illegal.[70] Where the wrong done consisted in negligence merely, plaintiff, who has been obliged to pay, may recover, on proof that, as between him and defendant, the latter was the one actually negligent, and the former only constructively liable therefor.[71] In either class of cases, the judgment against plaintiff

[68] Howe *v.* Buffalo, &c., R. R. Co., 37 N. Y. 297, affi'g 38 Barb. 124.

See Culmer *v.* Wilson, 13 Utah, 129, 44 Pac. Rep. 832, 57 Am. Rep. 713, where a trustee, innocent of any knowledge of the illegality of his act, and at the request of his *cestui que trust* obtained a judgment in a court which was subsequently found to have no jurisdiction over the matter.

[69] Dugdale *v.* Lovering, L. R. 10 C. P. 196, s. c., 12 Moak's Eng. R. 316.

[70] Peck *v.* Ellis, 2 Johns. Ch. 131; Miller *v.* Fenton, 11 Paige, 18.

Among wrongdoers, equity will not compel contribution or enforce subrogation. Gilbert *v.* Finch, 173 N. Y. 455, 66 N. E. Rep. 133, 93 Am. St. Rep. 623, 61 L. R. A. 807.

When one party paid for the wrongful acts of another for which he was not equally culpable or *in pari delicto*, it was held that he could recover indemnity of the person actually guilty of the wrong, though as to third parties either were liable. Balto., etc., R. R. Co. *v.* Howard Co., 113 Md. 404, 77 Atl. Rep. 930. See also cases in notes 40 L. N. S. 1147.

[71] Gray *v.* Boston Gas-Light Co., 114 Mass. 149, s. c., 19 Am. Rep. 324. See also Hart Twp. *v.* Noret, 191 Mich. 427, 158 N. W. Rep. 17, L. R. A. 1910, F. 83; Spiess *v.* Linde, 160 N. Y. Supp. 1105.

The plaintiff had the burden of proving that a judgment was recovered against it, not only because of the defendant's negligence, but through no personal negligence of its own. Oceanic Steam Navigation Co. *v.* Campania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. Rep. 360.

Where one of two or more persons chargeable with negligence was primarily liable therefor and the others were only liable by reason of their ownership of the property and not by reason of any negligence occurring by their active interposition or with their affirmative knowledge and assent, the latter are entitled to indemnity. Scott *v.* Curtis, 195 N. Y. 424, 88 N. E. Rep. 794, 133 Am. St. Rep. 811, 40 L. R. A. N. S. 1147.

and defendant, holding them jointly liable to the third person, and which judgment plaintiff has paid, may be explained by parol evidence to show the relation of the parties to the tort.[72] If the verdict or judgment which plaintiff has paid was in an action against both, or against one and defended at his request by the other, or defended by plaintiff, after notice and request to defendant to assume its defense, it is evidence against defendant of the amount of damages.[73]

9. Action between Parties to Negotiable Paper.

An action on the bill or note is founded directly on the instrument, and a release or other discharge, though given before maturity, may bar the action.[74] But an action for money paid on it, is on a cause of action which did not arise until the payment, and which consists in the right of one paying money for the benefit of another, pursuant to his request or direction, to have it refunded;[75] and although the

[72] Bailey *v.* Bussing, 28 Conn. 455; Armstrong County *v.* Clarion County, 66 Penn. St. 218, s. c., 5 Am. Rep. 368. See McArthor *v.* Ogletree, 4 Ga. App. 429, 433, 61 S. E. Rep. 859.

[73] See Inhabitants of Westfield *v.* Mayo, 122 Mass. 100, s. c., 23 Am. Rep. 292; Grand Trunk Ry. Co. *v.* Latham, 63 Me. 177. See also Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316, 16 S. Ct. 564, 40 L. ed. 712; Bloomington *v.* Chicago, etc., R. Co., 52 Ind. A. 510, 98 N. E. Rep. 188; Hill Steamboat Line *v.* N. Y. C., etc., R. Co., 94 Misc. 118, 158 N. Y. Supp. 1084.

Where the defendant had notice of the action in which a judgment was recovered against the plaintiff for an act for which the defendant was primarily liable, and was present at the trial thereof, it was held that, under the evidence, a peremptory instruction to find for the plaintiff the amount it had paid upon the judgment should have been given. Harrodsburg *v.* Vanarsdall, 148 Ky. 507, 147 S. W. Rep. 1.

[74] Cuyler *v.* Cuyler, 2 Johns. 186.

[75] Wright *v.* Garlinghouse, 26 N. Y. 539. See In re Barnes' Estate, 158 N. W. Rep. (Iowa) 754.

The cause of action by an indorser of a promissory note against the maker does not arise until he has in fact made payment on the note by reason of his liability as indorser. The statute of limitations begins to run from the time of such payment and not from the time the note became due. Blanchard *v.* Blanchard, 61 N. Y. Misc. 497,

negotiable paper, pursuant to the terms of which the payment was made, may be part of the necessary evidence,[76] the contract sued on does not inhere in the paper, but exists outside of it; and variance in the description of the paper is but of trifling importance.[77] Presumptively the right to claim reimbursement arises in the inverse order in which the names of the parties appear on the paper.[78] The promise to reimburse may be proved by parol, though contradictory to the apparent relation arising from the paper; as where an accommodation maker sues the payee,[79] or an accommodation acceptor sues the drawer.[80] So a parol agreement made between indorsers at the time of indorsing, that they will share any liability thereon, may be proved, to support an action by one against the other for contribution. Proof that an acceptance was made without funds rebuts this presumption arising from the order of names on the paper, and raises the presumption of such a promise by the

113 N. Y. Supp. 882; Norton *v.* Hall, 41 Vt. 471.

[76] Id.

[77] Cameron *v.* Warbritton, 9 Ind. 351.

[78] Watson *v.* Shuttleworth, 53 Barb. 357; Sweet *v.* McAllister, 4 Allen, 353.

[79] Seymour *v.* Minturn, 17 Johns. 175.

An accommodation indorser who paid the note may maintain an action for money paid for the maker thereof. Blanchard *v.* Blanchard, 61 Misc. 497, 113 N. Y. Supp. 882.

[80] Wright *v.* Garlinghous (above); Ross *v.* Espy, 66 Penn. St. 481, s. c., 5 Am. Rep. 394; Phillips *v.* Preston, 5 How. (U. S.) 278. But such a parol agreement between maker and indorser is not competent for the purpose of showing that the indorser is not entitled to recover against the maker, if the indorser was under no legal obligation for the consideration, and refused to contract except in that form. Crater *v.* Binninger, 45 N. Y. 545, affi'g 54 Barb. 155. To charge one who signed as surety for the drawer, there must be some evidence that he was a party to the request to accept for accommodation. Wright *v.* Garlinghouse, 26 N. Y. 539, rev'g 27 Barb. 474.

Where the defendant gives a check to a third person and states on the face of the check that it is in payment of the plaintiff's note, the defendant cannot charge the plaintiff with the amount of the check. Sheldon Canal Co. *v.* Miller, 40 Tex. Civ. App. 460, 90 S. W. Rep. 206.

drawer to reimburse. This latter presumption again is rebutted by evidence that the acceptance was by express agreement for accommodation of the payees, or other parties who were to be looked to for payment. It is only in the absence of an express agreement that the law implies a promise on the part of the drawer.[81] In the action for money paid, evidence of demand and notice of nonpayment is necessary to charge the defendant if it would have been necessary in an action against him by the same plaintiff directly upon the bill or note itself;[82] otherwise not. But a judgment recovered by a former holder against the defendant is competent evidence from which to infer that he had notice.[83]

10. Proof of Payment.

To sustain this action (as distinguished from an action on a contract to indemnify from liablity, etc.), actual payment must be shown.[84] Proof of the mere incurring of liability is not sufficient,[85] even as to incidental items,[86] nor is it made sufficient by the fact that the creditor accepted

[81] Thurman *v.* Van Brunt, 19 Barb. 410, HARRIS, J.

[82] Wilbur *v.* Selden, 6 Cow. 162.

[83] Hamilton *v.* Veach, 19 Iowa, 419. Even though plaintiff was not a party to the action in which the judgment was had. Keeler *v.* Bartine, 12 Wend. 110. Compare Beck *v.* Hunter, 3 La. Ann. 641.

[84] But under an agreement to pay personal expenses on a journey, such expenses as he avoided by means of facilities personal to himself, may be proved. Moore *v.* Remington, 34 Barb. 427.

Where the complaint alleges a promise to repay, it is incumbent on the plaintiff to produce evidence to support it. Wright *v.* Anderson, 117 N. Y. Supp. 209.

One cannot maintain an action for contribution by a joint obligor until the original obligation has been paid. Weidemeyer *v.* Landon, 66 Mo. App. 520.

Where the plaintiff alleged that he had been compelled to pay his own note which the defendant had assumed, it was held that the plaintiff must show actual payment by himself, since his action was on the theory of money paid for defendant's use rather than upon defendant's promise to pay the note. Tibbett *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. Rep. 815.

[85] Ainslie *v.* Wilson, 7 Cow. 662.

[86] Whiting *v.* Aldrich, 117 Mass. 582.

the plaintiff's obligation in discharge of the defendant's liability,[87] unless the new obligation was negotiable paper.[88]

11. —by Oral Evidence.

A witness of the fact of payment may testify to it, and, if an actor in the transaction, to the purpose and object of it, under the same restrictions as in the case of a loan.[89] But he must speak from his knowledge of the transaction, not from that subsequently derived from receipts or other memoranda.[90] But memoranda of payment, made by the witness at or presently after the time, may be used by him in testifying, and thereupon put in evidence.[91] If it be proved that a receipt was given, it need not (unless the receipt of a public officer) be produced or accounted for in order to let in oral evidence of the fact of payment,[92] unless its terms become material. Evidence of the oral admissions or declarations

[87] The giving of a bond, though accepted in satisfaction, is not enough (Maxwell *v.* Jameson, 2 B. & Ald. 51, and cases cited; Cumming *v.* Hackley, 8 Johns. 202; Ainslie *v.* Wilson, 7 Cow. 662); nor is a bond and warrant of attorney (Taylor *v.* Higgins, 3 East, 169); nor indorsing a bill given to make a compromise and release defendant's property (Douglas *v.* Moody, 9 Mass. 548); nor even the fact that plaintiff has been charged in execution (Powell *v.* Smith, 8 Johns. 249.)

[88] See paragraph 16 (below).

A surety who discharged the sureties' obligation on a note by giving his own note, negotiable by the law merchant, was held to have made such payment as would entitle him to indemnity. Nixon *v.* Beard, 111 Ind. 137, 12 N. E. Rep. 131. Likewise, where, as contribution, he gave his note to his co-surety it was held he could maintain a suit for indemnity against his principal. Stone *v.* Hammell, 3 Cal. Unrep. Cas. 128, 22 Pac. Rep. 203. And in Flannagan *v.* Forrest, 94 Ga. 685, 21 S. E. Rep. 712, a surety who had received a mortgage as indemnity was allowed the right of foreclosure where his note had been accepted as payment of the obligation on which he was surety.

[89] See chapter XII, paragraph 3, of this vol.

[90] Keith *v.* Mafit, 38 Ill. 303; and see Scarborough *v.* Reynolds, 12 Ala. 252, 263.

[91] See paragraph 15 (below).

[92] Berry *v.* Berry, 17 N. J. L. 440; Jackson *v.* Stackhouse, 1 Cow. 122.

of the payee is not competent against the defendant,[93] unless there is something to connect the defendant with him, or with the declaration offered, or unless the declaration was part of the *res gestæ* of an act properly in evidence.[94]

12. —by Producing Defendant's Order in Favor of Third Person.

The production from plaintiff's possession of an order or draft for the money, shown to have been executed by defendant,[95] and payable to a third person specified therein,[96] and which is shown, or may be presumed to have been previously in the possession of the payee (and this is presumed in the case of a draft or order in the common form, but not in the case of a letter or note addressed to the plaintiff), is *prima facie* evidence of payment according to its tenor by the plaintiff,[97] although it be not indorsed nor accompanied by a receipt.[98] The presumption may, however, be rebutted by evidence of facts tending to explain the possession as acquired without payment,—as, for instance, proof of a usage to leave drafts with the payee, for acceptance, in which case the question whether the plaintiff's possession is evidence of payment is one for the jury.[99] The order is not, however, evidence of payment of plaintiff's money to defendant's use,

[93] See Gandolfo *v.* Appleton, 40 N. Y. 533.

[94] See last note to paragraph 15, chapter XII.

[95] Lane *v.* Farmer, 13 Ark. 63.

Where one paid his son in law's notes at the latter's request and as cashier indorsed them to himself, the notes were held to be some evidence of the payment of the money for the son in law. In re Barnes' Estate, 158 N. W. Rep. (Iowa) 754.

[96] Zeigler *v.* Gray, 12 Serg. & R. 42. Compare Close *v.* Fields, 9 Tex. 442, 13 Id. 623, 2 Id. 232; where the same rule was applied to a draft with the payee's name in blank.

[97] Blount *v.* Starkey, 1 Tayl. N. C. 110, s. c., 2 Hayw. 75; Succession of Penny, 14 La. Ann. 194, 2 Greenl. Ev. 475, § 519.

[98] Zeigler *v.* Gray (above). If a receipt be indorsed, its execution should be proved, but if the omission to prove it is not objected to, the effect of the possession of the order as evidence of payment is not impaired. Weidner *v.* Schweigert, 9 Serg. & R. 385.

[99] Close *v.* Fields (above).

but is presumptively evidence of payment from funds of defendant inferred to be in plaintiff's hands. There must be some evidence to rebut this presumption.[1]

13. —by Plaintiff's Check or Accounts.

The same rules apply in proving payment by check, as in an action for money lent.[2] Evidence of defendant's admission, even by silence, when he was told by plaintiff that he had sent a check, is competent to go to the jury, although the payment be one not presumably within the personal knowledge of defendant, especially after great lapse of time.[3]

14. —by the Payee's Receipt or Surrender of Evidence of Debt.

Where there is no evidence connecting the plaintiff's request or obligation with the particular person to whom the payment was made,—as, for instance, in the case of an agent's purchases in the market, or payments for necessaries,—the receipt or other admission of the payee is not alone competent evidence of the payment, as against defendant; [4]

[1] Alvord *v.* Baker, 9 Wend. 323. Where it is the usual course of business for a factor to accept bills drawn by his principal and return them to him, to be used for raising money as he pleases, the factor's possession of such bills bearing the blank indorsement of the principal, is sufficient *prima facie* evidence of ownership to enable the factor to recover from the principal the money paid thereon at maturity, in the absence of proof of an unlawful diversion. Rice *v.* Isham, 4 Abb. Ct. App. Dec. 37.

[2] See Chapter XII, paragraphs 11–18, of this vol. Proof of a check drawn by plaintiff in favor of A., and paid to A., is evidence of payment, without proof that plaintiff delivered the check to A. Mountford *v.* Harper, 16 M. & W. 825.

[3] Price *v.* Burva, 6 Weekly R. 40.

[4] Cutbush *v.* Gilbert, 4 Serg. & R. 555; Roll *v.* Maxwell, 5 N. J. L. (2 South.) 493. Compare Steph. Dig. Ev. 37.

A receipt for money paid in behalf of the defendant is no evidence against him. Storrs *v.* Scougale, 48 Mich. 387, 12 N. W. Rep. 502.

for the payee or other witness should be produced; [5] but it is admissible in connection with other competent evidence of the fact of payment,—such as evidence that plaintiff's check was sent to, and received by, the payee,—and that the receipt was given in consequence,[6] and as part of the transaction.[7] If the payee is not living, however, his receipt is competent, as a declaration against interest.[8] On the other hand, when the person to whom the payment is made is designated by the contract of the defendant,—as in case of an order in favor of such person,[9] —or is pointed out by law,—as in case of a payment of taxes [10] or for public lands,[11] —then the receipt of such person, its execution being duly proved, is competent evidence of the fact of payment. Hence, where the payment was in discharge of a pre-existing liability of defendant (such liability or his admission of it being of course otherwise proven), the appropriate evidence of that discharge, as between him and the payee, is competent evidence against him and in favor of the plaintiff.[12] If the

[5] Printup *v.* Mitchell, 17 Ga. 558; Davidson *v.* Berthoud, 1 A. K. Marsh. (Ky.) 353.

[6] Carmarthen, etc., Ry. Co. *v.* Manchester, etc., Ry. Co., L. R. 8 C. P. 685; Leatherbury *v.* Bennett, 4 Harr. & M. 392.

[7] Davis *v.* Shreve, 3 Litt. (Ky.) 260; Keykendall *v.* Greer, 3 Coldw. (Tenn.) 463; Dunn *v.* Slee, Holt N. P. C. 399; Harrison *v.* Harrison, 9 Ala. 73.

[8] Davies *v.* Humphreys (6 Mees. & W. 153, s. c., 4 Jur. 250), even if plaintiff might but does not testify (Middleton *v.* Melton, 10 B. & C. 317, 325); and has even been held evidence of all material facts stated in it—*e. g.*, that the debt was originally incurred for the benefit of one of the joint debtors. Davies *v.* Humphreys (above).

[9] Paragraph 12 (above).

[10] Hall *v.* Hall, 1 Mass. 101. One who sues for re-imbursement for paying by mistake an *assessment* on his neighbor's land, must give some evidence of a legal assessment (Weinberger *v.* Fauerbach, 14 Abb. Pr. N. S. 91); otherwise as to regular annual taxes (Bowman *v.* Downer, 28 Vt. 532; and see Hall *v.* Hall, 1 Mass. 101, where the judges were equally divided on the point).

[11] Cluggage *v.* Swan, 4 Binn. (Penn.) 150; and see Russell *v.* Whiteside, 5 Ill. (4 Scam.) 7.

[12] See Sluby *v.* Champlin, 4 Johns. 461. Satisfaction of a decree may be proved without producing a copy of the decree itself. Davidson *v.* Peck, 4 Mo. 438.

debt paid subsisted in a written instrument, shown to have been in possession of the payee thereof,[13] the plaintiff's production of the instrument, with the written receipt, if any, (its execution by the payee being duly proved if required,) is competent evidence of payment.[14] And, in any case, the receipt given by the payee is competent evidence of the fact of payment whenever there is other evidence connecting defendant with the payee and the debt paid,—as, for instance, where defendant requested plaintiff to settle for him with a specified creditor,[15] or where the payment was of a joint obligation of both parties,[16] or a debt for which plaintiff was bound as surety.[17]

[13] Mygatt *v.* Pruden, 29 Geo. 43.

[14] See Jessup *v.* Gray, 7 Blatchf. 332; Bayne *v.* Stone, 4 Esp. 13; Bracken *v.* Miller, 4 Watts & S. 102, 112; Chandler *v.* Davis, 47 N. H. 462; even without plaintiff's testimony. Mills *v.* Watson, 1 Sweeny, 374. *Contra*, Mills *v.* Hyde, 19 Vt. 59. And is the best evidence, and should be produced or accounted for unless defendant has admitted the payment and expressly or tacitly promised to reimburse it, in which case the burden may be thrown on him to prove the instrument. Chappell *v.* Bray, 6 H. & N. 145.

[15] Sherman *v.* Crosby, 11 Johns. 148; approved in 3 Wall. 148. The person to whom performance of an act is agreed to be made, is competent to acknowledge such performance. Fenner *v.* Lewis, 10 Johns. 38. Whether the principle stated in the text applies to receipts of firm creditors in favor of one who assumed to pay the firm debts generally, is not well settled. Newell *v.* Roberts, 13 Conn. 63; Scott *v.* Russell, 36 Ga. 484.

[16] Ballance *v.* Frisbie, 3 Ill. (2 Scam.) 63. *Contra*, Thomas *v.* Thomas, 2 J. J. Marsh. 60, 64; Ford *v.* Smith, 5 Cal. 314.

[17] Prather *v.* Johnson, 3 Harr. & J. 487; approved in 3 Wall. 149; Sluby *v.* Champlin, and Mills *v.* Watson, cited above. Receipts by the holder of a note, entered on an execution issued at his suit against plaintiff as indorser, are competent to prove payment as against the maker. Garnsey *v.* Allen, 27 Me. 366. But a mere receipt of the sheriff is not evidence that plaintiff's payment discharged the execution against the defendant. Stone *v.* Porter, 4 Dana (Ky.), 207. In the case of money charged in the accounts of one acting in a trust capacity, the receipts of the payees are sufficient, especially if the payees are dead or beyond jurisdiction. Shearman *v.* Atkins, 4 Pick. 283; approved in 3 Wall. 148, as authority for treating them as primary evidence. The tax col-

When the receipt of the payee is thus competent, it is *prima facie* sufficient evidence of payment, without producing or accounting for the absence of the payee.

If the one who gave the receipt is produced, he may use it to refresh his memory, or to testify from, and the receipt then becomes admissible, independently of any other ground of competency, if it was made by the witness at or presently after the time of payment.[18]

15. Judgment against Plaintiff in Action of which Defendant had Notice.

When the money sued for was paid, pursuant to a judgment recovered by the third person against plaintiff, the judgment is competent evidence against the defendant to prove the fact of the judgment and the sum paid. If the action was defended by the plaintiff,[19] the judgment is evidence of the facts on which it was founded, in the following cases, viz., if defendant was joined with plaintiff as a co-party in the action; [20] or had agreed to abide the result,

lector's receipts are higher evidence of the administrator's payment of taxes on the estate, than the testimony of a witness to the fact of payment. The witness's testimony is not competent if the receipts can be produced. Hall *v.* Hall, 1 Mass. 101. The production of the bond to the collector, on which plaintiff was surety, with the collector's receipts, are competent, and *prima facie* sufficient. Sluby *v.* Champlin, 4 Johns. 461.

[18] See McCormick *v.* Pennsylvania Central R. R. Co., 49 N. Y. 303, rev'g 3 Alb. L. J. 129; Lathrop *v.* Bramhall, 64 N. Y. 365; Halsey *v.* Sinsebugh, 15 Id. 485, 489. As to case of contemporaneous memorandum by another witness, or contemporaneous declaration of witness to supply what he has since forgotten, see Shear *v.* Van Dyke, 10 Hun, 528.

[19] Otherwise of a judgment confessed, note 3 (below).

[20] Davidson *v.* Peck, 4 Mo. 438; Hare *v.* Grant, 5 Reporter, 183. Whether conclusive, see Dent *v.* King, 1 Ga. 200.

A judgment recovered against the plaintiff and defendant jointly was held admissible as evidence of all facts therein determined which were pertinent to the plaintiff's right to indemnity for the judgment so paid. Fulton County Gas, etc., Co *v.* Hudson River Telephone Co., 200 N. Y. 287, 93 N. E. Rep. 1052.

or covenanted against the consequences of such an action; [21] or was primarily liable as the one for whose debt or actual default the action was brought,[22] and had notice from defendant of its pendency, and reasonable opportunity to assume the defense if he desired.[23] In these cases the judgment recovered is conclusive evidence against the present defendant, both as to the damages and costs.[24] In other

[21] Rapelye *v.* Prince, 4 Hill, 119; Bridgeport Ins. Co. *v.* Wilson, 34 N. Y. 275, rev'g 7 Bosw. 427; Thomas *v.* Hubbell, 15 N. Y. 405. Unless collusion or neglect is shown. Chapin *v.* Thompson, 4 Hun, 779. A variance as to the manner in which the suit was brought is immaterial. Allaire *v.* Oulard, 2 Johns. Cas. 52. But on a mere general promise to indemnify, without referring to suits, a judgment against the plaintiff does not alone prove defendant's liability, unless he had notice and opportunity to defend. Douglass *v.* Howland, 24 Wend. 35.

Where plaintiff relies merely on a contract of indemnity, and proves that he confessed judgment, the burden of proof is upon him, in his action against his indemnitor, to show that the creditor was entitled to as much as the amount confessed. And this is so, although the indemnitee has previously given notice of suit brought to his indemnitor, and the latter has neglected to defend it. Stone *v.* Hooker, 9 Cow. 154.

[22] Mayor, etc., of Troy *v.* Troy, etc., R. R. Co., 49 N. Y. 657, affi'g 3 Lans. 270.

A judgment recovered against one for causes for which the defendant in the later action for indemnity was primarily liable was held conclusive of the facts upon which it was recovered where the defendant had notice of the commencement of the former action and was invited to assist in its defense. Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. Rep. 3.

[23] Smith *v.* Compton, 3 B. & Ad. 408; approved in 34 N. Y. 275.

Where a village gave the defendant due and timely notice of an action on a claim for which it contended that the defendant was primarily liable, and invited the latter to direct the defense thereof, it was held that the judgment rendered against and paid by the village was conclusive against the defendant in a subsequent action for indemnity. Port Jervis *v.* Erie R. Co., 59 Misc. 623, 111 N. Y. Supp. 851.

[24] Beers *v.* Pinney, 12 Wend. 309, and cases cited; Fake *v.* Smith, 2 Abb. Ct. App. Dec. 76; Green *v.* Goings, 7 Barb. 652. This rule has recently been held not to apply, where the claim for indemnity is not on contract, but on a breach of trust. Parker *v.* Lewis, L. R. 8 Ch. 1056, s. c., 7 Moak's Eng. 529. What is sufficient notice is

cases of actions against plaintiff alone, the judgment paid, with proof of the relation of suretyship or indemnity, is competent *prima facie* evidence of the amount due from defendant,[25] although there be no provision to that effect in defendant's contract.

Since the principal is not presumptively bound by the judgment, as he was not a party to the action, the surety, to make it evidence against him, is bound to show *aliunde* that it was rendered against him upon a transaction against which the principal was bound to indemnify him.[26]

The same rules apply whether the judgment was foreign or domestic.[27]

Parol evidence is competent to explain the relation of the parties to the cause of action in the judgment (in a judgment

not well settled. All authorities agree that reasonable notice under the circumstances is sufficient. Compare Robbins *v.* Chicago City, 2 Black, 418, 4 Wall. 657; Barmon *v.* Lithauer, 1 Abb. Ct. App. Dec. 99; Allaire *v.* Ouland, 2 Johns. Cas. 52. The rule is different in an action for a breach of warranty. Somers *v.* Schmidt, 24 Wisc. 417, s. c., 1 Am. Rep. 191. Whether costs of the former suit can be recovered, unless the present plaintiff proves he gave notice to the present defendant, is unsettled. De Colyar on Guar. 316; Pierce *v.* Williams, L. J. 23 Exch. 322; see the N. Y. Stat. of 1858, c. 314, § 3. Where one defends an action for debt, by showing voluntary payment of the amount to a sheriff holding an execution against his creditor, he must produce not only the execution and the sheriff's receipt, but also the record of the judgment. Handly *v.* Greene, 15 Barb. 601.

Where an indemnitee and indemnitor allowed a judgment to be taken by default after the latter had received notice to defend, it was held that, in a subsequent action for indemnity, the default judgment was conclusive as to both the amount of damages and costs. Morette *v.* Bostwick, 56 Misc. 140, 106 N. Y. Supp. 1102.

[25] Dubois *v.* Hermance, 56 N. Y. 673, affi'g 1 Supm. Ct. (T. & C.) 293.

A judgment against a receiver is not conclusive upon his sureties; before they are to be charged it must be shown that there was an accounting and decree establishing his inability to pay over money received by him in his official capacity. Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Supp. 659.

[26] Konitsky *v.* Meyer, 49 N. Y. 571. As to successive actions, see 6 Wend. 288.

[27] Id.

either upon contract [28] or for tort),[29] for the purpose of showing that as between them defendant was primarily liable. If plaintiff paid as the surety, etc., of the defendant, in consequence of a suit against himself, but does not prove that he gave defendant notice of the suit, defendant may show that plaintiff has no claim to be reimbursed; or not to the amount alleged; or that he made an improvident compromise and that defendant, had he received notice, might have done better.[30]

16. Medium of Payment.

Under the common-law procedure, proof of the transfer of property, whether land, chattels, or things in action, accepted by the defendant's creditor, in payment, as money, is admissible under an allegation of money paid to defendant's use,[31] but the mere giving of one's own non-negotiable obligation to the creditor is not,[32] nor is the giving of one's own negotiable obligation, unless expressly accepted in payment,[33] or unless wrongfully obtained and actually negoti-

[28] Davidson *v.* Peck, 4 Mo. 438, paragraph 8 (above).

[29] Paragraph 8 (above).

[30] Smith *v.* Compton, 3 B. & Ad. 408. Compare 34 N. Y. 275.

[31] Randall *v.* Rich, 11 Mass. 494; Ainslie *v.* Wilson, 7 Cow. 662; Garnsey *v.* Allen, 27 Me. 366; Jones *v.* Cooke, 3 Dev. N. C. Law, 112; Ralston *v.* Wood, 15 Ill. 159, 171; Hulett *v.* Soullard, 26 Vt. 295, 298. *Contra*, Stroud *v.* Pierce, 6 Allen (Mass.), 413. As to value of foreign money, see chapter XII, paragraph 20. Where plaintiffs, who were agents to purchase for defendants, proved delivery of their own merchandise to defendants, instead of payment of purchase price—*Held* a total failure of proof. Field *v.* Syms, 2 Robt. 35.

When a surety, with the consent of his co-surety, paid their obligation with a check drawn on the funds of a corporation of which he was an officer, and the amount of the said check was charged against him by the corporation, it was held he could maintain an action against the co-surety's estate for contribution. Meeske *v.* Pfenning, 120 Mich. 474, 79 N. W. Rep. 795.

[32] Cases in note 1, paragraph 10 (above); unless, perhaps, if payable to a stranger. Parker *v.* Osgood, 4 Gray (Mass.), 456.

[33] Van Nostrand *v.* Reed, 1 Wend. 424.

It has been held that where one of a number of co-sureties induced their creditor to accept his personal note in discharge of their original

ated, or wrongfully negotiated in fraud of plaintiff's rights.[34] Under the new procedure, the payment will usually be alleged as made; or if, on the trial, there be a variance in the proof, it will be a question for the court or referee, whether to disregard or amend it, or not. If the payment was of a precedent debt, and was made with negotiable paper, plaintiff may recover on showing, either [35] that the creditor expressly accepted the paper in payment,[36] or that the paper has been paid. If he proves that even his own negotiable bill or note was expressly accepted in payment of defendant's debt, he may recover against defendant without proving that such paper has been paid.[37] If the payment was by giving any other obligation binding himself to pay, he must prove payment on such obligation,[38] unless there was an express promise of defendant, to pay him if he would incur the expense.[39]

obligation, he could maintain an action for contribution by his co-sureties. Green *v.* Anderson, 19 Ky. Law Rep. 1187, 43 S. W. Rep. 195.

[34] Bleadon *v.* Charles, 7 Bing. 246.

[35] See Dunnigan *v.* Crummey, 44 Barb. 528, and cases cited.

And where a surety's personal note was accepted by his co-surety in satisfaction of his claims for contribution, the surety, it was held, could maintain an action for reimbursement. Stone *v.* Hammell, 3 Cal. Unrep. Cas. 128, 22 Pac. Rep. 203.

[36] Howe *v.* N. Y. & Erie R. R. Co., 37 N. Y. 297; Bennett *v.* Cook, 45 Id. 268; Witherby *v.* Mann, 11 Johns. 518.

[37] Cummings *v.* Hackley, 8 Johns. 202. As to the presumption whether paper was accepted in payment, see 13 N. Y. 167, 46 Id. 637.

Where it appeared that a principal's creditor accepted $150 in cash and the surety's note for $350 in satisfaction of his claim, a judgment for $500 in favor of the surety and against his principal was upheld, even though the note was not then due. Auerbach *v.* Rogin, 40 Misc. (N. Y.) 695, 83 N. Y. Supp. 154.

[38] And it seems that payment pursuant to such obligation, though even after suit brought would sustain the action. 9 Mass. 548, 23 Pa. St. 464.

[39] Bullock *v.* Lloyd, 2 Carr. & P. 119; Smith *v.* Pond, 11 Gray 234; but in this case the action was on a promise of indemnity, not for money paid.

17. Amount.

It has been held that where plaintiff is compelled to pay defendant's debt, and does so by transferring property at a valuation, or any sufficient consideration other than money, which is received by the creditor as of equivalent value, defendant cannot reduce the recovery by offering evidence that the property was of less value; for it is enough for him that he was discharged by what his creditor accepted as worth the full amount of the debt.[40] But if the transaction was a compromise on payment of a less sum than was due,—especially if plaintiff stood in a relation of trust and confidence, as where he acted as defendant's agent in settling a debt, at less than its full value, or in a depreciated currency,—he can only recover the sum he actually paid; and the same rule applies to a surety.[41]

18. Source of the Fund Paid.

A money payment shown to have been made by plaintiff will ordinarily be presumed to have been made from his own funds; but when there is anything in the relation of the parties or the character in which plaintiff sues, to allow of doubt, he should be prepared with evidence on the point.[42]

[40] Garnsey *v.* Allen, 27 Me. 366. NELSON, J., was of the same opinion in Bonney *v.* Seeley, 2 Wend. 482; and this is clearly the sound rule, although in that case the Supreme Court held that evidence of the actual value was admissible in reduction, but in that case there does not seem to have been any other evidence of a valuation than that implied in the consideration mentioned in the deed, S. P. Ralston *v.* Wood, 15 Ill. 159, 171; Hulett *v.* Soullard, 26 Vt. 295, 298.

[41] Reed *v.* Morris, 2 Mylne & C. 361.

Though the case of Partridge *v.* Moynihan, 59 Misc. 234, 110 N. Y. Supp. 539, came before the court in the form of a motion for leave to issue an execution, it was there said that "payment by a third person of a sum less than the amount due, with the understanding that it should be in full satisfaction thereof, is a valid accord and satisfaction, and no action will be against the debtor to recover the balance."

[42] In an action by plaintiff in his private capacity, he may be asked whether the loan sued for was made as his private transaction,

Thus, where a partner is compelled to pay a firm debt, the presumption is that he pays with firm money.[43] So, advances made by one of a committee holding funds, are not presumed to be of his own money.[44] If co-plaintiffs allege a joint payment they must show payment out of joint funds, by proof of partnership or otherwise.[45] The declaration of the person who paid the money, made at the time of paying it, as to whose fund it was, is competent in his favor, as part of the *res gestæ*.[46]

19. Object and Application of the Payment.

Where a payment has been proved to have been made through an agent by correspondence, the letters of the agent enclosing the receipts, and the entries thereupon made by the plaintiffs in their accounts, are admissible in connection, as part of the *res gestæ*, to establish necessary dates, etc.[47] The conversation accompanying an act of payment, and characterizing it, is admissible as part of the *res gestæ*, to show the application made of it.[48] And a witness who was

or was his act as a receiver. Davis *v.* Peck, 54 Barb. 425.

[43] Hill *v.* Packard, 5 Wend. 375.

[44] Bassford *v.* Brown, 22 Me. 9.

[45] Doremus *v.* Selden, 19 Johns. 213; see also Coffee *v.* Tevis, 17 Cal. 239.

[46] Carter *v.* Beals, 44 N. H. 408; Bank of Woodstock *v.* Clark, 25 Vt. 308. In Beasley *v.* Watson 41 Ala. 234, a guardian's declaration that the payment was his ward's money was admitted; and see 36 Ala. 670, 10 M. & W. 572. But where plaintiff was guardian of property of infants, and administrator of their father's estate, and made advances to the widow while she was supporting the wards—*Held* that evidence that he had no funds as guardian during the period was too remote, and not competent to show that the advances were his own money. Elliott *v.* Gibbons, 31 N. Y. 67. Compare further chapter XII, paragraph 5, of this vol. and next chapter.

[47] See Beaver *v.* Taylor, 1 Wall. 637. This case and those referred to in notes to paragraph 5 of this chapter, must be deemed to overrule, to this extent, Jordan *v.* Wilkins, 3 Wash. 110.

The time and pay roll is admissible in evidence in connection with the oral testimony of the foreman who superintended the work and kept the time of the men. Dobbins *v.* Graer, 50 Colo. 10, 114 Pac. Rep. 303.

[48] Bank *v.* Kennedy, 17 Wall. 19; Bank of Woodstock *v.* Clark,

a party to the transaction, and was present and cognizant of the circumstances, may be asked on whose behalf the payment was made, and whether it was made in consequence of the request, and what was its purpose and intent,[49] subject, of course, to cross-examination.[50] But on the question as to whether the payment was made on the credit of defendant or another person, evidence of their relative wealth or poverty is incompetent.[51]

20. Demand and Notice.

Where plaintiff sues for contribution on having paid a joint debt, he need not prove that a demand was made on him before payment; [52] and where he has been sued, he need

25 Vt. 308; Allen *v.* Duncan, 11 Pick. 308; but not subsequent declarations as narratives of past events, made by one still living, unless they are the admission of him against whom they are adduced. Dunn *v.* Slee, Holt, N. P. 399. Evidence admitted thus as part of the *res gestæ* does not have the effect, if the defendant was absent, to bind him as a representation by him, unless there is other evidence of the authority of the declarant to represent him. Second Nat. Bank *v.* Miller, 2 Supm. Ct. (T. & C.) 107. But it is nevertheless admissible, for the purpose simply of characterizing the act of the party present. See last note to paragraph 15 of preceding chapter. When made by an alleged agent of the absent party, its effect to bind him as a declaration must depend on evidence of authority.

[49] Sweet *v.* Tuttle, 14 N. Y. 465; Richmondville Seminary *v.* McDonald, 34 Id. 379; Bank *v.* Kennedy (above). To the contrary see 56 N. Y. 618, 57 Id. 651.

[50] See chapter XII, paragraph 6, of this vol.

[51] Wheeler *v.* Packer, 4 Conn. 102, S. P., 56 N. Y. 334, rev'g 7 Lans. 381, on this point; Second Nat. Bank *v.* Miller, 2 N. Y. Supm. Ct. (T. & C.) 107, S. P., Trowbridge *v.* Wheeler, 1 Allen (Mass.), 162. In Wheeler *v.* Packer (4 Conn. 102), HOSMER, Ch. J., excludes the evidence, saying aptly "If poverty will authorize inferences concerning a person's agreement, so will wealth and avarice, and generosity and benevolence." Pollock *v.* Brennan (39 Super. Ct. [J. & S.] 477), on the question of a sale is not necessarily to the contrary, for there the question was whether a business properly belonged to the husband or wife, and the very question seems to have been, to whom did the capital belong?

[52] Pitt *v.* Purssford, 5 Jur. 611.

not generally prove notice of the suit to defendant, except for the purpose of making the judgment recovered against him *prima facie* or conclusive evidence of the amount of defendant's obligation, etc., and of recovering all his costs.[53]

Demand on defendant, (which should be proved where he is not in default without it,) if made solely by letter, should be proved by notice to produce the letter, and if defendant does not comply, by giving secondary evidence of its contents.[54] A letter-press copy can only be used as secondary evidence,[55] but a duplicate original, written and signed at the same time with the one sent, is primary evidence, admissible without giving notice to produce the counterpart.[56] An independent oral demand, though made at the same time with delivery of a written one, is competent; [57] but the conversation had with the mere bearer of a written demand is not competent without producing or accounting for the writing.[58] An account in plaintiff's handwriting, produced from defendant's possession,[59] or otherwise shown to have been presented to him, is competent to go to the jury; and, with the omission to make any objection, is *prima facie* evidence of the correctness of the items as to amount, etc.[60] If defendant's oral admissions [61] are adduced in evidence,

[53] See paragraph 15 (above). This being a collateral notice, it seems that the written notice need not be produced or accounted for, unless some question arises on its terms. See McFadden *v.* Kingsbury, 11 Wend. 667.

[54] Weeks *v.* Lyon, 18 Barb. 530.

The defendant was held to have waived any right to a demand before suit for contribution as a cosurety on a note which the plaintiff had paid, where in his answer, he denied all liability. Shuford *v.* Cook, 164 N. C. 46, 80 S. E. Rep. 61.

[55] Foot *v.* Bentley, 44 N. Y. 166.

[56] Hubbard *v.* Russell, 24 Barb. 404.

[57] Smith *v.* Young, 1 Campb. 439.

[58] Glenn *v.* Rogers, 3 Md. 312.

[59] Nichols *v.* Alsop, 10 Conn. 263.

[60] See chapter on ACCOUNTS STATED.

[61] "It is not necessary that admissions of a party to an action, in order to be evidence, should be of facts within the knowledge of the party making them. Such admissions do not come within the category of hearsay evidence." Reed *v.* McCord, 18 App. Div. 381, 384–385.

he is entitled to have the whole statement taken together, to the extent of all that was said by the same person in the same conversation that would in any way qualify or explain the part adduced against him, or tend to destroy or modify the use which the adversary might otherwise make of it, but no further.[62] But the jury may discredit the connected denial, while giving credit to the admission.[63] The fact that he questioned part of the items only, strengthens the presumption that others are correct.[64] His objecting to the whole account on other grounds, explains the omission of any objection to the correctness of items, sufficiently to deprive it of the effect of an admission.[65]

21. Defenses.

If plaintiff proves a request to pay a particular demand, is no defense that the demand was not legally due, as for instance where it was a void assessment, or even a contract usurious on its face;[66] but illegality, such that the act of

[62] Rouse *v.* Whited, 25 N. Y. 170, rev'g 25 Barb. 279. "The rule appears to be firmly settled, both as to a conversation or writing, that the introduction of a part renders admissible so much of the remainder as tends to explain or qualify what has been received, and that it is to be deemed a qualification which rebuts and destroys the inference to be derived from or the use to be made of the portion put in evidence. (Rouse *v.* Whited, 25 N. Y. 170; Forrest *v.* Forrest, 6, Duer, 126–7; Gildersleeve *v.* Landon, 73 N. Y. 609.)" Gratton *v.* Metropolitan Life Ins. Co., 92 N. Y. 274, 284. See also Collins *v.* Sherbet, 114 Ala. 480, 21 So. Rep. 997. A party cannot testify to declarations made by him in his own favor to a witness, in the absence of the other party, where they are not in rebuttal of anything said by the witness. Noble *v.* White, 103 Iowa, 352, 72 N. W. Rep. 556.

[63] Craighead *v.* The State Bank, 1 Meigs, 199. (But not arbitrarily. 1 Abb. Ct. App. Dec. 111.)

[64] Id.

[65] Quincy *v.* White, 63 N. Y. 370.

[66] As to the form and effect of denials, see Simmons *v.* Sisson, 26 N. Y. 264.

The fact that the payment was made under a contract which was void under the Statute of Frauds is no defense. Minder, etc., Land Co. *v.* Brustuen, 29 S. D. 562, 137 N. W. Rep. 282.

Where the plaintiff has paid a bill for services rendered by an attorney to the defendant, the value

paying was illegal, must be shown.[67] Although the claim paid was not merely void but illegal, and plaintiff knew it, yet if the money was advanced on a new contract it is recoverable;[68] though it would be otherwise if plaintiff was *particeps criminis* in the original transaction.[69]

Defendant may prove in his exoneration that the payment was from a fund plaintiff held for his indemnity;[70] and evidence that plaintiff received such a fund,[71] or was party to a proceeding in which he was entitled to it, throws on plaintiff the burden of accounting for its disposition.[72] The statute of limitations is available as to any payment, though only a part payment, not made within the six years.[73]

of the attorney's services is immaterial. McNerney *v.* Barnes, 77 Conn. 155, 58 Atl. Rep. 714.

[67] Mosely *v.* Boush, 4 Rand. (Va.) 302; McElroy *v.* Melear, 7 Coldw. (T.) 140.

When an auctioneer makes certain disbursements in selling goods for the defendant, who accepts the benefits of the sale, the latter cannot defend an action by the auctioneer on the ground that the auctioneer was not duly licensed. Robinson *v.* Green, 3 Metc. (Mass.) 159.

[68] Armstrong *v.* Toler, 11 Wheat. 258.

[69] Brown *v.* Tarkington, 3 Wall. 381; Pitcher *v.* Bailey, 8 East, 171. Compare Knowlton *v.* Congress Spring Co., 5 Reporter 166, and contrary decision in 57 N. Y. 518.

One who knows that certain proceedings brought against the defendant are unlawful and nevertheless pretends to befriend him and makes certain payments to help him out of the difficulty, has no legitimate claim against the defendant for money so advanced. Storrs *v.* Scougale, 48 Mich. 387, 12 N. W. Rep. 502.

[70] Gorrpel *v.* Swinden, 1 D. & L. 888.

A denial that the plaintiff had "paid out any money or moneys of his own" constitutes no defense. It is immaterial from what source the money expended by the plaintiff was obtained. Van Duzer *v.* Towne, 12 Colo. App. 4, 55 Pac. Rep. 13.

[71] Fielding *v.* Waterhouse, 40 Super. Ct. (J. & S.) 427, and cases cited; Ramsey *v.* Lewis, 30 Barb. 403.

[72] Cockayne *v.* Sumner, 22 Pick. 117.

[73] Davis *v.* Humphreys, 6 M. & W. 153; De Colyar on G. 318.

An accommodation indorser who sued the maker of a note to recover money paid upon it was held to have proceeded timely where he commenced his action within six years from the date of making his payments, notwithstanding the note was outlawed. Blanchard *v.*

Blanchard, 61 Misc. 497, 113 N. Y. Supp. 882.

A purchaser of a mortgage executed by a principal to indemnify his surety could, in an action by the surety to foreclose, avail himself of a plea of the statute of limitations which would have been available to the principal had the action been brought against him. May *v.* Ball, 108 Ky. 180, 56 S. W. Rep. 7.

With respect to the claim of a co-surety against his principal for the amount paid in contribution, the statute of limitations begins to run at the time of the contribution. Stone *v.* Hammell, 83 Cal. 547, 23 Pac. Rep. 703, 17 Am. St. Rep. 272, 8 L. R. A. 425.

CHAPTER XIV

ACTIONS TO RECOVER BACK MONEY PAID BY PLAINTIFF TO DEFENDANT UNDER MISTAKE, DURESS, EXACTION OR FRAUD, OR THE CONSIDERATION FOR WHICH HAS FAILED

1. The payment.
2. Mistake.
3. Subsequent promise to repay.
4. Forged or counterfeit paper.
5. Duress or exaction.
6. Fraud.
7. Failure of consideration.

1. The Payment.

In all these classes of cases the payment to be proved is usually not a payment to a third person by plaintiff, as in actions for Money Paid to Defendant's Use, nor a payment to defendant by a third person, as in actions for Money Received to Plaintiff's Use, but a payment directly from plaintiff to defendant, which plaintiff seeks to recall on the ground that he was under no legal obligation to pay, and that defendant has no title to the money. The payment should be shown to have been in money, or that which defendant received as money, or equitably ought to account for as such.[74] An allegation of money paid by plaintiffs to defendant is not sustained by proof that they gave him their negotiable

[74] Moyer *v.* Shoemaker, 5 Barb. 319.

Money paid by the payor, laboring under a mistake of material fact, can be recovered of the party receiving it in an action of assumpsit, on either of the common counts, for money had and received, or for money loaned or for money paid. Russell *v.* Richard, 6 Ala. App. 73, 60 So. Rep. 411.

It is competent to prove payment to show that third persons made payments for the plaintiff's benefit. Konz *v.* Henson, 156 S. W. Rep. (Tex. Civ. App.) 593.

Where the plaintiff made the payment pursuant to an agreement which he had no right to make, the payment was voluntary and the money is not recoverable. Mt. Adams, etc., Ry. Co. *v.* Cincinnati, 23 Weekly Law Bul. 68.

promise to pay, unless it was expressly accepted as cash in absolute payment,[75] or unless it has been negotiated by defendant in fraud of plaintiffs' right.[76] The principles governing the mode of proving the payment, and the effect of a variance, are sufficiently stated in the last two chapters and the next one.

2. Mistake.

The burden of proof is on the plaintiff to show the mistake[77] on which he relies.[78] Evidence of a mistake at the time of making the contract pursuant to which the payment

[75] Van Nostrand *v.* Reed, 1 Wend. 424.

[76] Bleadon *v.* Charles, 7 Bing. 246.

Where the plaintiff has received a check with the proceeds of which he was to satisfy a judgment and, relying upon the check, pays cash in satisfaction of the judgment, he cannot recover back the money paid, if the check subsequently is not honored. Garretson *v.* Joseph, 100 Ala. 279, 13 So. Rep. 948.

[77] For recent cases on the distinction between mistakes of law and of fact, see 15 Am. Rep. 171, n.; Earl of Beauchamp, L. R. 6 Eng. & J. App. 223, s. c., 6 Moak's Eng. 37; Carpentier *v.* Minturn, 6 Lans. 56, 65 Barb. 293; Holdredge *v.* Webb, 64 Barb. 9.

The burden of proof to show mistake rests on the plaintiff. McBride *v.* Grand Rapids, 47 Mich. 236, 10 N. W. Rep. 353; Congdon *v.* Preston, 49 Mich. 204, 13 N. W. Rep. 516.

The plaintiff has the burden of establishing the mistake by clear and satisfactory proof. Conn *v.* Converse, 164 Iowa, 604, 146 N. W. Rep. 49.

The burden of proof to show excessive payment is on the plaintiff throughout the case. Gibbs *v.* Farmers', etc., Bank, 123 Iowa, 736, 99 N. W. Rep. 703.

If an administrator pays a claim before it is allowed and subsequently the court allows the claim only for a reduced amount, the administrator cannot recover back the excess paid by him. Fairbanks *v.* Mann, 19 R. I. 499, 34 Atl. Rep. 1112.

[78] Kirkpatrick *v.* Bank, 2 Hill (S. C.), 577; Urquhart *v.* Grove, 2 Rob. (La.) 207. In case of a person *non sui juris*, surprise and a mistake of law may be enough. Pitcher *v.* Turin Plankroad Co., 10 Barb. 436.

Where the plaintiff sues for an overpayment on an account, he cannot establish his cause of action by simply showing the amounts he has paid; he must prove both sides of the account. Wisner *v.* Consolidated Fruit Jar Co., 25 N. Y. App. Div. 362, 49 N. Y. Supp. 500.

was made, does not raise a presumption that the plaintiff continued under the mistake at the subsequent time of payment, but the evidence must connect the mistake with the time of payment also,[79] unless there is evidence of exaction and protest.[80] Clear proof of mistake is requisite.[81] Mistake of fact is shown within the rule, by proof either that some fact which really existed was unknown, or that some fact was supposed to exist which did not.[82] The material

[79] Wyman *v.* Farnsworth, 3 Barb. 369.

[80] Meyer *v.* Clark, 45 N. Y. 284, rev'g 2 Daly, 497.

[81] Elting *v.* Scott, 2 Johns. 157; Taylor *v.* Beavers, 4 E. D. Smith, 215; and see Mutual Life Ins. Co. *v.* Wager, 27 Barb. 354; Cullreath *v.* Cullreath, 7 Ga. 64; Kent *v.* Manchester, 29 Barb. 595, and cases cited. For the contrary notion, that in all civil issues preponderance of probability is enough, see Kane *v.* Hibernia Ins. Co., 10 Vroom, 697, s. c., 23 Am. Rep. 239.

"It is the settled rule in this state, . . . that whenever, by a clear or palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without consideration which, in law, honor or conscience, was not due and payable, and which, in honor or good conscience, ought not to be retained, it may and ought to be recovered. . . . In such a case, it is not necessary to allege mistake in express terms. It is only necessary to allege facts, from which the conclusion of mistake inevitably follows." Supreme Council C. K. A. *v.* Fenwick et al., 169 Ky. 269, 183 S. W. Rep. 906.

[82] Rheel *v.* Hicks, 25 N. Y. 291.

The plaintiff in purchasing a certain tract of land paid for more acres than were actually included within the boundaries of the tract, due to a miscalculation of the surveyor in computing the acreage. It was held that he could maintain an action for money had and received to recover what he had paid for the excess acreage. Mobley *v.* Harrell, 13 Ga. App. 483, 79 S. E. Rep. 372.

In Atlanta Telephone, etc., Co. *v.* Fain, 16 Ga. App. 475, 85 S. E. Rep. 791, the court held that there was such mistake of fact as to entitle the plaintiffs to recover money paid, where it appeared that money had been paid on telephone bills under the belief that a higher rate had been charged when in fact the charges were for an extension phone which had never been installed.

The plaintiff brokers, who had received an order to sell the defendant's stock in the Pittsburgh-Westmoreland Coal Company, upon notice from their correspondent that the stock had been sold,

facts intended by the rule are those which show that the demand asserted did not exist, not such as show a mere set-off.[83] The rule applies, notwithstanding the parties made a jump settlement or an adjustment "hit or miss," if it be shown that such agreement was made under mistake.[84] Where the case is free from fraud and from negligence prejudicing defendant, it is not necessary for plaintiff to negative the means of knowledge as well as actual knowledge of the true state of facts.[85] Under the general rule that in the interpretation of a writing the court may receive all the light that surrounding circumstances can throw upon its language [86] evidence of the parties' knowledge [87] or ignorance,[88] is competent, and may be shown by the testimony of the party himself.[89] If a reformation of a written contract is

paid the proceeds of the supposed sale to the defendant. Thereafter they were notified by their correspondent that the notice of the sale had been a mistake and that the stock actually sold was that of the Westmoreland Coal Company. It was held that the money had been paid "under a manifest mistake of fact." Donner *v.* Sackett, 251 Pa. St. 524, 97 Atl. Rep. 89.

[83] Franklin Bank *v.* Raymond, 3 Wend. 72.

[84] Wheadon *v.* Olds, 20 Wend. 174.

[85] Kelly *v.* Solari, 9 Mees. & W. 54, s. c., 6 Jur. 107; and see Martin *v.* McCormick, 8 N. Y. 331.

Even though one who sued to recover money paid by mistake had the means of ascertaining the real facts at the time of payment, it was held that this fact was insufficient to defeat his action. Hinds *v.* Wiles, 12 Ala. App. 596, 68 So. Rep. 556.

[86] See chapter V, paragraphs 81–84, of this vol. for the fuller discussion of this principle.

[87] Lake *v.* Artisans' Bank, 3 Abb. Ct. App. Dec. 10.

[88] Reynolds *v.* Commerce Fire Ins. Co., 47 N. Y. 597. But ignorance is not always equivalent to mistake. National Life Ins. Co. *v.* Minch, 53 N. Y. 144, rev'g 6 Lans. 100.

Evidence explaining the transaction and showing how the mistake was made is admissible. Pine Belt Lumber Co. *v.* Morrison, 13 Ga. App. 453, 79 S. E. Rep. 363.

[89] But his undisclosed intent is not usually competent. Dillon *v.* Anderson, 43 N. Y. 231; unless motive is material. See Lewis *v.* Rogers, 34 Super. Ct. (J. & S.) 64. Nor is the intent of the draftsman competent. Nevins *v.* Dunlap, 33 N. Y. 676.

The plaintiff paid a certain sum of money in satisfaction of the defendant's claims as evidenced

necessary, the omission to demand that relief in the complaint may be cured by amendment, or disregarded.[90] Conversations at the time of payment, and forming part of the *res gestæ*, are competent even to contradict statements contained in writings of defendant's agents put in evidence by plaintiff to show defendant's receipt of the money.[91] Negligence in making the mistaken payment is not relevant, unless the situation of other parties has been changed in consequence of the payment;[92] and if this be so, the burden of proving the fact rests upon the defendant.[93]

by two notes. In a subsequent action to recover excess money paid by reason of having been charged compound interest, the plaintiff's testimony was held competent as tending to prove the true consideration of the notes and as affording a proper basis on which to compute interest. Smith *v.* Yancey, 73 So. Rep. (Ala.) 477.

[90] Rosboro *v.* Peck, 48 Barb. 96.

[91] Hall *v.* Holden, 116 Mass. 172.

Conversations preceding the transaction are not admissible. Wilson *v.* Storm, 164 Ill. App. 13.

[92] Duncan *v.* Berlin, 11 Abb. Pr. N. S. 116, rev'g 5 Robt. 547, s. c., 4 Abb. Pr. N. S. 34; Lawrence *v.* Am. Nat. Bank, 54 N. Y. 432.

Plaintiff will not be allowed to recover money negligently paid by him under a mistake of facts if the situation of the party receiving it has thereby been materially changed so that his original position cannot be restored. Atlantic Coast Line R. Co. *v.* Schirmer, 87 S. C. 309, 69 S. E. Rep. 439.

[93] Mayer *v.* Mayor, etc., of N. Y., 63 N. Y. 455.

The burden of showing that the situation of the parties has changed is upon the defendant. Walker *v.* Conant, 65 Mich. 194, 31 N. W. Rep. 786.

In order to recover money paid through mistake it is necessary to make a demand in order to recover. Gillett *v.* Brewster, 62 Vt. 312, 20 Atl. Rep. 105.

Where the defendant knew at the time that the money was being paid him that the amount was in excess of what was due him, it is not necessary to make a demand for repayment in order to recover. Bower *v.* Thomas, 64 Hun, 637, 19 N. Y. Supp. 503.

Where the money of a married woman was paid to her husband's creditor to settle a debt due to the creditor by her husband, and in consideration that a criminal prosecution against him would be stopped, she is entitled to recover the money so paid if the creditor knew at the time it was paid that it belonged to the wife. She is entitled to recover without making any demand. Bank of Waynesboro *v.* Walters, 135 Ga. 643,

3. Subsequent Promise to Repay.

It is not necessary to allege the promise to repay, which the law implies from defendant's receiving plaintiff's money by mistake; [94] but if sufficient evidence of a legal obligation, or what the law regards as a moral obligation,[95] has been given, evidence of a subsequent promise by the plaintiff to refund is competent.[96]

4. Forged or Counterfeit Paper.

There is a presumption that the drawees know the signature of the drawer,[97] and of the payee [98] and indorser,[99] on

70 S. E. Rep. 244; Mills *v.* Hudgins, 97 Ga. 417, 24 S. E. Rep. 146.

[94] See Farron *v.* Sherwood, 17 N. Y. 227; Byxbie *v.* Wood, 24 Id. 607; Steamship Co. *v.* Jolliffe, 2 Wall. 457.

The right to recover money paid by mistake is in no manner dependent upon an express admission by the party receiving it, or on his agreement to refund; the allegation of such admission and promise in plaintiff's petition is unnecessary to a statement of a cause of action, and he will not be required to sustain it by evidence. Fidelity Savings Bk. *v.* Reeder, 142 Iowa, 373, 120 N. W. Rep. 1029; Russo-Chinese Bank *v.* National Bk. of Commerce, 109 Cir. Ct. App. 398, 187 Fed. Rep. 80.

[95] See chapter XIII, paragraph 4, of this vol.

[96] Bentley *v.* Morse, 14 Johns. 468; Rosboro *v.* Peck, 48 Barb. 92; Ege *v.* Koontz, 3 Penn. St. 109.

[97] National Park Bank *v.* Ninth Nat. Bank, 46 N. Y. 77.

"The law is well settled that a bank is conclusively presumed

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[98] Graves *v.* Am. Exchange Bank, 17 N. Y. 205.

Where an agent of the payee of a check indorsed the payee's signature thereon, though not authorized to do so, it was held that the unauthorized payment and subsequent charge to the account of the drawer was a sufficient basis for a liability of the bank to the payee. McFadden *v.* Follrath, 114 Minn. 85, 89, 130 N. W. Rep. 542, 37 L. R. A. N. S. 201. See also Burstein *v.* People's Trust Co., 143 N. Y. App. Div. 165, 127 N. Y. Supp. 1092.

Where the payee's indorsement was forged, it was held that the bank rather than the drawer, had the opportunity of ascertaining whether or not an indorsement was genuine, and if it did not do so before making the payment, the loss fell upon the bank. Kearny *v.* Met. Trust. Co., 110 N. Y. App. Div. 236, 97 N. Y. Supp. 274, 276.

[99] Morgan *v.* Bank of State of N. Y., 11 N. Y. 404. But as to

whose supposed signatures they pay, which is conclusive in favor of the drawer against their allegation of mistake; but there is no such presumption as to the genuineness of the writing in the body of the paper.[1] In an action to recover the value of bad money received by plaintiff from defendant in payment of a debt, or for other consideration, the burden

and bound to know the signature of its customer, when that signature appears as drawer on a check, drawn upon that bank, purporting to be signed by the customer." Missouri Lincoln Trust Co. *v.* St. Louis Third Nat. Bank, 154 Mo. App. 89, 100, 133 S. W. Rep. 357.

There is an implied obligation upon a bank to pay out a depositor's money only upon the latter's order. Consequently payments upon forged orders afforded no protection to the bank. In the eye of the law, as to the depositor, a forged check paid is not paid. Parker-Smith *v.* Prince Mfg. Co., 172 App. Div. 302, 158 N. Y. Supp. 346.

When the amount of a check was raised, it was held that the drawee of the check could only be held to a knowledge of the signature of the drawer. By accepting and paying the check, it only vouched for the genuineness of the signature. Oppenheim *v.* West Side Bank, 22 Misc. 722, 50 N. Y. Supp. 148.

The drawee bank is conclusively presumed to know the signatures of its depositors. Marshalltown First Nat. Bank *v.* Marshalltown State Bank, 107 Iowa, 327, 77 N. W. Rep. 1045, 44 L. R. A. 131.

[1] Bank of Commerce *v.* Union Bank, 3 N. Y. 230.

By accepting and paying a check, a bank vouched for the genuineness of the signature, but could not be held to a knowledge of want of genuineness of any other part thereof. Oppenheim *v.* West Side Bank, 22 Misc. 722, 50 N. Y. Supp. 148.

Where the plaintiff allowed his check to be made out in such a careless manner that it could be easily raised, it was held that the drawee bank paying the raised check was entitled to charge the amount so paid to the plaintiff, depositor. Otis Elevator Co. *v.* San Francisco First Nat. Bank, 163 Cal. 31, 124 Pac. Rep. 704, 41 L. R. A. N. S. 529.

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indorsers other than the payee, see Holt *v.* Ross, 54 N. Y. 472, affi'g 59 Barb. 554.

"The defendant bank could acquire no title to the check, nor right to collect it, through forgery of the indorsement of one of the owners in the chain of title, and, having collected the proceeds, it may not retain the money against the true owner." Wolfin *v.* Security Bank of New York, 170 App. Div. 519, 156 N. Y. Supp. 474.

is on the plaintiff to prove the money bad.[2] In an action on a receipt for bills, to be accounted for if good, parol evidence is competent to show that defendant promised to take the money and try it, and return it if condemned; and this, with evidence of sufficient lapse of time,[3] throws on defendant the burden of accounting.[4]

5. Duress.[5]

To recover back money paid under duress, it is not essential to allege and prove a contract.[6] The mere fear of legal process,[7] or threats of prosecution without threats of

[2] Atwood *v.* Cornwall, 25 Mich. 142. Compare Burrill *v.* Watertown, etc., Co., 51 Barb. 105.

[3] Marcum *v.* Beirne, 6 J. J. Marsh. (Ky.) 604.

[4] As to appropriate evidence on question of genuineness, see chapter on BILLS, NOTES AND CHECKS.

[5] For conflicting definitions of duress, coercion, and exaction, see 7 Wall. 214, 10 Id. 414, 14 Id. 332; Peyser *v.* Mayor, etc., of N. Y., 70 N. Y. 497; Meyer *v.* Clark, 45 N. Y. 284, rev'g 2 Daly, 497; Am. Exch. Fire Ins. Co. *v.* Britton, 8 Bosw. 148.

[6] Carew *v.* Rutherford, 106 Mass. 1, s. c., 8 Am. Rep. 287, and cases cited.

If the payment was purely voluntary, with no element of duress of any sort, there can be no recovery. Selby *v.* United States, 47 Fed. Rep. 800.

It is not enough to allege that a payment was made under duress; the facts constituting the duress or compulsion must be pleaded. Minneapolis Stock-Yards, etc., Co. *v.* Cunningham, 59 Minn. 325, 61 N. W. Rep. 329.

To constitute duress there must be some actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment over the person or property of another, from which the latter has no immediate relief than by making the payment. Williams *v.* Rutherfurd Realty Co., 159 N. Y. App. Div. 171, 144 N. Y. Supp. 357.

[7] Quincy *v.* White, 63 N. Y. 370, rev'g 5 Daly, 327.

Even though a claim be unjust or illegal, if it is paid merely in fear of a threatened suit, the money cannot be recovered. Weber *v.* Kirkendall, 44 Neb. 766, 63 N. W. Rep. 35; Laredo *v.* Loury, 20 S. W. Rep. (Tex. Ct. of App.) 89; Flack *v.* National Bk. of Commerce, 8 Utah, 193, 30 Pac. Rep. 746, 17 L. R. A. 583; Hanford Gas, etc., Co. *v.* City of Hanford, 163 Cal. 108, 124 Pac. Rep. 727.

A threat by a creditor that he will sue his *prima facie* debtor

imprisonment or arrest, are not sufficient.[8] As against a party to legal process, who by fraudulent or improper use of it, knowing that he has no just claim, compelled plaintiff to pay a demand, neither evidence of protest,[9] nor of the final

unless the debt is paid will not sustain an action for money paid under duress. Holt *v.* Thomas, 105 Cal. 273, 38 Pac. Rep. 891.

Where the plaintiff pays more than the full amount due on a mortgage in order to terminate a pending foreclosure, he cannot recover the excess paid on the ground of duress. Vereycken *v.* Vanden Brooks, 102 Mich. 119, 60 N. W. Rep. 687.

The mere fact that there was an action pending against the plaintiff, which he voluntarily settled, is not sufficient to prove that he paid the money under duress. Teem *v.* Ellijay, 89 Ga. 154, 15 S. E. Rep. 33.

Where execution is issued against A and levied on property of B, who pays the money, he cannot recover on the ground of duress. His remedy was to obtain an injunction instead of voluntarily making the payment. Stover *v.* Mitchell, 45 Ill. 213.

[8] Harmon *v.* Harmon, 61 Me. 227, s. c., 14 Am. Rep. 556.

It has been held, however, that where on the defendant's threat to foreclose a mortgage on the plaintiff's property, the latter agreed to pay monthly sums which were found by the court to be unconscionable, an action to recover the money so paid could be maintained. Bither *v.* Packard, 115 Me. 306, 98 Atl. Rep. 929.

In Helmick *v.* Carter, 171 Ill. App. 25, it was held that a payment made under a threat of foreclosing a mortgage which had become due was not made under duress. See also Holt *v.* Thomas, 105 Cal. 273, 38 Pac. Rep. 891; Burke *v.* Gould, 105 Cal. 277, 38 Pac. Rep. 733. Nor did a threat of attachment in a civil suit constitute duress. Paulson *v.* Barger, 132 Iowa, 547, 109 N. W. Rep. 1081. Threats of criminal prosecution without the issuance of a warrant are insufficient to constitute duress. Patoka Loan, etc., Ass'n *v.* Holland, 63 Ill. App. 58.

But where the plaintiff showed that he had paid money and given his note because of threats of exposure, arrest and criminal prosecution, on untrue charges of false measurements and dishonesty, it was held that he had made out a *prima facie* case for the recovery of money paid under duress. And though no threats were made when he subsequently paid his note, he did not thereby waive the duress since he had every reason to believe that the same danger to his business and to his personal liberty existed as when the threats were made. Knee *v.* Yankee Waist Co., 167 App. Div. 753, 153 N. Y. Supp. 56.

[9] Meek *v.* McClure, 49 Cal. 624, s. p., McKee *v.* Campbell, 27 Mich. 497.

Where, in order to get a con-

termination of the process,[10] is necessary. Evidence that a judgment has been reversed after the money has been collected under it, and that the action was subsequently finally dismissed, makes a *prima facie* case in favor of the defendant in the judgment [11] to recover back the money; and the burden of proving an equitable right to retain it is cast on the adverse party.[12] One who sues to recover back what he paid to get possession of his goods withheld on an unjust claim of lien thereon,[13] has the burden of showing that the claim of lien was unfounded.[14] So in an action against the

signment of goods, the consignees were compelled to make payments in excess of lawful rates, it was held that this excess money paid under compulsion could be recovered, even in the absence of protest at the time of payment. So. Pac. Co. *v.* California Adjustment Co., 237 Fed. Rep. 954, 962, 150 C. C. A. 604.

[10] Chandler *v.* Sanger, 114 Mass. 364, s. c., 19 Am. R. 367. Compare Moulton *v.* Beecher, 1 Abb. N. C. 193.

[11] But not in favor of his surety who was not a party. Garr *v.* Martin, 20 N. Y. 306, rev'g 1 Hilt. 358.

Where a judgment which has been paid is subsequently reversed, the payment will be deemed to have been voluntary and not recoverable. Ditman *v.* Raule, 134 Pa. 480, 19 Atl. Rep. 676.

When payment has been coerced on a judgment which is afterwards reversed, the party paying has, *prima facie*, a right to restitution of the money. Florence Cotton, etc., Co. *v.* Louisville Banking Co., 138 Ala. 588, 36 S. Rep. 456, 100 Am. St. Rep. 50.

[12] Crocker *v.* Clement, 23 Ala. 296, 307.

It has been held that where one dismissed his suit after a judgment in his favor had been reversed, he could not, in a subsequent action against him to recover money paid upon the reversed judgment, offer as a defense thereto the fact that the claim upon which he originally brought suit was unpaid. Florence Cotton, etc., Co. *v.* Louisville Banking Co., 138 Ala. 588, 36 S. Rep. 456, 100 Am. St. Rep. 50.

[13] Harmony *v.* Bingham, 12 N. Y. 99, affi'g 1 Duer, 209; and see Great Western Ry. Co. *v.* Sutton, L. R. 4 H. of L. Cas. 226, 249.

Money, in excess of the legal rate, when paid to a common carrier to secure the release of goods in the carrier's possession, was held to have been paid under duress and to be recoverable in an action for money had and received. Clough *v.* Boston, etc., R. Co., 77 N. H. 222, 90 Atl. Rep. 863.

[14] Briggs *v.* Boyd, 56 N. Y. 289, affi'g 65 Barb. 197.

The burden of proving duress

collector, for duties alleged to have been illegally exacted, the burden of proof is on plaintiff to show not merely exaction, but that it was excessive and illegal; unless it be shown that he had no authority in the premises, and could hold the goods for no amount whatever. On an issue as to the amount of duty, the burden of proof of illegal amount rests on plaintiff.[15] If an officer had no notice of the facts which rendered his demand illegal, proof of protest at the time of payment is necessary;[16] otherwise not,[17] unless required by statute.[18] In cases of personal duress, when the state of mind of the person at the time is relevant, to show weakness (in connection with which defendant's pressure, though perhaps not technically amounting to duress, is fraudulent, and therefore equivalent in effect), the plaintiff's own acts and declarations, as well as those constituting the alleged duress, are competent, within the limits already stated in regard to proof of mental weakness and undue influence.[19] But the opinion of a witness, as to whether language used was calculated to

is on the plaintiff. Buck *v.* Houghtaling, 110 N. Y. App. Div. 52, 96 N. Y. Supp. 1034.

[15] Arthur *v.* Unkart, 96 U. S. (6 Otto) 118, 122.

Where plaintiff claims that he made the payment under duress, the burden of proving that he subsequently ratified the transaction is on the defendant. Brown *v.* Worthington, 162 Mo. App. 508, 142 S. W. Rep. 1082.

[16] Meek *v.* McClure, 49 Cal. 624.

The party paying an illegal demand need not specify the grounds of illegality in the protest accompanying the payment. Whitford *v.* Clark, 33 R. I. 331, 80 Atl. Rep. 257, 36 L. R. A. N. S. 476, Ann. Cas. 1913, D. 564.

[17] Id.; Atwell *v.* Zeluff, 26 Mich. 118. Except for purpose of recovering interest. Id.

[18] See 36 L. N. S. 476, notes. As to the requisite distinctness of protest, compare Curtis' Administratrix *v.* Fiedler, 2 Black, 461; Davies *v.* Arthur, 96 U. S. (6 Otto) 148.

[19] See chapter on WILLS. Blair *v.* Coffman, 2 Overt. (Tenn.) 176.

Where the money was paid to recover certain property, it is competent to show the circumstances which made it important and necessary that the plaintiff should have possession of his property, as tending to show that the money was paid under duress. Fargusson *v.* Winslow, 34 Minn. 384, 25 N. W. Rep. 942.

induce one to act through fear, is not competent; the language itself must be given.[20]

6. Fraud.

The fact that the complaint states fraudulent representations of the defendant, by which the plaintiff was induced to pay him the money which he seeks to recover back, does not necessarily stamp the action as in tort. It is no objection to a recovery in such a case that fraud is not proved,[21] if sufficient facts appear to warrant a recovery as for money had and received; especially when the words in the complaint charging fraud may be regarded as matter of inducement. Having money that rightfully belongs to another, creates a debt; wherever a debt exists without an express promise to pay, the law implies a promise, and the action sounds in contract, although, under the Code, this implied promise need not be alleged.[22] But if fraud is alleged as the cause of

[20] Johnson *v.* Ballew, 2 Port. (Ala.) 29.

[21] The New York Code Civ. Pro., § 549, now requires proof of fraud if alleged.

Even though no fraud be alleged, if the statements upon which the plaintiff relied when he paid the money are proved to have been untrue, he can recover. Ely *v.* Padden, 13 N. Y. State Rep. 53.

Where a surety settles a claim for less than its face amount, and then falsely represents to the plaintiff that it has paid the full amount, the plaintiff can recover the excess paid by him to the surety relying upon its representations. Price *v.* Horton, 4 Tex. Civ. App. 526, 23 S. W. Rep. 501.

[22] Byxbie *v.* Wood, 24 N. Y. 607, affi'g Sheldon *v.* Wood, 2 Bosw. 267; compare Knapp *v.* Meigs, 11 Abb. Pr. N. S. 405, and paragraphs 1 and 2, and note, of chapter XV, of this vol.

"It is elementary law that when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained. . . . It lies for the money paid under protest, or obtained through fraud, duress, extortion, imposition, or any other taking of undue advantage of the plaintiff's situation, or otherwise involuntarily and wrongfully paid." Bither *v.* Packard, 115 Me. 306, 98 Atl. Rep. 929.

"Formerly it was essential, in a count for money had and received,

action, so that defendant would be liable to arrest on a judgment against him, plaintiff cannot recover on establishing a contract, express or implied, without proving the fraud.[23]

Proof of a mistake is not enough to sustain an allegation of a cause of action thus founded on fraud.[24] The burden of proof is of course on the plaintiff to prove the fraud by which the payment was induced.[25] The principles regulating the mode of proof of fraud are the same as those elsewhere stated of actions for deceit.

to employ the fiction of a promise, but this is no longer required under the code. The facts should now be stated out of which the cause of action arose, and the law will imply the promise." Waite *v.* Willis, 42 Or. 288, 70 Pac. Rep. 1034.

[23] The release of a precedent debt is not enough under an allegation of money payment induced by fraud. De Grau *v.* Elmore, 50 N. Y. 1.

Where a complaint alleged that the defendant had received money in a fiduciary capacity which he fraudulently appropriated to his own use, it was held that the purpose of the allegations was to enable the plaintiffs to cause the defendant's arrest and, therefore, though the prayer indicated an action *ex contractu*, the allegations in tort could not be treated as surplusage. Frick *v.* Freudenthal, 45 Misc. 348, 90 N. Y. Supp. 344.

[24] Dudley *v.* Scranton, 57 N. Y. 424, and cases cited.

The action will lie for a mistake which was induced by fraud. Bull *v.* Quincy, 52 Ill. App. 186.

Where the defendant was consenting to and desiring the debauchery of his wife, and both were confederating together to entrap the plaintiff into the commission of acts of adultery with the wife for the purpose of enabling the defendant to demand and extort money from the plaintiff, the plaintiff not having had any knowledge of the conspiracy, may recover the money extorted. Tuller *v.* Fox, 46 Ill. App. 97.

[25] Mutual Life Ins. Co. *v.* Wager, 27 Barb. 354.

The plaintiff who bases his action on fraudulent representations has the burden of proving the representations and that they were false. Devereux *v.* Peterson, 126 Wis. 558, 106 N. W. Rep. 249; Johnson *v.* Mann, 72 Wash. 651, 131 Pac. Rep. 213.

The burden of proof is on the defendant to show that the plaintiff with full knowledge of all the facts ratified the agreement under which the payment was made. Schoellhamer *v.* Rometsch, 26 Ore. 394, 38 Pac. Rep. 344.

7. Failure of Consideration.[26]

Where plaintiff sues to recover back money paid by him to defendant under a contract the consideration of which has failed, the principles applicable to actions on such contracts apply as to the mode of proof, except that the burden is on the plaintiff to prove nonperformance by defendant, or other failure of consideration.[27] If the contract was in writing it should be produced or accounted for.[28] If it contains a covenant to repay and is under seal, the action should be upon the covenant; [29] though under the new procedure, if the complaint shows a good cause of action for money paid, the allegation of the contract may be regarded as matter of inducement, and is properly pleaded for that purpose.[30] Evidence that plaintiff delivered his money to defendant upon conditions stated by him at the time, and that defendant received it in silence, is *prima facie* evidence of assent to the conditions.[31] An order drawn by defendant in favor of plaintiff, and delivered to him, and proved to have been subsequently countermanded by defendant, is competent without evidence of presentment to the drawee; and if expressed to be for value received, is *prima facie* evidence of the receipt by defendant of its amount from plaintiff.[32]

[26] As to the test of the right to recover back money paid under an illegal contract see Knowlton *v.* Congress Spring Co., 57 N. Y. 518; opposed in a further decision in 5 Reporter, 166, s. c., 16 Alb. L. J. 10.

[27] Wheeler *v.* Board, 12 Johns. 363.

[28] Allen *v.* Potter, 2 McCord, 323.

[29] Miller *v.* Watson, 5 Cow. 195.

[30] Eno *v.* Woodworth, 4 N. Y. (4 Comst.) 249.

[31] Hale *v.* Holden, 116 Mass. 172.

[32] Child *v.* Moore, 6 N. H. 33.

CHAPTER XV

ACTIONS FOR MONEY RECEIVED BY DEFENDANT TO PLAINTIFF'S USE

1. Grounds of Action.

The ground of the action is that defendant, or his agent, has received money, or property which plaintiff is entitled to charge him with as money, which belongs of right to plaintiff, and which defendant ought to pay over to him.[33]

[33] The principles on which this action is sustained are liberal, applying to almost every case where a person has received money which in equity and good conscience he ought to refund; and, upon the same principles, the defendant may avail himself of any considerations, equitable as well as legal, which show that the plaintiff, in fairness and justice, is not entitled to the whole of his demand, or any part of it. BLACKSTONE, J., MANSFIELD, J., NELSON, J., Eddy *v.* Smith, 13 Wend. 490, and cases cited. S. P., Cope *v.* Wheeler, 41 N. Y. 303, affi'g 53 Barb. 350, s. c., 37 How. Pr. 181. Strictly speaking, evidence that plaintiff paid money to a third person for defendant's use (Claycomb *v.* McCoy, 48 Ill. 110); or in consequence of his fraud (Butler *v.* Livermore, 52 Barb. 570); or to defendant under a contract which has failed (Briggs *v.* Vanderbilt, 19 Barb. 222); is not appropriate under a mere allegation of money had and received by defendant to plaintiff's use. See chapter XIV of this vol. But under the new procedure, the question is usually one of variance, not of entire failure of proof. But see N. Y. Indemnity Co. *v.* Gleason, 7 Abb. N. Cas. 334.

"The action for money had and received for the use of the plaintiff is an equitable action and lies

2. The Pleadings.

The complaint, unless on an account,[34] must usually be

for money had and received by the defendant, which in equity and good conscience he should not retain, but should pay to the plaintiff. . . . The law in such cases implies a promise to pay, although there is no privity between the parties." Schoden *v.* Schaefer, 184 Ill. App. 456.

"When one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such cases an action for money had and received may be maintained." Mayo *v.* Purington, 113 Me. 452, 94 Atl. Rep. 935.

Plaintiff's right to recover in an action for money received must be determined on principles which govern courts of equity. Seward *v.* Tasker, 143 N. Y. Supp. 257; Henderson *v.* Koenig, 192 Mo. 690, 91 S. W. Rep. 88.

The action will lie when money had been received which in justice belongs to another and which ought to be returned. Estate of Stepan, 178 Ill. App. 227.

The action is equitable in character. Any evidence showing that the defendant has money which he ought to pay to the plaintiff will sustain the action. Edwards *v.* Mt. Hood Const. Co., 64 Ore. 308, 130 Pac. Rep. 49.

An action for money had and received is founded upon equitable principles. No privity of contract between the parties is required except that which results from circumstances showing an equitable obligation. Commercial Nat. Bk. *v.* Sloman, 121 N. Y. App. Div. 874, 106 N. Y. Supp. 508; Roberts *v.* Ely, 113 N. Y. 128, 20 N. E. Rep. 606.

The action will lie if the defendant has received money, the property of the plaintiff, under such circumstances as to be obliged by natural justice, good conscience, right, and equity to refund. Bradley Lumber Co. *v.* Bradley County Bk., 124 Cir. Ct. App. 175, 206 Fed. Rep. 41; Copper Belle Mining Co. *v.* Gleeson, 14 Ariz. 548, 134 Pac. Rep. 285, 48 L. R. A. N. S. 481; Smith *v.* Farmers', etc., Bk., 2 Cal. App. 377, 84 Pac. Rep. 348; Humbird *v.* Davis, 210 Pa. 311, 59 Atl. Rep. 1082.

The law implies a promise to repay on demand money which belongs to another. Arkansas Natl. Bk. *v.* Martin, 110 Ark. 578, 163 S. W. Rep. 795.

Unless it appears that the money ought to be repaid the law will not imply a promise to repay. Gile *v.* Interstate Motor Car Co., 27 N. D. 108, 145 N. W. Rep. 732, L. R. A. 1915, B. 109.

[34] Allen *v.* Patterson, 7 N. Y. 476.

The complaint need not allege every fact upon which the cause of action is based; the defendant can demand a bill of particulars.

special, setting forth the relation of the parties and the contract or wrong by means of which the money was received. If the facts alleged constitute a tort, such as a conversion or deceit in obtaining credit, or a breach of trust, it does not necessarily make the action one of tort. If a wrong is alleged merely as matter of inducement,[35] or if it be, although in form stated as the gist of the action, a mere legal conclusion, and unsupported by the facts alleged,[36] evidence

Downing *v.* Mulcahy, 6 Cal. Unrep. Cas. 242, 56 Pac. Rep. 466.

If the complaint alleges that the defendant has received money to the use of the plaintiff it is not necessary to allege a demand for the money. Field *v.* Brown, 146 Ind. 293, 45 N. E. Rep. 464; Waite *v.* Willis, 42 Ore. 288, 70 Pac. Rep. 1034.

The relation of the parties out of which the duty to account arises must be alleged. Biddle *v.* Boyce, 13 Mo. 532.

There need not be any relation of the parties nor any promise to repay. The gist of the action is that the defendant has in his possession money belonging to the plaintiff. Beardslee *v.* Horton, 3 Mich. 560.

The petition must set forth the relation of the parties and the agreement or wrong which gave rise to the cause of action, it not being an action on an account. St. Louis Sanitary Co. *v.* Reed, 179 Mo. App. 164, 161 S. W. Rep. 315.

While under the California Code a complaint for money had and received should consist of a statement of facts upon which the cause of action is based, it is not necessary to allege directly that the defendant received the money for the use of the plaintiff's assignor; and in that case the defendant is not required to deny the allegations in any more specific language than that used in the complaint. McDonald *v.* Pacific Debenture Co., 146 Cal. 667, 80 Pac. Rep. 1090.

In Maryland, under Code Art. 75, § 23, the words "For money payable by the defendant to the plaintiff," must precede money counts. Littleton *v.* Wells, etc., Council, No. 14, J. O. U. A. M., 98 Md. 453, 56 Atl. Rep. 798.

Text quoted in St. Louis Sanitary Co. *v.* Reed, 179 Mo. App. 164, 171, 161 S. W. Rep. 315.

[35] Graves *v.* Harte, 59 N. Y. 162; Byxbie *v.* Wood, 24 Id. 607, affi'g 2 Bosw. 267.

Where the plaintiff alleges fraud he has the burden of proving it. There is a presumption in favor of defendant's innocence. Early *v.* Atchison, etc., Ry. Co., 167 Mo. App. 252, 149 S. W. Rep. 1170.

[36] As where, after alleging a delivery of money to a banker or agent, which necessarily constitutes a mere debt, not a bailment,

of the facts alleged establishing liability on contract, express or implied, will sustain the action,[37] although the suggestion of fraud be unproved. If, on the other hand, fraud is alleged in such way that, on a judgment against defendant, he would be liable to arrest, the plaintiff cannot recover without proof of this allegation.[38] Plaintiff will not be deemed to waive a tort alleged in a manner appropriate to a cause of action, and to rest on an implied promise, unless such intent appears by the complaint.[39] Where the tort

the pleader alleges that defendant wrongfully converted the sum to his own use. Greentree *v.* Rosenstock, 61 N. Y. 583, affi'g 34 Super. Ct. (J. & S.) 505; Sheahan *v.* Shanahan, 5 Hun, 461, s. p., Vilmar *v.* Schall, 61 N. Y. 564, affi'g 35 Super. Ct. (J. & S.) 67.

A promise to repay, which the law implies, need not be alleged. Mumford *v.* Wright, 12 Colo. App. 214, 55 Pac. Rep. 744.

[37] Where the defendant admits his indebtedness on the note given in evidence, that note, though varying from the description given in a special count, is admissible under the common counts as evidence of money had and received by the defendant to the plaintiff's use. Hopkins *v.* Orr, 124 U. S. 510, 513; Grant *v.* Vaughn, 3 Burrow, 1516; Page *v.* Bank of Alexandria, 7 Wheat. 35; Goodwin *v.* Morse, 9 Met. 278.

And a complaint which alleged the collection of fines and the retention thereof was held sufficient to authorize a recovery, for money had and received, though it contained an additional allegation of conversion. Green Island *v.* Williams, 79 App. Div. 260, 79 N. Y. Supp. 791.

A complaint which alleged that the defendant, an attorney, collected money for the plaintiff, paid over part thereof and retained the balance which the plaintiff demanded but which the defendant refused to pay, was held a sufficient statement of a cause of action for money had and received, irrespective of an additional allegation of conversion contained therein. Reed *v.* Hayward, 82 App. Div. 416, 81 N. Y. Supp. 608.

[38] Ross *v.* Mather, 51 N. Y. 108; De Grau *v.* Elmore, 50 Id. 1. Compare Coit *v.* Stewart, 12 Abb. Pr. N. S. 216; Barker *v.* Clark, Id. 106.

See Frick *v.* Freudenthal, 45 Misc. 348, 90 N. Y. Supp. 344.

[39] Chambers *v.* Lewis, 11 Abb. Pr. 210, affi'g 10 Id. 206, s. c., 2 Hilt. 591.

"If money of the plaintiff has in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort and bring assumpsit on the common

is not alleged, plaintiff may still prove it, as part of the transaction by which defendant actually received money which he ought to refund to plaintiff—as, for instance, that defendant wrongfully took plaintiff's goods, sold them, and received the price.[40] But to entitle plaintiff to recover, on waiver of tort and as for money received, facts constituting a cause of action on contract, express or implied, must be alleged;[41]

counts." 2 Greenl. Ev. (16th Ed.), § 120.

It is only where ambiguity as to whether a cause of action is on a contract or in tort exists in the body of a complaint that one can look to the prayer for relief to determine the pleader's intention. Frick *v.* Freudenthal, 45 Misc. 348, 90 N. Y. Supp. 344.

[40] Harpending *v.* Shoemaker, 37 Barb. 270, 291, s. p., Boston, etc., R. R. Co. *v.* Dana, 1 Gray (Mass), 83, 100; Pierce *v.* Wood, 3 Fost. (N. H.) 519, 531. Where the evidence was that defendant received proceeds of *negotiable paper* wrongfully obtained from plaintiff—*Held* that the action should have been for equitable relief. Wilson *v.* Scott, 3 Lans. 308. So it has recently been held that this action by a municipality is not sustained by evidence that defendant wrongfully borrowed of a public officer money held by him as such. The action should be case or a bill in equity. Perley *v.* County of Muskegon, 32 Mich. 132, s. c., 20 Am. Rep. 637.

Where the complaint alleges an actual conversion it is not necessary to allege a demand for repayment. Bunger *v.* Roddy, 70 Ind. 26.

[41] Walter *v.* Bennett, 16 N. Y. 250.

In an action for money had and received it is not necessary to allege a conversion, as the action will lie without such allegation. Antonelli *v.* Basile, 93 Mo. App. 138; Reed *v.* Hayward, 82 N. Y. App. Div. 416, 81 N. Y. Supp. 608; Lindskog *v.* Schouweiler, 12 S. D. 176, 80 N. Y. Rep. 190; Andrews *v.* Moller, 37 Hun, 480.

In an action for money had and received the plaintiff may waive all tort and damages and claim only the money. Law *v.* Uhrlaub, 104 Ill. App. 263.

Where the action is for money obtained by threats and duress, it is not necessary to allege that the money has not been repaid, as the action is not based on contract. Woodham *v.* Allen, 130 Cal. 194, 62 Pac. Rep. 398.

Where the only evidence is the check which the plaintiff gave to the defendant which the defendant collected at the plaintiff's bank, the action will not lie, for the presumption is that the check was given in payment of a debt. Fall *v.* Haines, 65 N. H. 118, 23 Atl. Rep. 79.

and it must appear that defendant received money or pecuniary benefit equivalent thereto.[42]

3. Plaintiff's Title to the Fund.

Plaintiff may recover on proof of a contract made with himself, in his own name, although he acted as agent of the true owner of the fund; for the contract makes him the trustee of an express trust.[43] So, under an unsealed contract,

[42] Under an express contract of a bailee to account for proceeds, recovery for mere application of the property to defendant's own use, without receipt of proceeds, is not allowed. Moffat *v.* Wood, Seld. Notes, No. 5, 14. Compare Roth *v.* Palmer, 27 Barb. 652. Whether evidence of appropriation by a wrong-doer is sufficient, without evidence of sale and receipt of proceeds, is not agreed. Compare Moses *v.* Arnold, 43 Iowa, 187, s. c., 22 Am. Rep. 239; Norden *v.* Jones, 33 Wisc. 600, s. c., 14 Am. Rep. 782; 2 Greenl. Ev. 88, § 108, n. 5, and cases cited; Henry *v.* Marvin, 3 E. D. Smith, 71.

The burden of proof is on the plaintiff to show that the defendant had no authority to collect and receive the money. Weiss *v.* Mendelson, 24 N. Y. Misc. 692, 53 N. Y. Supp. 803.

The burden of proof is on the plaintiff to show that the retention of the money by the defendant is inconsistent with equity. Morrison *v.* Morrison, 101 Me. 131, 63 Atl. Rep. 392.

A complaint which alleges that the defendant wrongfully took possession of land by his tenants, and unlawfully withheld the same from the plaintiff, and specifying a sum as the reasonable rental for the land is not demurrable. Womack *v.* Carter, 160 N. C. 286, 75 S. E. Rep. 1102.

[43] Chapter XI, paragraph 1, of this volume.

The burden is on the plaintiff to prove title to the fund which he seeks to recover. Bishop *v.* Taylor, 41 Fla. 77, 25 So. Rep. 287.

The burden of proving the facts from which to imply a promise to repay is on the plaintiff. Gile *v.* Interstate Motor Car Co., 27 N. D. 108, 145 N. W. Rep. 732, L. R. A. 1915, B. 109.

The plaintiff must prove his case by preponderance of evidence; it is not necessary to prove it beyond a reasonable doubt. Broaddus *v.* Bruce, 177 Ill. App. 183.

Unless the plaintiff can show that he has title to or some interest in or lien on the money claimed he cannot recover. Carolina Glass Co. *v.* Murray, 197 Fed. Rep. 392.

The evidence must establish that the money in justice belongs to the plaintiff before he can recover. Richolson *v.* Moloney, 96 Ill. App. 254.

Where a newspaper publisher

he may recover on parol proof that he was the real principal, and that the contract was made by his consent,[44] or with his agent, though without his consent.[45] Parol evidence is competent to show that, in an unsealed [46] contract [47] made by another in his own name,[48] the plaintiff was the real principal, whether disclosed [49] to defendant or not.[50] The declarations of the depositor or payer of money, made as part of the *res gestæ* of payment, are competent to show the source of the fund for the purpose of proving in whom was the title.[51] And the letters in which plaintiff received the fund

solicits and receives subscriptions to a fund for the support of the families and dependent relatives of dead firemen, he becomes a voluntary trustee of the fund with large discretionary powers to determine who compose such families and dependent relatives among whom the moneys are to be distributed, and, except in case of gross abuse a court would not interfere with his determination. Hallinan *v.* Hearst, 133 Cal. 645, 66 Pac. Rep. 17, 55 L. R. A. 216.

[44] Fischesser *v.* Heard, 42 Geo. 531.

In an action for money had and received to the use of the plaintiff, it is unnecessary for the plaintiff to allege the source of his title, or the facts or circumstances out of which the indebtedness to him arose. Hofferberth *v.* Duckett, 175 App. Div. 498, 162 N. Y. Supp. 167.

[45] Calland *v.* Lloyd, 6 Mees & W. 26.

Where a husband sues a life insurance company for money had and received, being premiums paid by the wife on a policy on his life of which policy he had no knowledge, his testimony that she had no income and never earned any money will not be sufficient to establish that the money paid to the company was his money. Metropolitan Life Ins. Co. *v.* Monohan, 102 Ky. 13, 19 Ky. Law. Rep. 992, 42 S. W. Rep. 924.

[46] As to sealed contracts, see Briggs *v.* Partridge, 64 N. Y. 357, affi'g 39 Super. Ct. (J. & S.) 339.

[47] Even though such as the statute of frauds requires to be in writing. Ford *v.* Williams, 21 How. U. S. 287, S. P., Dykers *v.* Townsend, 24 N. Y. 57.

[48] It is not material that the contract does not indicate that the apparent party was an agent. Ford *v.* Williams (above).

[49] See Ford *v.* Williams, 21 How. U. S. 287; Hubbert *v.* Borden, 6 Whart. (Pa.) 79, 91.

[50] See N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. U. S. 344, 381.

[51] Stair *v.* York Nat. Bank, 55 Penn. St. 364, S. P., Bank *v.* Kennedy, 17 Wall. 19.

In an action by a wife against a

are competent as bearing on the question, though not necessarily as proof of the facts stated therein.[52] If declarations as to the source or title of the fund are shown to have been made in presence of the defendant, they are competent, in connection with evidence of his tacit admission or other conduct under them.[53] Defendant's declaration to plaintiff that he holds the fund subject to his order is sufficient *prima facie* evidence of plaintiff's title.[54] But privity of contract is not essential.[55]

4. The Receipt of the Money by Defendant.

The action is not sustained unless there has been an actual receipt of money by the defendant, or something equivalent to it,[56] or unless the defendant is estopped by representa-

bank for money paid on checks issued by her husband, it appeared that the husband had deposited money to her account for which he received a bank book in her name, marked "Special Deposit." It was held error to exclude the bank president's testimony that at the time the deposit was made the husband had given directions that both his and his wife's checks should be honored. Anniston Nat. Bank *v.* Howell, 116 Ala. 375, 22 So. Rep. 471.

[52] Darling *v.* Miller, 54 Barb. 149; see chapter VI, paragraph 9, of this volume, and paragraph 15 of chapter XII.

[53] Hayslep *v.* Gywmer, 1 Ad. & E. 162.

[54] Stacy *v.* Graham, 3 Duer, 444.

[55] Causidiere *v.* Beers, 1 Abb. Ct. App. Dec. 333; Ela *v.* Am. Merchants' Union Express Co., 29 Wisc. 611, s. c., 9 Am. Rep. 619; Cutler *v.* Demmon, 111 Mass. 474; Ross *v.* Curtis, 30 Barb. 238. See Farmers' Bank, etc., Co. *v.* Shut, 192 Ala. 53, 68 So. Rep. 363.

It is not necessary to prove that there was a privity of contract, as long as the defendant has received money belonging to the plaintiff. Bates-Farley Savings Bk. *v.* Dismukes, 107 Ga. 212, 33 S. E. Rep. 175; Richardson *v.* Moffit-West Drug Co., 92 Mo. App. 515, 69 S. W. Rep. 398; Madden *v.* Watts, 59 S. C. 81, 37 S. E. Rep. 209.

[56] Price *v.* Oriental Bank, 38 Law J. N. S. 41, s. c., 26 Weekly R. 543.

Plaintiff cannot recover unless he can show that the money was actually received by the defendant. J. V. Le Clair Co. *v.* Rogers-Ruger Co., 124 Wis. 44, 102 N. W. Rep. 346; Nelson *v.* First Nat. Bk., 139 Ala. 578, 36 So. Rep. 707, 101 Am. St. Rep. 52; Minor *v.* Baldridge, 123 Cal. 187, 55 Pac. Rep. 783.

One who receives money from

tions made to the plaintiff from denying the receipt.[57] But it is enough that, on all the facts, it may fairly be presumed that defendant has received plaintiff's money. Positive evidence is not required.[58] For this purpose evidence of its payment over the counter of the defendant's office, to a person acting as clerk and apparently in authority, is competent to go to the jury.[59] Where there are several defendants, partnership,[60] or a joint reception, or a joint interest, or a joint contract,[61] should be shown. An acknowledgment of

another with instructions to pay a debt due from the sender to a stranger, and does not so apply the money, is liable in an action for money had and received. Clark *v.* Jenness, 188 Mass. 297, 74 N. E. Rep. 343; Kidder *v.* Biddle, 13 Ind. App. 653, 42 N. E. Rep. 293.

Where a mortgage is made payable out of the proceeds of the sale of certain products grown on the mortgaged premises, the presumption is that after a reasonable time has elapsed the products have been sold, and an action by the mortgage holder for money had and received will lie. Barfield *v.* McCombs, 89 Ga. 799, 15 S. E. Rep. 666.

"Where the defendant is proved to have in his hands the money of the plaintiff, which *ex aequo et bono* he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly; and, after verdict, the promise is presumed to have been actually proved." Mayo *v.* Purington, 113 Me. 452, 94 Atl. Rep. 935.

[57] As, for instance, where plaintiff has acted on the representation by settling with third persons, or as in the case of a sheriff's return. See also Bullard *v.* Hascall, 25 Mich. 132.

"A balance struck in a pass book is in effect an account stated between the bank and its depositor, which it is true may be impeached for fraud or error, but unless so impeached the bank is estopped from denying its liability as shown by the account" so stated by it. Greenhalgh Co. *v.* Farmers' Nat. Bank, 226 Pa. St. 184, 75 Atl. Rep. 260, 134 Am. St. Rep. 1016, 18 Ann. Cas. 330.

[58] Tuttle *v.* Mayo, 7 Johns. 132.

[59] Newman *v.* North Am. Steamship Co., 113 Mass. 362; Gary First Nat. Bank *v.* Josefoff, 57 Ind. App. 320, 105 N. E. Rep. 175.

[60] Gilchrist *v.* Cunningham, 8 Wend. 641.

[61] Manahan *v.* Gibbons, 19 Johns. 427.

"Where more than one person is sued, a joint recovery of the whole amount against all will not be authorized, unless it appears that all received the money jointly. If it

having received the money, made by defendant in any form, is competent evidence against him.[62] Thus the consideration named in the agent's conveyance to a third person is competent against the agent;[63] but it does not conclude plaintiff as to the amount.[64] If a receipt was given by defendant to the plaintiff, or to the third person from whom the money was received, it is not necessary to produce or account for it, unless some question arises on its terms. Its terms are not conclusive against either party, but explainable by parol,[65] unless grounds for an estoppel appear.

Where defendant's duty was to sell and collect, evidence of a sale alone is not alone enough [66] without other evidence raising a presumption of collection. But if defendant is a wrongdoer, or neglect to collect were a breach of duty, his admission that he had sold the goods is enough to go to the jury from which they may infer receipt of proceeds.[67]

If the money was received by collecting a written security or evidence of debt from a third person,[68] the instrument

was not so received, the plaintiff can only recover from each defendant separately the amount shown to have come into his hands." Great Southern Acc., etc., Co. *v.* Guthrie, 13 Ga. App. 288, 79 S. E. Rep. 162.

[62] As to qualified oral admissions, see chapter XIII, paragraph 20 of this vol.

The plaintiff may recover, however, even if he does not produce the original receipt or account for its absence. Kelsey *v.* Dickson, 2 Blackf. (Ind.) 236.

Thus where an attorney, having a claim for collection, on being requested to pay over $20 collected, replied that he would "straighten up" when he collected the balance of the claim, this was held a "plain admission of the receipt of the $20." Mahler *v.* Hyman, 17 N. Y. Supp. 588.

[63] Thalheimer *v.* Brinckerhoff, 6 Cow. 90.

[64] Mains *v.* Haight, 14 Barb. 76.

[65] White *v.* Parker, 8 Barb. 48, 69; Phelps *v.* Bostwick, 22 Barb. 314; Union Bank *v.* Solles, 2 Strobh. 390.

[66] Haskins *v.* Dunham, Anth. N. P. 111.

[67] Hathaway *v.* Burr, 21 Mc. 567.

[68] As, for instance, where one who collected a running account (Planters' Bank *v.* Farmers' Bank, 3 Gill & J. [Md.] 449, 469); or a warrant of attorney to confess judgment (Bayne *v.* Stone, 4 Esp. 13); or a judgment (Martin *v.* Williams, 1 Dev. L. N. C. 386), or an award (Brinckerhoff *v.* Wemple, 1 Wend.

need not be produced or accounted for in order to let in parol proof of the collection of the sum due on it;[69] but the instrument is competent in favor of plaintiff if he chooses to put it in evidence,[70] and being only collaterally in question, subscribing witnesses need not be produced unless it is under seal.[71]

5. —by an Agent of Defendant.

If payment to a third person is relied on, there must be some evidence that he was defendant's agent.[72] Evidence

470), or a negotiable note or draft (Bullard *v.* Hascall, 25 Mich. 132; Sally *v.* Capps, 1 Ala. 121), is sued for the proceeds, plaintiff need not produce nor account for the instrument.

[69] S. P., Steele *v.* Lord, 70 N. Y. 283.

[70] See, for instance, French *v.* Shreeve, 18 N. J. Law Rep. 3 (Harr.) 147; Geisse *v.* Dobson, 3 Whart. (Pa.) 34.

[71] Rundle *v.* Allison, 34 N. Y. 180, 184.

[72] Farias *v.* De Lizardi, 4 Rob. 407; and see chapter XII, paragraph 7 of this vol.

"The rule is, that any agent of the bank who receives a deposit from a customer within the bank during banking hours, binds the bank unless the dealer had notice of lack of power." Thus an interpreter who within banking hours, in an office of the bank accepted money from one who could neither read nor write English was held to be an agent accepting money for the bank, even though he gave his personal receipt for the depositor's money. Gary First Nat. Bank *v.* Josefoff, 57 Ind. App. 320, 105 N. E. Rep. 175.

A bank cashier, from the nature of banking business, was held to be the bank's agent and not the plaintiff's, for the transmission of the plaintiff's deposit to another bank and the opening of an account with the latter in the plaintiff's name. Goshorn *v.* People's Nat. Bank, 32 Ind. App. 428, 69 N. E. Rep. 185, 102 Am. St. Rep. 248, and see also Heim *v.* Humboldt First Nat. Bank, 76 Neb. 831, 107 N. W. Rep. 1019.

Certain agents of a corporation with authority to sell its stock for cash delegated that duty to others whom the plaintiff paid and who, after deducting their commission, remitted the balance to the corporation's agents. It was held that this balance could be recovered from the corporation as money paid to its agents, except the amount deducted as commission, since that sum was not paid to duly authorized agents of the corporation. Great Southern Acc., etc., Co. *v.* Guthrie, 13 Ga. App. 288, 79 S. E. Rep. 162.

of the declarations of the alleged agent are not competent for the purpose of proving the agency, unless there is something to connect the defendant with the declarations.[73] Evidence that the defendant was informed by the alleged agent of his receipt of the fund, and thereupon gave him directions as to its disposal, is competent evidence that defendant received the money.[74] Where the authority shown was not a general agency, but a special authority,—particularly if conferred by a principal acting in *autre droit*, as, for instance, an executor authorizing an attorney to take out ancillary administration in another State and sell assets there,—the person dealing with the agent must look to his authority, and cannot recover of the principal on proof of money received by the agent only.[75] A sufficient agency having been proved, a receipt given, or admission of payment made, by the agent, at the time of the transaction, is admissible against the principal.[76]

[73] Snook *v.* Lord, 56 N. Y. 605.

"It is competent for a person to testify that he acted as agent for another, though mere hearsay evidence of declarations of agency is inadmissible." Great Southern Acc., etc., Co. *v.* Guthrie, 13 Ga. App. 288, 79 S. E. Rep. 162.

[74] Coates *v.* Bainbridge, 5 Bing. 58.

[75] Owings *v.* Hull, 9 Pet. 607.

[76] Thalheimer *v.* Brinckerhoff, 6 Cow. 90, S. P., Anderson *v.* Broad, 2 E. D. Smith, 530, S. C., 12 N. Y. Leg. Obs. 187.

Likewise where, from the nature of banking business, a cashier was held to be the agent of the bank for the transmission of the plaintiff's deposit to another bank there to be deposited to the plaintiff's account, the receipt given to the plaintiff was *prima facie* evidence of payment of the money to the defendant bank. Goshorn *v.* People's Nat. Bank, 32 Ind. App. 428, 69 N. E. Rep. 185, 102 Am. St. Rep. 248.

In an action for money received, it appeared that the defendant collecting agency had a schedule of charges providing for a 10% fee where attorneys' services were required. Inasmuch as the plaintiff saw this schedule at the time the contract with the defendant was made, it was held admissible, though a printed schedule of the defendant's charges providing that the above 10% rate did not apply in cities where a bar rate prevailed was held inadmissible in the absence of proof that the plaintiff had ever seen this schedule. Credit Clearing House *v.* Wheeland Co., 18 Ga. App. 475, 89 S. E. Rep. 634.

6. The Medium and Amount of Payment.

The evidence must show payment of money, or that which the parties treated as money, or which the defendant ought to account for as such. Evidence of the receipt of foreign money is competent;[77] so, of course, of bank notes;[78] but defendant may show the depreciated character of the medium of payment, except where it was a breach of his duty to plaintiff to accept such currency.[79] The delivery of non-negotiable things in action, or other property, is not appropriate under an allegation of money received,[80] unless connected with evidence that defendant expressly accepted the property as a payment of money, or that he has actually

[77] Ehrensperger *v.* Anderson, 3 Exch. 149, 156.

See also Guinan *v.* Blum, 93 Misc. 667, 157 N. Y. Supp. 279; Mayer *v.* Metropolitan Traction Co., 165 App. Div. 497, 150 N. Y. Supp. 1026.

"It is not always necessary that actual money shall have been received. If property or anything else, be received as the equivalent of money, by one who assumes to cancel or dispose of a property right, for which, by contract, or liability, legal or equitable, it is his duty to account to another, the latter may treat the transaction as a receipt of money, and sue for it as such." Barnett *v.* Warren, 82 Ala. 557, 2 So. 457, quoted with approval in Farmers' Bank, etc., Co. *v.* Shut, 192 Ala. 53, 60, 68 So. Rep. 363. In the latter case the defendant received logs which he converted into the money for which the plaintiff sued.

[78] Pickard *v.* Bankes, 13 East 20. See Mason *v.* Waite, 17 Mass. 560.

"In regard to things treated as money, it has been held that this count may be supported by evidence of the defendant's receipt of bank notes." 2 Greenl. Ev. § 118. See also Gordon *v.* Camp, 2 Fla. 422.

[79] See Cockrill *v.* Kirkpatrick, 9 Mo. 688.

[80] Nightingale *v.* Devisme, 5 Burr. 2589.

The plaintiff may produce the unauthorized promissory notes of the defendant as proving that the amount shown on their face was advanced by the plaintiff. Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. Rep. 29, 48 Am. St. Rep. 98.

Where goods or property have been wrongfully converted into money an action for money had and received will lie. Southern Ry. Co. *v.* Born Steel Range Co., 122 Ga. 658, 50 S. E. Rep. 488; Nelson *v.* Kilbride, 113 Mich. 637, 71 N. W. Rep. 1089; Green *v.* Lepley, 88 Ill. App. 543.

turned it into money or its equivalent, or that it was intended between him and the plaintiff to be sold, and sufficient time has elapsed to do so, and that he is in default for not accounting. A credit in account with a third person may be proved under an allegation of money received, if accepted by defendant as a set off equivalent to money,[81] or if allowed in violation of his duty and to the prejudice of plaintiff. Under the new procedure, however, if defendant is shown to have received money value, a variance in the medium is not an entire failure of proof, but material if defendant is prejudiced. The evidence must tend to show a definite sum,[82] or certain *data* from which, by an arithmetical calculation, the jury may ascertain the sum,[83] and it is no objection that the fund was received mixed with other moneys, if a several right of action is shown to exist in plaintiff for his share.[84] Variance in the amount may be disregarded,[85] within the limits of recovery fixed by the demand for judgment. If the receipt of coins or bank notes is proved without proof of their denomination, the smallest denomina-

[81] Noy *v.* Reynolds, 1 Ad. & E. 159.

Where the plaintiff, pursuant to an agreement with a railroad contractor's agent, boarded the contractor's employees, it was held that when the contractor, with his employee's consent, credited them with the payment of the plaintiff's board bills and deducted the amounts from their wages he was liable to the plaintiff as for money received, even though he had never actually received the money so credited. Edwards *v.* Mt. Hood Const. Co., 64 Or. 308, 130 Pac. Rep. 49.

[82] Harvey *v.* Archbold, 3 B. & C. 626.

See also Bothman *v.* County of Jackson, 194 Ill. App. 255.

An action could not be maintained as for money had and received from the sale of certain shares of stock which had been sold together with a note for a lump sum, since it did not appear that any specific sum had been received for the stock, and no means were suggested for ascertaining what proportion of this lump sum had been paid therefor. French *v.* Robbins, 172 Cal. 670, 158 Pac. Rep. 188. See also Palmer *v.* Guillow, 224 Mass. 1, 112 N. E. Rep. 493.

[83] Taukersley *v.* Childers, 23 Ala. 781.

[84] See Green *v.* Givan, 33 N. Y. 343.

[85] Lass *v.* Wetmore, 2 Sweeny 209.

tion in circulation is to be presumed,[86] in the absence of fraud or fraudulent concealment.

7. Action by Depositor against Bank.

A certificate of deposit,[87] as well as evidence of an ordinary deposit in account, is competent in an action for money received. An ordinary certificate of deposit is not a contract, within the rule excluding parol evidence,[88] and if it be, parol evidence is competent to explain abbreviations, etc., in it,[89] and to charge the bank by showing that the depositor justly supposed he was dealing with them although the certificate was signed by an officer individually.[90]

Evidence of usage is not admissible to show that deposits made during depreciation of currency, and marked in the pass-book respectively, "coin" or "currency," were always to be repaid in kind, for without special agreement, a bank deposit creates a debt, and whatever is legal tender will discharge it. Usage cannot alter the law.[91] The fact that

[86] 2 Greenl. Ev. 109, § 129a.

[87] Talladega Ins. Co. *v.* Landers, 43 Ala. 115, 134.

A deposit slip providing for the payment of the money deposited upon the happening of a certain contingency, made by the cashier of a bank in the usual and ordinary course of business, is *prima facie* evidence of the liability of the bank. National Bank *v.* Presnall, 58 Kan. 68, 49 Pac. Rep. 556.

The case of Hotchkiss *v.* Mosher cited in note below has been held to have been overruled on the point that a certificate of deposit is a mere receipt. In re Baldwin, 170 N. Y. 156, 63 N. E. Rep. 62, 58 L. R. A. 122. But see later case Young *v.* American Bank, 44 Misc. 305, 89 N. Y. Supp. 913.

[88] Hotchkiss *v.* Mosher, 48 N. Y. 478.

[89] Hulbert *v.* Carver, 37 Barb. 62, and cases cited.

[90] Coleman *v.* First Nat. Bank of Elmira, 53 N. Y. 388, 394, and although, as between the officer and the bank, it was the officer's private transaction. Caldwell *v.* National Mohawk Valley Bank, 64 Barb. 333. Whether deposit was made with teller, as such, or personally, a question of fact for the jury. Id.; Pattison *v.* Syracuse Nat. Bank, 4 Supm. Ct. (T. & C.) 96.

[91] Thompson *v.* Riggs, 5 Wall. 663, 680. *Contra*, Chesapeake Bank *v.* Swain, 29 Md. 483. As to when the credit given for a deposit is conclusive, see Manhattan Co.

plaintiff's book has been balanced, does not dispense with the necessity of proving demand before suit.[92] The balancing and return of the pass-book has the effect of an account stated, but a depositor is not concluded if he objects within a reasonable time;[93] still the burden is upon him to show the error.[94] Drawing for the precise balance is evidence of ac-

v. Lydig, 4 Johns. 377; Mechanics' & Farmers' Bank *v.* Smith, 15 Id. 115; Oddie *v.* National City Bank, 45 N. Y. 735; Hepburn *v.* Citizens' Bank, 2 La. Ann. 1007.

The relation of creditor and debtor is held to exist between a depositor and his bank. Parker-Smith *v.* Prince Mfg. Co., 172 App. Div. 302, 158 N. Y. Supp. 346.

[92] Downes *v.* Phœnix Bank, 6 Hill, 297; and see Payne *v.* Gardiner, 29 N. Y. 146.

But it was held that no demand was necessary where a bank, without authority, paid the depositor's note, charged the amount so paid to his account and returned it with his cancelled checks. Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. Rep. 944.

[93] Schneider *v.* Irving Bank, 1 Daly, 500, s. c., 30 How. Pr. 190; Hutchinson *v.* Market Bank, 48 Barb. 302.

"It is well settled that the entry of debits for payments made in a bank book and striking a balance is undoubtedly the statement of the account, and the delivery of it to the dealer, and his retention of it without objection . . . gives to this statement of accounts the character of a stated account." August *v.* Fourth Nat. Bank, 48 Hun 620, 1 N. Y. Supp. 139, 141.

"A balance struck in a pass book is in effect an account stated between a bank and its depositor, which it is true may be impeached for fraud or error, but unless so impeached the bank is estopped from denying its liability as shown by the account so stated by it." Greenhalgh Co. *v.* Farmers' Nat. Bank, 226 Pa. 184, 75 A. Rep. 260, 134 Am. St. Rep. 1016, 18 Ann. Cas. 330.

A balanced pass-book, when returned to the depositor constitutes a statement of the account between the bank and the depositor, and thereupon it is the depositor's duty to examine the same within a reasonable time. Janin *v.* London, etc., Bank, 92 Cal. 14, 27 Pac. Rep. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82. For other cases see list 29 L. N. S. 339 n.

[94] Shepard *v.* Bank of State of Missouri, 15 Mo. 143.

The burden of proving error was held to rest upon the plaintiff who received and retained without objection his balanced pass-books and vouchers. August *v.* Fourth Nat. Bank, 48 Hun 620, 1 N. Y. Supp. 139.

A depositor upon receiving his balanced pass-book and vouchers has the burden of proving that a check with which he was debited

quiescence.[95] But payments by the bank on checks in which the depositor's signature was forged,[96] are made in their own wrong, and plaintiff's delay to discover the forgery does not avail defendants,[97] unless defendants show negligence to their prejudice.[98] The books of the bank are evidence against

was a forgery. Janin *v.* London, etc., Bank, 92 Cal. 14, 27 Pac. Rep. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82.

[95] Lockwood *v.* Thorne, 11 N. Y. 170, rev'g 12 Barb. 487.

[96] Weisser *v.* Denison, 10 N. Y. 68. Otherwise of raised checks, chapter XIV, paragraph 4 of this vol.

"The general rule of law is that a bank may pay and charge to its depositor only such sums as are duly authorized by the latter, and of course a forged check is not authority for such payment." Morgan *v.* U. S. Mortgage, etc., Co., 208 N. Y. 218, 101 N. E. Rep. 871, L. R. A. 1915, D. 741, Ann. Cas. 1914, D. 462.

"Banks are bound to know the signatures of their depositors." Wachsman *v.* Columbia Bank, 8 Misc. 280, 28 N. Y. Supp. 711. See also New York Produce Exchange Bank *v.* Houston, 169 Fed. Rep. 785, 95 C. C. A. 251.

"All unauthorized payments, such as upon forged checks, are . . . made at the peril of the bank." Janin *v.* London, etc., Bank, 92 Cal. 14, 22, 27 Pac. Rep. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82.

One is entitled, "to assume that the bank, before paying the check, had ascertained the genuineness of" an indorsement. Harter *v.* Mechanics' Nat. Bank, 63 N. J. Law Rep. 578, 44 Am. Rep. 715, 76 Am. St. Rep. 224.

[97] Welsh *v.* German American Bank, 42 Super. Ct. (J. & S.) 462.

In Critten *v.* Chemical Nat. Bank, 60 App. Div. 241, 70 N. Y. Supp. 246, it was held that a depositor owed the bank no duty to examine his bank account and returned vouchers to discover forgeries, but the Court of Appeals held in the same case (171 N. Y. 219, 63 N. E. Rep. 969, 57 L. R. A. 529) that there was a duty to exercise reasonable care to verify the vouchers by a comparison with the stubs of his check book, where he possessed such stubs.

"It is well established that appellants owed the duty of making some examination and verification of their account with the bank when the pass book and vouchers were returned." Morgan *v.* U. S. Mortgage, etc., Co., 208 N. Y. 218, 101 N. E. Rep. 871, L. R. A. 1915, D. 741, Ann. Cas. 1914, D. 462.

[98] Chapter IV, paragraph 2 of this vol. In an action against a savings bank for a mispayment, where the bank relied on its rule that it would only be responsible for ordinary care and diligence, if the two signatures were so dissimilar that when compared the discrep-

it,[99] but not in its favor.[1] The declarations of plaintiff, made at the time of the deposit, as part of the *res gestæ*, are competent in his favor,—for instance, to prove the capacity in which he claimed to hold the fund,—and the declarations of an officer or clerk of the bank, made in reference to the accounts, while acting in the course of his duty as such, are also competent against the bank.[2]

ancy would be easily and readily discovered by a person competent for the position, then the failure to discover it would be evidence of negligence which should go to the jury. Otherwise, if the difference was not marked and apparent, or if it would require a critical examination to detect it, and especially if the discrepancy was one as to which competent persons might honestly differ in opinion. Appleby *v.* Erie Co. Savings Bank, 62 N. Y. 12.

See also Janin *v.* London, etc., Bank, 92 Cal. 14, 27 Pac. Rep. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82; Wind *v.* Fifth Nat. Bank, 39 Mo. App. 72.

The burden of proving that the plaintiff was neglegent in intrusting the examination of returned vouchers and balanced pass-book to his clerk rested on the defendant which had cashed forged checks drawn upon the plaintiff's account. Wachsman *v.* Columbia Bank, 8 Misc. 280, 28 N. Y. Supp. 711.

Where a depositor's agent forged and cashed checks which he extracted from the returned bundle of vouchers before giving them and the balanced pass-book to his principal, it was held that the failure of the latter to verify his account by a comparison with his check list and pass-book was such negligence as would absolve the bank from liability for the payment of the forged checks. Morgan *v.* U. S. Mortgage, etc., Co., 208 N. Y. 218, 101 N. E. Rep. 871. L. R. A. 1915, D. 741, Ann. Cas, 1914, D. 462. See also Myers *v.* The Southwestern Nat. Bank, 193 Pa. St. 1, 44 Am. Rep. 280, 74 Am. St. Rep. 672.

[99] See page 162 of this vol.

[1] White *v.* Ambler, 8 N. Y. 170. Unless it be a foreign corporation. See page 162 of this vol.

[2] Price *v.* Marsh, 1 Car. & P. 60; page 144 of this vol.

But statements that there was a certain deposit in the name of a third person, when made by a bank's officers in a casual conversation with the plaintiff who had succeeded to such person's claim against the bank were held inadmissible. McCoy *v.* City Nat. Bank, 128 Minn. 455, 151 N. W. Rep. 178.

And in an action to recover an alleged deposit, which the bank denied, evidence of the cashier's statement to a witness that business kept up remarkably and that he had received a deposit from a third person for the plaintiff was

8. Bank's Action for Over-draft.

In the action of the bank against a depositor for an over-draft, the presumption is that the depositor had funds there to meet any check drawn by him which they are shown to have paid,[3] and the books of the bank are not of themselves evidence in their favor, of the state of his account.[4]

held inadmissible as having occurred after the time the alleged deposit was made and being a narrative of past events. Bank of Phœnix City *v.* Taylor, 72 So. Rep. (Ala.) 264.

After a bank became insolvent, but before the management of its affairs had been taken out of the hands of its directors, the bank's manager issued a certificate or statement of the account of a depositor in exchange for the latter's pass-book. It was held that his statement was admissible as a restatement of an old account rather than as the creation of a new one after the bank's insolvency. Dingley *v.* McDonald, 124 Cal. 90, 56 Pac. Rep. 790.

[3] White *v.* Ambler, 8 N. Y. 170.

See Spokane, etc., Trust Co. *v.* Huff, 63 Wash. 225, 115 Pac. Rep. 80, 33 L. R. A. N. S. 1023, Ann. Cas. 1912, D. 491.

When a bank pays an overdraft drawn by the defendant "the presumption of the law is that the defendant had funds in the bank to meet checks drawn by him which the said bank is shown to have paid. Such presumption is not conclusive." People's Nat. Bank *v.* Rhoades, 28 Del. 65, 90 Atl. Rep. 409.

[4] Id.; State Bank *v.* Clark, 1 Hawks 36; chapter XII, paragraphs 12 and 13 of this vol. Unless it be a foreign corporation (p. 162), or it be shown that the bank furnished transcripts to its depositors, so that its officers can be deemed to have been the agents of both parties for the purpose of keeping the account (Union Bank *v.* Knapp, 3 Pick. 96), or some other special ground is shown. See p. 162 of this vol. As to negligence in permitting plaintiff's clerk or officer to make over-drafts, see Manufacturers' Nat. Bank *v.* Barnes, 65 Ill. 69, s. c., 16 Am. Rep. 576; Tradesman's Bank *v.* Astor, 11 Wend. 87.

But in Delaware, a statute allowing a book of original charges to be admitted to charge the defendant with the sums therein contained for goods sold and delivered, "and other matters," was held to include, under the latter clause, a bank's books containing debits and credits of depositors; and such book was, therefore, admitted to charge the defendant in an action to recover the sum paid on an overdraft in excess of the amount on deposit. People's Nat. Bank *v.* Rhoades, 28 Del. 65, 90 Atl. Rep. 409.

9. Action by Principal against His Agent.

The agency of defendant may be proved by direct testimony to the fact,[5] or by the acts and conduct of the parties, and evidence of what passed between them in reference to the transactions in question.[6] The fact that defendant received or charged commissions is cogent evidence of agency.[7] On the question of agency in a particular transaction, when the testimony is in conflict, the fact that defendant had acted as such agent in previous transactions for plaintiff is admissible to explain the language and writings of the parties in the transaction in question. But the evidence of such fact (if not sufficient to prove a general agency) is not competent for the purpose of proving an agency in the particular transaction, or even in determining the credibility of the conflicting testimony. The principle upon which evidence of similar transactions to the one in issue is admitted, is to explain intent, not to prove the act or its probability.[8] Under an allegation of agency, evidence of a joint adventure is not a failure of proof, but raises a question of variance.[9]

A general receipt may be explained by parol, even though it contain a general promise to account.[10] But when the

[5] See chapter XII, paragraph 7, and chapter XIII, paragraph 2, of this vol.

[6] A circular, stencil plate, and form of invoice delivered to plaintiff by defendant, while soliciting consignments, of goods for sale,—*Held*, competent as evidence bearing upon the consignments and the terms on which they were made, and the character in which defendant proposed to plaintiff to act in receiving. Whittaker *v.* Chapman, 3 Lans. 155.

A bank "receiving a draft for collection merely, is the agent of the remitter, drawer or forwarding bank, and takes no title to the paper, or the proceeds, when collected, but holds the same in trust for remitting." State Nat. Bank *v.* First Nat. Bank, 124 Ark. 531, 187 S. W. Rep. 673.

[7] Armstrong *v.* Stokes, L. R. 7 Q. B. 598, s. c., 3 Moak's Eng. 217.

[8] Richards *v.* Millard, 56 N. Y. 574, rev'g 1 Supm. Ct. (T. & C.) 247.

[9] Power *v.* Fisher, 8 Bosw. 258. Otherwise of an allegation of loan; for there is agency in a partnership or joint adventure, but none in a loan.

[10] Eaton *v.* Alger, 2 Abb. Ct. App. Dec. 5.

receipt embodies a contract,—as, for instance, where it prescribes the manner in which the money is to be appropriated,—it is not liable to be varied by parol evidence; [11] though a subsequent parol agreement, superseding that shown by the receipt, may be proved.[12] When an attorney gives a general receipt for the evidence of a debt then due, it is presumed that he received it as attorney, for collection; and the burden is on him to show that he received it specially and for some other purposes.[13] Notwithstanding writings between the parties in which the transaction appears as an assignment from plaintiff to defendant, or a conveyance showing a sale from defendant to plaintiff, parol evidence is competent to show that their relation was that of principal and agent, and, therefore, that the defendant is accountable for the property or transaction. The legal effect of the instrument as between the parties thereto is not varied by this proof, but only the accountability of defendant.[14] And where plaintiff relies on defendant's conveyance or bill of sale to prove a sale by him, the consideration named, though *prima facie* evidence in plaintiff's favor, is not conclusive, but parol evidence is competent to vary it.[15] Partners may be held on their agreement to account and pay over, although one had withdrawn before the sales, and the moneys were received by the other only.[16] On an allegation that money was received by his agent, plaintiff may recover on proof that he received property of substantial pecuniary value,[17] or notes which were good and collectible,[18] and by his transactions he released the debtor and deprived his

[11] Wood *v.* Whiting, 21 Barb. 190, 197.

[12] Egleston *v.* Knickerbocker, 6 Barb. 458.

[13] Smedes *v.* Elmendorf, 3 Johns. 185.

[14] Richards *v.* Millard, 56 N. Y. 574, s. c. (below, 1 Supm. Ct. (T. & C.) 247.

[15] Mains *v.* Haight, 14 Barb. 76.

[16] Briggs *v.* Briggs, 15 N. Y. 471. Compare Ayrault *v.* Chamberlin, 26 Barb. 83; and see chapter on PARTNERS; and see Andrews *v.* Jones, 10 Ala. 460.

[17] Beardsley *v.* Root, 11 Johns. 464.

[18] Allen *v.* Brown, 44 N. Y. 228, affi'g 51 Barb. 86, and cases cited.

principal of all remedy except against himself.[19] Profits made by an agent in his employment belong absolutely to his principal, and he may recover them as money received.[20] Refusal of an agent, after reasonable time, to account for goods delivered to him for sale raises the presumption that he has sold them and has the proceeds; [21] and the invoice which was delivered to him, and is unexplained by him, is evidence that all the articles named in it came to his possession, and raises a presumption against him that he sold them at least for as much as the invoice prices.[22] The source of the money received, and circumstances of its receipt, not being within plaintiff's knowledge, he is not held to strictness of allegation and proof in that respect.[23] In cases of long continued fraudulent embezzlement or misappropriation by one who was exclusively plaintiff's agent, if there is sufficient evidence of the main fact to go to the jury, evidence of his previous insolvency, and contemporaneous unexplained acquisition of large property, is relevant; and his declarations concerning his property and business transactions, made to third persons, in the absence of the plaintiff or his agents, are inadmissible to rebut such evidence.[24] To show the intentional character of false entries and the like, evidence of other such acts by him (within reasonable limits of time), the errors all being in his own favor, is competent to explain motive and intent.[25]

10. Demand and Notice.[26]

Demand may be inferred by the jury from notice of the

[19] Same cases.

[20] Morison *v.* Thompson, L. R. 9 Q. B. 480.

[21] Hunter *v.* Welch, 1 Stark. 224.

[22] Field *v.* Moulton, 2 Wash. C. C. 155.

[23] See Hall *v.* Morrison, 3 Bosw. (N. Y.) 520, 527.

[24] Boston & W. R. R. Co. *v.* Dana, 1 Gray, 83, 101, 103.

[25] Regina *v.* Richardson, 2 F. & F. 343.

[26] "There is considerable diversity of opinion as to the necessity of a demand as a condition precedent to an action for money had and received. The doctrine is broadly stated in some decisions that the commencement of suit is a sufficient demand. This state-

mistake or other ground of the demand, and an informal request to rectify it.[27] Demand or instructions to remit will not be presumed against even a foreign factor, merely from lapse of time.[28] Where plaintiff proves a demand and refusal, defendant has a right to prove the reasons which were given by him at the time.[29]

11. Defendant's Evidence.

Under a general denial of the contract alleged, defendant may prove that the contract contained material provisions under which the money was received, other than those alleged,[30] or that there was a departure from the contract by plaintiff's request, and the money was paid accordingly.[31]

ment, however, is inaccurate, as it is obvious that under some circumstances a demand is necessary." 27 Cyc. 871 & 872. "Where one has wrongfully obtained the money of another by duress, or has by fraudulent means induced another to pay him money, no demand is necessary as a prerequisite to an action for money had and received." Likewise for mistake, 27 Cyc. 873.

Whether demand is necessary in case of mistake, etc., is not agreed. The better opinion is that where defendant is not a wrong-doer, or violating his agreement (14 N. Y. 492), in retaining the money, demand, or at least notice of mistake, given before suit, must be proved. Moak's Van Santv. Pl. 379; Mayor, etc., of N. Y. *v.* Erben, 3 Abb. Ct. App. Dec. 255, affi'g 10 Bosw. 189. *Contra*, Calais *v.* Whidden, 64 Me. 249; Utica Bank *v.* Van Gieson, 18 Johns. 485. Unless defendant has put it out of his own power to comply. The reasonableness of the rule is seen in the fact that, while the cause of action is in the nature of an equitable one, the form of the action is legal, and costs are not in the discretion of the court.

[27] Muir *v.* Rand, 2 Ind. 291. Compare Walsh *v.* Ostrander, 22 Wend. 178, and 2 Abb. N. Y. Dig. 2d ed. 642–644.

"Where there is nothing to be done by the plaintiff to place the defendant in *statu quo*, the action for money had and received is in itself a rescission as well as a demand." Bither *v.* Packard, 115 Me. 306, 98 Atl. Rep. 929.

[28] Halden *v.* Crafts, 4 E. D. Smith, 490, s. c. as Walden *v.* Crafts, 2 Abb. Pr. 301.

[29] Bennett *v.* Burch, 1 Den. 141.

[30] Marsh *v.* Dodge, 66 N. Y. 533, rev'g 4 Hun, 278, s. c., 6 Supm. Ct. (T. & C.) 568.

[31] Gwynn *v.* Globe Locom. Works, 5 Allen, 317.

The burden is on the defendants,

Plaintiff's parol evidence to show a rescission by subsequent consent may be met by parol evidence that, by a still later consent, the contract (although under seal) was reinstated.[32]

An agent, sued by his principal, may testify to his own opinion as to the necessity of the exercise of a discretion which was vested in him for the purpose of the transactions on which he is called to account,[33] and to his good faith in its exercise.[34] The *res gestæ* are competent for the same purpose.[35] He may testify generally that he paid over all he had received, and may testify to what allowances were made on settlements which are in evidence, although there were written receipts.[36] Evidence that the usual course of dealing was to make daily returns and payments, without passing any vouchers, raises a presumption of law that defendant had fully accounted, and throws on plaintiff the burden of proving the contrary.[37] If defendant relies on plaintiff's consent that he retain to his own use moneys received, the evidence of such consent should be clear and satisfactory.[38]

if they have relieved themselves of liability for the money after it passed into their hands, to prove that fact. Andrews *v.* Moller, 37 Hun, 480.

Where the defendant received the money in connection with a joint business venture in which he was engaged with the plaintiff, he may show that the money was spent in connection with the business. Fisher *v.* Sweet, 67 Cal. 228, 7 Pac. Rep. 657.

Where the defendant admits having received the money he must prove his affirmative defense by a preponderance of evidence. Dillon *v.* Pinch, 110 Mich. 149, 67 N. W. Rep. 1113; Logan *v.* Freerks, 14 N. D. 127, 103 N. W. Rep. 426.

[32] Flynn *v.* McKeon, 6 Duer, 203.

[33] France *v.* McElhome, 1 Lans. 7.

[34] See 38 N. Y. 281, and cases cited.

[35] See paragraph 15 of chapter XII, and chapter VI, paragraph 9, and Hudson *v.* Crow, 26 Ala. 515, 522.

[36] France *v.* McElhone, 1 Lans. 7. See, however, chapters on ACCOUNTS STATED and PAYMENT.

[37] Evans *v.* Birch, 3 Campb. 10.

[38] Howe *v.* Savory, 49 Barb. 403, 51 N. Y. 631.

If the defendant contends that he was to retain the money in payment of services rendered by him it is competent to show what those services were as bearing on the question whether it was probable that the plaintiff made such arrangement. Barney *v.* Fuller, 15

Defendant cannot exonerate himself by proving that he received the money merely as agent for another,[39] unless the agency was disclosed; [40] nor even then if he was a wrongdoer in receiving,[41] or paid over in fraud of plaintiff's right. Defendant's agency for a third person being shown, it will not be presumed that the money had been paid over to the principal, unless from the nature of the business, or the usual course of transacting it, it would be expected that payment would be made to the principal and not to the agent.[42] To show good faith in paying over, the *res gestæ* of the payment are competent,[43] as well as the testimony of the defendant.[44]

In respect to illegal consideration, the law recognizes a distinction between enforcing an illegal contract and asserting title to money which has arisen from it.[45] One who received money in trust to pay it to plaintiff in discharge of an alleged indebtedness of the payer, cannot resist the action on the ground that the contract between plaintiff and the payer, out of which the alleged indebtedness arose, was illegal. The debtor waiving the objection, the depositary cannot avail himself of it.[46] The fact that the defendant

N. Y. Supp. 694, 61 Hun, 618, aff'd 133 N. Y. 605, 30 N. E. Rep. 1007.

[39] And a custom of banks to collect money as agents, without disclosing their agency, is insufficient to show that a bank, in collecting, acted as agent. Canal Bank *v.* Bank of Albany, 1 Hill, 287.

[40] See Barbour *v.* Litchfield, 4 Abb. Ct. App. Dec. 655, and cases cited; and chapter on Goods Sold.

[41] Tugman *v.* Hopkins, 4 M. & G. 389, 401.

[42] Hathaway *v.* Burr, 21 Me. 567, 572. In an action against an agent for money alleged to be due to plaintiff—*Held*, that defendant might give in evidence a verbal order of his principal not to pay the money. Thorne *v.* Peck, 13 Johns. 315.

[43] See, for instance, Knowlton *v.* Clark, 25 Ind. 395.

[44] See paragraph 11 of this chapter.

Where a patient sues a physician for money paid him for useless services he cannot avail himself of the statute making communications between physician and patient privileged. Bernard *v.* Dr. Nelson Co., 123 Minn. 468, 143 N. W. Rep. 1133.

[45] Brooks *v.* Martin, 2 Wall. 81.

[46] Merritt *v.* Millard, 3 Abb. Ct. App. Dec. 291, s. c., 4 Keyes, 208, and cases cited, affi'g 10 Bosw. 309.

himself was the agent by whom the illegal agreement was made, does not alter the case. It is not ignorance on his part of such illegality, but the absence of any legal connection between the new promise of defendant to deliver such money as directed and the original contract, which precludes him from setting up such a defense.[47] But money received by defendant under an illegal contract to which plaintiff was a party, cannot be recovered if the action requires the enforcement by the court of any unexecuted provision of the contract.[48]

[47] Id.; and see Wilkinson *v.* Tousley, 16 Minn. 299, s. c., 10 Am. Rep. 139. Character is not in issue on the question whether a debt was for money lost at play. Thompson *v.* Brown, 4 Wall. 471.

[48] Woodworth *v.* Bennett, 43 N. Y. 273, and cases cited, rev'g 53 Barb. 361. Compare Knowlton *v.* Congress Spring Co., 57 N. Y. 518. Again, *contra*, 5 Reporter, 166.

One who had located a stand in front of the defendants' premises but within the 'stoop line' was not allowed to recover rent paid for such location under a claim that a city ordinance made the payment of such rent illegal, since the parties stood *in pari delicto* before the court. Barrett *v.* Smith, 37 Misc. 825, 76 N. Y. Supp. 907.

CHAPTER XVI

ACTIONS ARISING ON SALES OF PERSONAL PROPERTY

1. ACTIONS FOR THE PRICE OF GOODS, &c.*

1. Grounds of Action.

The characteristic facts constituting the cause of action, are that plaintiff, at the defendant's request, sold and delivered to him personal property for which he owes the price or value.[49] These facts are implied in and admissible under

* The Uniform Sales Act, the original draft of which was prepared by Professor Williston, has become the law in a number of states. It was adopted in New York in 1911, as part of the Personal Property Law. Many noteworthy changes have been effected by the Act, some of them involving fundamental rules of evidence. In order to make the chapter conform as far as possible to the provisions of the Act, parts of the text have been rewritten and many recent cases construing the statute have been cited in the notes.

[49] Allen *v.* Patterson, 7 N. Y. (3 Seld.) 476; Scoggin *v.* Morrilton, 124 Ark. 585, 187 S. W. Rep. 445.

A complaint, alleging that defendant gave a written order for certain books, which order was made a part of the complaint, in pursuance of which plaintiff shipped the books and defendant accepted and retained the same,

a general allegation that defendant is indebted to plaintiffs in the sum of, etc., for goods sold and delivered to defendant by plaintiffs at a time and place named, on defendant's request.[50]

The agreement of sale is of the gist of the action.[51] Evidence of an agreement which is to be regarded as one for the manufacture of goods for defendant rather than for a sale to him, is not an entire failure of proof; and the variance may be disregarded,[52] unless defendant is surprised to his

that plaintiff has performed his contract and that a certain balance is due, states a cause of action. King *v.* Edward Thompson Co., 56 Ind. App. 274, 104 N. E. Rep. 106.

[50] Id. As to the seller's election of remedies, see Dustan *v.* McAndrew, 44 N. Y. 72, affi'g 10 Bosw. 130.

"When a seller of goods has performed in full, his part of the contract of sale and has placed the purchaser in possession of the goods, and nothing remains to be done by either of the parties to the contract but the payment by the purchaser to the seller of the price of the goods, then the seller may recover of the purchaser the purchase price of the goods under a common count for goods sold and delivered." Vinegar Bend Lumber Co. *v.* Soule Steam Feed Works, 182 Ala. 146, 62 So. Rep. 279.

A complaint which alleges merely that "plaintiff sold and defendant purchased" certain goods for a certain price, and that at the time of sale plaintiff was the owner, has been held sufficient. Ballard *v.* Friedeberg, 164 N. Y. Supp. 912.

[51] On a voluntary delivery to defendant, in payment of his demand against a stranger to the transaction, the deliverer cannot receive the value from the deliveree, on the ground that the delivery was made pursuant to a parol promise void under the statute of frauds. Fowler *v.* Moller, 10 Bosw. 374.

Where the answer puts in issue all of the allegations of the complaint, it is incumbent upon the plaintiff to prove, (1) that he furnished or sold the goods to the defendant at his request; (2) the nature or description of the same; (3) the agreed price; (4) in the absence of an agreement as to price, the reasonable value of the goods. Quaker City Cut Glass Co. *v.* Webber, 156 Iowa, 678, 137 N. W. Rep. 925; Starke *v.* Stewart, 33 N. D. 359, 157 N. W. Rep. 302, 304.

Where the plaintiff fails to show either an agreement as to the price of the goods, or their reasonable value in the absence of an agreement, he has failed to establish a foundation for his suit. Vinegar Bend Lumber Co. *v.* Howard, Hooks & Henson, 186 Ala. 451, 65 So. Rep. 172.

[52] Union Rubber Co. *v.* Tomlin-

prejudice.[53] On the other hand, if the facts on which the law raises an implied promise to pay are directly stated, an allegation of such promise is not necessary.[54] Under the the new procedure,[55] as well as at common law,[56] where plaintiff may waive his right of action for damages for the tortious conversion of personal property, and recover in assumpsit, he may prove the facts under a complaint for goods sold and delivered.[57] If the evidence supports allegations in the complaint of a cause of action on contract, the failure to prove superfluous allegations of fraud, will not prevent a recovery;[58] but if the fraud is alleged as the gist of the action, so that, on judgment against defendant, execution would go against his person, a failure to prove the fraud is fatal,[59] unless an amendment is allowed, or a waiver of the tort put on record.

The *delivery*, under an agreement alleged as a sale and

son, 1 E. D. Smith, 364. Compare Prince *v.* Down, 2 Id. 525.

[53] The chief importance of the distinction is in the fact that on a contract for manufacture, &c., compliance with the statute of frauds need not be shown.

[54] Farron *v.* Sherwood, 17 N. Y. 227.

[55] Weigand *v.* Sichel, 4 Abb. Ct. App. Dec. 595; Abbott *v.* Blossom, 66 Barb. 353; Harpending *v.* Shoemaker, 37 Id. 270; see also Pomeroy on Rem., § 567, &c.; Link *v.* Vaughn, 17 Mo. 585; Robinson *v.* Rice, 20 Id. 229.

[56] See Osborn *v.* Bell, 5 Den. 370; Hinds *v.* Tweddle, 7 How. Pr. 278, and cases cited.

[57] To the contrary where there was an express contract to account. Moffat *v.* Wood, Seld. Notes, No. 5, 14; but see Roth *v.* Palmer, 27 Barb. 652.

[58] Graves *v.* Waite, 59 N. Y. 156; Ledwich *v.* McKim, 53 Id. 307. See Ames Portable Silo & Lumber Co. *v.* Gill (Tex. Civ. App.), 190 S. W. Rep. 1130.

[59] See Ross *v.* Mather, 51 N. Y. 108; De Graw *v.* Elmore, 50 Id. 1. The reason of the rule is, that on the one hand, if plaintiff alleges and proves facts raising an implied promise or an express contract, the tortious conduct of defendant ought not to exonerate him. On the other hand, if the complaint states a tort as the cause of action, defendant may be precluded from pleading counterclaims, and will be liable to imprisonment; hence, a failure to prove the tort is not a mere variance. If the frame of the complaint is such as to present contract as the cause of action, unproved allegations of tort are mere variance, to be disregarded, unless defendant has been surprised and prejudiced. *Contra*, now by N. Y. Code Civ. Pro., § 529.

delivery, or its equivalent so far as plaintiff's duty is concerned, is essential to the theory of the action.[60] But if, where proof of delivery fails, the facts in evidence would sustain an action for damages for defendant's refusal to complete his bargain, the case is one of variance merely, not of entire failure of proof, and the court or referee may allow an amendment.[61] So, under an allegation that the sale and delivery was to defendant, evidence of a sale to defendant on his credit, and of delivery to a third person at his request, is not an entire failure of proof, but only a question of variance, even though the sale was for the benefit of such third person.[62] Failure to prove a superfluous allegation of promise to indemnify, etc., may be disregarded.[63]

For the greater convenience of the reader we will consider, first, the rules applicable in the more common action for price, although they are to some extent applicable also in actions for refusal to deliver, etc., and, then, those peculiar to special and executory contracts, and to warranties.

2. Plaintiff's Title to the Goods, &c.

The usual allegation that plaintiffs sold and delivered goods, etc., sufficiently imports that the goods belonged to them.[64] Evidence of title is not usually required,[65] and when

[60] Evans *v.* Harris, 19 Barb. 416; Catlin *v.* Tobias, 26 N. Y. 217; Roaring Fork Potato Growers *v.* C. C. Clemons Produce Co., 193 Mo. App. 653, 187 S. W. Rep. 617.

Goods sold at a particular place, are deliverable thereat, where the contract is silent as to the place of delivery. Robert McLane Co. *v.* Swernemann & Schkade, 189 S. W. Rep. (Tex. Civ. App.) 282.

[61] Dunnigan *v.* Crummey, 44 Barb. 528, and cases cited.

[62] Rogers *v.* Verona, 1 Bosw. 417. Compare Cowdin *v.* Gottgetreu, 55 N. Y. 650. At common law not even a variance. Porter *v.* McCluer, 15 Wend. 189, and cases cited (Bronson, J.); and see Monroe *v.* Hoff, 5 Den. 360.

[63] Hay *v.* Hall, 28 Barb. 378.

[64] Phillips *v.* Bartlett, 9 Bosw. 678. And if they were partners, an allegation of partnership is not necessary. Id. Under an allegation that property belonged to plaintiff, proof that it was consigned to him as factor, he being chargeable with its value, whether sold, lost, or destroyed—*Held* not a material variance. Gorum *v.* Carey, 1 Abb. Pr. 285.

[65] Compare Gilmore *v.* Wilbur, 18 Pick. 517.

required, unless title is specially put in issue, very slight evidence is enough, and if plaintiff proves sale and delivery,[66] he is not bound to give further evidence of his title than the fact that he had actual possession and control.[67] If one purchases a doubtful right, he concedes the right, and cannot afterward dispute it in an action for the price.[68] On the question of title, evidence of the plaintiff's declarations of ownership, made while in possession and before sale, and explanatory of the existing possession, is competent in his own favor, and if clear, they are *prima facie* evidence of his title.[69] The admissions and declarations of one under whom plaintiff claims, and who is deceased, if against his interest when made, are competent in support of plaintiff's title.[70]

Ability to give title at the time set for delivery is all that is essential. Consolidated Nat. Bank *v.* Giroux, 18 Ariz. 253, 158 Pac. Rep. 451.

[66] Compare Cobb *v.* Williams, 7 Johns. 24; Marston *v.* Rue, 92 Wash. 129, 159 Pac. Rep. 111.

Where title is directly in issue, however, and defendant's evidence shows or tends to show that plaintiff has no title, the latter, in order to recover, must overcome the effect of defendant's evidence. Marcus *v.* Mayer, 147 N. Y. Supp. 973.

[67] See Gourd *v.* Healy, 165 App. Div. 288, 150 N. Y. Supp. 1006; Fitzpatrick *v.* Caplin, 4 E. D. Smith, 365; Reilly *v.* Cook, 13 Abb. Pr. 255, s. c., 22 How. Pr. 93.

[68] Compare Costar *v.* Brush, 25 Wend. 628.

In an action for the purchase price of certain lumber, it appeared that the plaintiff had previously obtained the lumber from a lumber company. The defense was that plaintiff had no title to the lumber in question because he had purchased it from the company on credit induced by false representations. The evidence, however, established that the sale of the lumber to the plaintiff had been for cash but that he had not paid therefor. The court held that in the absence of proof that the lumber was taken by the plaintiff without the company's consent, or that the consent, if given, was induced by fraudulent representations, plaintiff was entitled to recover. McNabb *v.* Whissel, 75 App. Div. 626, 78 N. Y. Supp. 269.

[69] Roebke *v.* Andrews, 26 Wis. 311. Compare Tilson *v.* Terwilliger, 56 N. Y. 273.

[70] Thus in a broker's action, the declarations of the owner of the goods that he had sold them, and received the price from the broker as guarantor, are, after the death of the declarant, competent against the buyer, to show that the right of action was transferred from the

3. License to Sell.

Plaintiff will be presumed to have a license, if one be necessary to render the sale lawful.[71] But if the lack of one is shown, there is no presumption that one would have been taken out in time.[72]

4. Ordinary Sale by Delivery.

The agreement, price and delivery may all be proved by uncontradicted evidence showing an account rendered by plaintiff to defendant on the face of which he is charged as the buyer, and that he unqualifiedly admitted the justice of the demand.[73] Where the admission is susceptible of being understood as referring only to the correctness of items in description or price, other evidence of delivery of the goods must be adduced. Admissions as proof of either separate fact will be further considered below. Under an allegation of sale and delivery to or by a party, evidence of the act on the part of his agent is admissible.[74]

5. Evidence of Express Agreement.

A witness testifying to a sale can state it in general terms,

declarant to the broker. White *v.* Chouteau, 10 Barb. 202, s. p., in a further decision, 1 E. D. Smith, 493.

[71] Smith *v.* Joyce, 12 Barb. 21; and see McPherson *v.* Cheadell, 24 Wend. 15; Thompson *v.* Sayre, 1 Den. 175.

[72] See Kane *v.* Johnston, 9 Bosw. 154.

The plaintiff must prove possession of the license, where the issue is raised by plea. Brown *v.* Raisin Fertilizer Co., 124 Ala. 221, 26 So. Rep. 891.

[73] See Power *v.* Root, 3 E. D. Smith, 70; Jaques *v.* Elmore, 7 Hun, 675; N. Y. Ice Co. *v.* Parker, 21 How. Pr. 302; Griffin *v.* Keith, 1 Hilt. 58; Webb *v.* Chambers, 3 Ired. (No. Car.) 374. This is the better opinion (see Pow. Ev. 226), although other proof of delivery has been sometimes required at circuit.

[74] Sherman *v.* N. Y. Central R. R. Co., 22 Barb. 239. See also Fitch *v.* Metropolitan Hotel Supply Co., 69 N. Y. App. Div. 611, 74 N. Y. Supp. 616.

subject of course to cross-examination,[75] but cannot state his opinion or understanding, as distinguished from his recollection or impression of the acts and conversation of the parties.[76] If it appear by the testimony that there was a written contract, it must be produced, or its absence accounted for, to open the way for parol evidence of its contents;[77] and plaintiff must prove performance of its conditions. A mere receipt for price, though specifying the goods [78] or for the goods, though specifying the price, is not the primary evidence of the contract, such as to render oral testimony secondary;[79] nor is a memorandum of the terms of

[75] A witness cognizant of the fact can state whether an agreement was made, without detailing the circumstances showing that it was made. Wallis *v.* Randall, 81 N. Y. 164, 169; Sweet *v.* Tuttle, 14 N. Y. 465; Frost *v.* Benedict, 21 Barb. 247; Ayrault *v.* Chamberlain, 33 Barb. 229; R'Ville Union Sem. *v.* McDonald, 34 N. Y. 379; Osborn *v.* Robbins, 36 N. Y. 365.

[76] Murray *v.* Bethune, 1 Wend. 191; and see on this distinction, 3 Abb. N. C. 229.

[77] Unless defendant's admission of its contents is received as primary evidence. Slatterie *v.* Pooley, 6 Mees. & W. 664.

In the absence of a plea of *non est factum*, a written contract sued on is admissible without proof of execution. Fulton *v.* Sword Machine Co., 145 Ala. 331, 40 So. Rep. 393.

See as to method of proving execution, when it is necessary, by an attesting witness, Alabama Const. Co. *v.* Continental, etc., Car Co., 131 Ga. 365, 62 S. E. Rep. 160.

Compare Northrup *v.* Jackson, 13 Wend. 85. As to destruction of the instrument, see Tayloe *v.* Riggs, 1 Pet. 591; Steele *v.* Lord, 70 N. Y. 280, and cases cited. Items charged in an account as goods delivered on defendant's orders will not be presumed to have been delivered on written orders. Smith *v.* Joyce, 12 Barb. 21. Where plaintiff sets up an express agreement but fails to establish it at the trial, he may move for an amendment so as to prove his case on the common counts. Mach Mfg. Co. *v.* Donovan, 86 N. J. L. 327, 91 Atl. Rep. 310.

[78] See Terry *v.* Wheeler, 25 N. Y. 520; but compare Bonesteel *v.* Flack, 41 Barb. 435, s. c., 27 How. Pr. 310.

[79] Southwick *v.* Hayden, 7 Cow. 334. If the sale was of a note or other written evidence of debt, the rule does not require the production of the note, etc. Lamb *v.* Moberly, 3 Monr. (Ky.) 179.

sale, made by one party,[80] or by a witness,[81] and not communicated to, or not assented to by the other—as for instance where it was made by the broker of both merely for the purpose of preserving a charge of his commissions.[82] Evidence that the buyer, after receiving a written statement of terms, took possession of the property without dissent, shows an acceptance of, and acquiescence in the terms.[83] Where the contract refers to a written instrument not as embodying the contract, but for ascertaining some of the terms of the contract, it is not necessary to prove the execution of the latter in order to admit it in evidence in establishing the contract sued on; but identifying it is enough.[84]

A contract for a sale on fixed terms as to price or otherwise, is admissible under a general allegation of sale and delivery, etc., if all the conditions of the contract are fulfilled, and nothing remains but payment of the price.[85]

[80] Meacham *v.* Pell, 51 Barb. 65. It is competent if it was communicated. Lathrop *v.* Bramhall, 64 N. Y. 365.

The defendant cannot introduce in evidence agreements which were signed only by the plaintiff but not by himself and which he claims do not bind him, the purpose of such introduction being to treat the agreements as statements signed by the plaintiff. Mach Mfg. Co. *v.* Donovan, 86 N. J. L., 327, 91 Atl. Rep. 310.

[81] Parsons *v.* Disbrow, 1 E. D. Smith, 547.

[82] Gallaher *v.* Waring, 9 Wend. 28.

[83] Dent *v.* N. A. Steamship Co., 49 N. Y. 390. Compare 1 Wall. 359; Mach. Mfg. Co. *v.* Donovan, 86 N. J. L. 327, 329, 91 Atl. Rep. 310 (where bills and statements for brick sold were rendered by the plaintiff to the defendant, who made no objection to their accuracy, and paid on account and had repeatedly promised to pay the balance, the amount sued for).

[84] Smith *v.* N. Y. Central R. R. Co., 4 Abb. Ct. App. Dec. 262.

Where the contract between the parties fixed the price of glass at a certain per cent lower than the lowest price of a certain glass company, circular letters issued by such company, enumerating its prices were held admissible. Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. Rep. 371.

[85] Moffett *v.* Sackett, 18 N. Y. 522; Porter *v.* Talcott, 1 Cow. 359, and cases cited. And at common law this rule was applied where conditions not performed had been forfeited by the defendant. Corlies *v.* Gardner, 2 Hall, 345; Clark

A written contract is admissible under an allegation of the contract, not stating that it was in writing;[86] and an allegation that there was a writing is not needed, even when the writing is necessary by reason of the statute of frauds.[87]

If the contract was in duplicate, the production of either one will be enough, if signed by the defendant,[88] without producing or accounting for the other.[89] If it consists of two or more parts, one containing the consideration for the other, both must be produced or accounted for, unless the one is complete in itself.[90]

An invoice is, alone, no evidence of a sale,[91] but may be made

v. Fairchild, 22 Wend. 583. Otherwise now. See Oakley *v.* Morton, 11 N. Y. 25. Compare Holmes *v.* Holmes, 9 N. Y. 525, affi'g 12 Barb. 137; Vinegar Bend Lumber Co. *v.* Soule Steam Feed Works, 182 Ala. 146, 62 So. Rep. 279. (Recovery of purchase price under common counts for goods sold and delivered.)

[86] See paragraph 7 of this chapter; and Tuttle *v.* Hannegan, 54 N. Y. 686, affi'g 4 Daly, 92.

[87] 1 Greenl. Ev. 86.

[88] Stephen Dig. Ev., art. 64.

[89] See Cleveland, &c., R. R. Co. *v.* Perkins, 17 Mich. 296.

Where an order for the sale of books was executed in duplicate by the defendant, and it appeared that the order alleged by the plaintiff did not conform with the duplicate copy held by the defendant, both copies were held admissible to prove the real contract between the parties and evidence as to all that occurred at the time of the signing is also admissible as bearing on the question of mutual mistake, but not to vary the terms of the contract when reformed. King *v.* Edward Thompson Co., 56 Ind. App. 274, 104 N. E. Rep. 106.

[90] Dobbin *v.* Watkins, Col. & C. Cas. 39, s. c., 3 Johns. Cas. 2d ed. 415. But see paragraph 44, and Chapter XXVIII, paragraph 2 of this vol.

[91] It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title. Dows *v.* National Exchange Bank of Milwaukee, 91 U. S. (1 Otto), 618, 630. As between the consignor and consignee, the bill of lading cannot be regarded as a contract in writing, but merely as an admission or declaration on the part of the consignor as to his purpose, at the time, in making the shipment, and such admission is subject to be rebutted by other circumstances connected with the transaction. Emery's Sons *v.* Irving Nat. Bank, 25 Ohio St. 360, s. c., 18 Am. Rep. 299, s. p., Beebe *v.* Mead, 33 N. Y. 587.

relevant by connected writings[92] or parol evidence of intention. A bill of parcels or particulars, expressing that defendant bought the goods of plaintiff, if shown to have accompanied the goods to defendant's possession,[93] is *prima facie*, but not conclusive evidence that the transaction was a sale.[94]

Oral evidence is competent, to show that a mere receipt for merchandise[95] or for the money as an advance on merchandise to be delivered,[96] or a mere unilateral promise in writing by the buyer, to pay a certain sum, not stating any terms of sale,[97] was given on a sale, and to prove the terms of the sale; for such a receipt or promise is not a written contract within the rule excluding parol evidence to explain or vary it. Otherwise of an instrument that expressly imports a bailment or storage,[98] unless shown to have been delivered subsequently to a completed sale.[99]

6. — made by Letter or Telegram.

To prove a contract made by a proposal and assent through correspondence (as distinguished from the filling of an order received by mail), it is not enough to prove that the proposal was assented to by a mental act, nor by conduct unknown and not communicated to the proposer.[1] But

[92] Buxton *v.* Rust, L. R. 7 Exch. 1, 5, s. c., 1 Moak's Eng. 135, 139.

[93] Or to have been received by him before delivery of the goods. Dent *v.* N. A. Steamship Co., 49 N. Y. 390.

[94] Sutton *v.* Crosby, 54 Barb. 80; Beebe *v.* Mead (above).

[95] Though containing such words as "at $ per bushel." Sheldon *v.* Peck, 13 Barb. 317; or "consigned for six months." George *v.* Joy, 19 N. H. 544; Benj. on S., § 213.

[96] Potter *v.* Hopkins, 25 Wend. 417.

[97] Tisdale *v.* Harris, 20 Pick. 9.

[98] Wadsworth *v.* Allcott, 6 N. Y. 64; Stapleton *v.* King, 33 Iowa, 28, s. c., 11 Am. Rep. 109. Compare Rahilly *v.* Wilson, 3 Dill. 420.

[99] See Allen *v.* Schuchardt, 1 Am. L. Reg. 13; Domestic Sewing Machine Co. *v.* Anderson, 23 Minn. 57.

[1] Northwest Thresher Co. *v.* Kubicek, 82 Nebr. 485, 118 N. W. Rep. 94; White *v.* Corlies, 46 N. Y. 467. Compare Lungstrass *v.* German Ins. Co., 40 Mo. 201, s. c., 8 Am. Rep. 100. An order for goods is accepted upon the delivery of the goods to a carrier before countermand. Bloom *v.* Edward Miller

it is not necessary to prove that the assent actually came to the knowledge of the proposer, nor does evidence that it did not come to his knowledge avail.[2] It is enough to prove that the assenting party duly mailed or delivered to the telegraph company[3] (whichever was the adopted course of correspondence),[4] an unqualified[5] assent; and from the mo-

& Co. (Ark.), 176 S. W. Rep. 673.

[2] Vassar *v.* Camp, 11 N. Y. 441, affi'g 14 Barb. 341.

[3] Parks *v.* Comstock, 59 Barb. 16; Trevor *v.* Wood, 36 N. Y. 307, s. c., 3 Abb. Pr. N. S. 355, rev'g 41 Barb. 255, s. c., 26 How. Pr. 451; Perry *v.* German-American Bank, 53 Neb. 89, 91–92, 73 N. W. Rep. 538. "We think it should be held that upon proof of delivery of the message for the purpose of transmission, properly addressed to the correspondent at his place of residence, or where he is shown to have been, a presumption of fact arises that the telegram reached its destination, sufficient at least to put the other party to his denial, and raise an issue to be determined." Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 452–453, 3 N. E. Rep. 485. Whether acceptance by telegram was made within reasonable time is a question for the jury. Robeson *v.* Pels, 202 Pa. 399, 51 Atl. Rep. 1028. When one commences correspondence with another by telegraph he makes the telegraph company his agent for the transmission and delivery of his communication, and the transmitted message actually delivered is primary evidence of the transaction. If such message is lost or destroyed, its contents may be proved by parol. Magie *v.* Herman, 50 Minn. 424, 36 Am. St. Rep. 660, 52 N. W. Rep. 909. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business then carried on, and the fact that the voice at the telephone was not identified does not render the conversation inadmissible. Wolfe *v.* Missouri Pac. Ry. Co., 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. Rep. 49.

[4] An offer sent by mail by one who must have known that the regular usage of conducting business was to reply by mail, implies authority to communicate acceptance by mail. Wall's Case, L. R. 15 Equity, 18, s. c., 5 Moak's Eng. 686.

[5] Cherokee Mills *v.* Gate City Cotton Mills, 122 Ga. 268, 271, 50 S. E. Rep. 82. As to what is a qualification such as to preclude assent, see Vassar *v.* Camp, 11 N. Y. 441, affi'g 14 Barb. 341;

ment the communication thus passed beyond his control the contract was complete,[6] unless the proposal had been revoked, by notice previously actually reaching him,[7] or by the death of the proposer.[8] Where the contract is made by correspondence the original letters or telegrams constituting it are the *primary evidence.* In the case of a letter, the original which was actually sent must be produced or accounted for, or a duplicate made and signed as such at the time. A press copy is not competent in lieu of it without laying proper foundation for secondary evidence.[9] When such foundation is laid, a copy may be put in evidence by calling the person who made it, or some other witness who has compared it with the original, to swear to its accuracy. An entry purporting to be a copy, made in a letter-book by a clerk since deceased, is competent *prima facie* evidence of the contents of the original, upon proof that according to the usual course of the employer's business, letters by

Clark *v.* Dales, 20 Barb. 42; Beck's Case, L. R. 9 Ch. App. 392, s. c., 8 8 Moak's Eng. 929.

A telegram asking an offer for eggs was answered by telegraph, viz: "For good stock will give $8.25, Chicago, prompt acceptance." On the same day the offeree telegraphed: "Accept offer of $8.25 per case." These telegrams constitute a contract. The Hollow Rock Produce Co. *v.* Linn, 174 Ill. App. 419.

[6] The leading case is Mactier *v.* Frith, 6 Wend. 103, 117, rev'g 1 Paige, 434, s. p., Re Imperial Land Co., L. R. 7 Ch. 587; opposed in 7 Am. Law Rev. 433; Reeves & Co. *v.* Bruening, 13 N. D. 157, 100 N. W. Rep. 241. In the application of this rule observe that it is based on the mail or telegraph being the usual and proper course of communication. If the parties are in the same place, acceptance sent by mail or telegraph, and not actually reaching the party, is not enough, unless that mode of communication was authorized by him, or the proposal was communicated by him in the same way. In general a communication sent in either method may be accepted by assent put on its course in the same method.

[7] Wheat *v.* Cross, 31 Md. 99, s. c., 1 Am. Rep. 28, and cases cited.

[8] See Mactier *v.* Frith (above).

[9] 1 Tayl. Ev. 414. Where the copies are made by manifolding or by printing from a stencil, as in the use of the papyrograph or electric pen, the principle that each is an original seems applicable, as in the case of ordinary printing.

him were copied by this clerk; and—if it be a hand copy, not a press copy—that this entry was in the clerk's handwriting, and that in other instances his copies had been examined and found correct.[10] Evidence that it was the usual course of business of the deceased clerk to mail letters thus copied by him, is *prima facie* evidence that the original was mailed.[11] A sworn copy of a letter-press copy is competent secondary evidence of the contents of the letter, without producing the letter-press copy, if production of the letter-book is offered and not required.[12] Where a press copy is produced as secondary evidence, a witness may be asked if it appears to be in the handwriting of the party; then by proving that it is a press copy, it will follow that the letter was his.[13]

If the communication was by *telegraph*, the appropriate primary evidence, in strictness, is sometimes the original message delivered to the telegraph company by the sender, and sometimes the transcript delivered by the company to the receiver.[14] The question depends on whether it is desired to prove the act of the sender as the manifestation of assent,[15] or admission[16] on his part; or to prove actual notice to the receiver.[17] In the former case, the sender's message

[10] Prith *v.* Fairclough, 3 Campb. 305.

[11] Id.; and see 3 Campb. 379; and 61 N. Y. 362.

[12] Goodrich *v.* Weston, 102 Mass. 362, s. c., 3 Am. Rep. 469.

[13] Commonwealth *v.* Jefferies, 7 Allen, 561.

[14] "While the transcript delivered to the person addressed is for some purposes, as between him and the sender, deemed the original, it can never be so without competent proof that the alleged sender did actually send, or authorize to be sent, the dispatches in question. The primary and original evidence of that fact would be the telegram itself in the handwriting of the sender, or of an agent shown to have been duly authorized. But when it appears that the telegram has been destroyed by the company, secondary evidence of the essential fact may be given." Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 453, 3 N. E. Rep. 485.

[15] As in Trevor *v.* Wood, 36 N. Y. 307, s. c., 3 Abb. Pr. N. S. 355.

[16] See Commonwealth *v.* Jefferies, 7 Allen, 563.

[17] As where the offerer desires

as delivered to the telegraph office is primary evidence. In the latter case the company's transcript, as delivered to the receiver is the only primary evidence. In either case the duplicate that is not the primary evidence is competent as secondary evidence, and from it the jury may infer the other.[18] The telegraph clerks are not privileged merely because of the character of their vocation.[19]

A written order, shown, by proof of handwriting,[20] or otherwise, to have come from defendant or his authorized agent, produced from plaintiff's possession, is competent without proof of the *mode of its transmission*, for it will be presumed to have been duly delivered.[21] Where the admission is susceptible of being understood as referring only to the correctness of items in description or price, other evidence of delivery of the goods must be adduced. Admissions as proof of either separate fact will be further considered below. Under an allegation of sale and delivery to or by a party, evidence of the act on the part of his agent is admissible,[22] and if shown to have been received in due course of mail, in answer to letters mailed to the alleged writer, it may be presumed to have come from him.[23] The date of the paper, if it be dated, is *prima facie* evidence of the time it was written,[24] unless its competency as evidence

to revoke; see Wheat *v.* Cross, 31 Md. 99, s. c., 1 Am. Rep. 28.

[18] See Commonwealth *v.* Jefferies (above).

[19] State *v.* Litchfield, 58 Me. 267.

[20] See Chapter on Bills, Notes and Checks.

See as to the admissibility of an unsigned order dictated by the purchaser to plaintiff's agent, Gross *v.* Feehan, 110 Iowa, 163, 81 N. W. Rep. 235.

[21] See, for this principle, Chapter XIII, paragraphs 12 and 20.

[22] Sherman *v.* N. Y. Central R. R. Co., 22 Barb. 239.

[23] See Bush *v.* Miller, 13 Barb. 487. A letter received in due course of mail in response to a letter sent by the receiver is presumed, in the absence of any showing to the contrary, to be the letter of the person whose name is signed to it. Regan *v.* Smith, 103 Ga. 556, 29 S. E. Rep. 759. And proof of handwriting is not required. National Acc. Soc. *v.* Spiro, 47 U. S. App. 293, 78 Fed Rep. 774.

[24] Livingston *v.* Arnoux, 36 N. Y. 519, affi'g 15 Abb. Pr. N. S. 158.

depends on the date, in which case plaintiff should be prepared with other evidence on that point.[25] Evidence that a letter was duly mailed [26] in the post-office or government letter box,[27] or deposited in the box or other place where the person addressed was accustomed to have his letters received,[28] will sustain an inference that he received it,[29] even though he testify that he did not.[30] The post-mark is *prima facie* evidence of the time and place when the communication was in the post-office,[31] but not of the time when it was first put in.[32] Its genuineness should be shown.[33]

The mere fact that a letter or telegram put in evidence was sent in response to a previous one, or was one of a series

[25] Smith *v.* Shoemaker, 17 Wall. 637. Compare Jermain *v.* Dennison, 6 N. Y. 276.

[26] Huntley *v.* Whittier, 105 Mass. 391, s. c., 7 Am. Rep. 536, and cases cited; 3 Dill. 571.

[27] See 2 Abb. New Cas. 70, note.

[28] Howard *v.* Daly, 61 N. Y. 366.

[29] A stricter rule is applied in some other actions. See Chapter IX, paragraph 42 of this vol., and Carpener *v.* Providence Ins. Co., 4 How. U. S. 220. A letter properly mailed and addressed to a person at his place of residence is presumed to have been received by him. Oregon Steamship Co. *v.* Otis, 100 N. Y. 446. But it must appear that the person to whom it was addressed resides in the city or town named in the address. Henderson *v.* Carbondale Coal Co., 140 U. S. 25. The presumption is one of fact, subject to control and limitation by other facts. Shultz *v.* Jordan, 141 U. S. 213; German Nat. Bank of Denver *v.* Burns, 12 Col. 539, 13 Am. St. Rep. 247, 21 Pac. Rep. 714. Whether there is a presumption by the law, or only ground for an inference by the jury, compare further, Allen *v.* Blunt, 2 Woodb. & M. 121, 130; Bank of Bellefontaine *v.* McManigle, 69 Penn. St. 156, s. c., 8 Am. Rep. 236.

[30] Huntley *v.* Whittier (above). Wall's Case, L. R. 15 Eq. 18, s. c., 5 Moak's Eng. 686, 693. Where the person to whom the letter was addressed is interested in the event of the action, and denies that it was received by him, this presents a question of fact which is for the jury to determine, and not the court. Moran *v.* Abbott, 26 App. Div. (N. Y.) 570, 572.

[31] 2 Abb. New Cas. 70, note. As to its genuineness, see 2 Tayl. Ev. 1229.

[32] Id.

[33] There is no presumption that a person whose name is signed to a letter is its author, merely because it was carried by the post. O'Connor Mining, &c. Co. *v.* Dickson, 112 Ala. 304, 309, 20 So. Rep. 413.

of *connected correspondence*, nor even the fact that it refers to the previous letter to which it was an answer, does not render it incompetent without the other, nor compel him who puts it in to offer that also, although it entitles the other party to offer the connected letter if he desires.[34] But unless the communication on its face appears to embody all the terms intended to be assented to, either party may show that it was sent in answer to a previous one of such nature that it should be read or taken with the answer, in order that the whole contract may appear;[35] and if this be shown, the earlier letter will be a necessary part of the primary evidence of the contract.[36]

If the contract was made by correspondence, and it is not apparent on the face of the communication offered in evidence that it was intended as embodying the terms of the contract at large, then for the purpose of determining whether it constituted the contract within the rule which excludes *oral evidence to vary* a contract, oral evidence is admissible of the circumstances and purpose in which it was sent; and the question is whether, according to the intent and understanding of the parties at the time it was sent and received, it was the expression of the contract, or only a part of it.[37] If the latter, the other terms may be shown by parol.[38] If the correspondence appears to embody the contract, it constitutes the primary evidence, and is within the rule forbidding parol evidence to explain a writing.[39]

[34] Stone *v.* Sanborn, 104 Mass. 319, s. c., 6 Am. Rep. 238, disapproving 1 C. & K. 626. And see Cary *v.* Pollard, 14 Allen, 285.

[35] Beach *v.* Raritan, &c. R. R. Co., 37 N. Y. 463, 464.

[36] See Hough *v.* Brown, 19 N. Y. 111; Myers *v.* Smith, 48 Barb. 614; Brisban *v.* Boyd, 4 Paige, 17; Clark *v.* Dales, 20 Barb. 42; Brayley *v.* Jones, 33 Iowa, 508. A letter of a party to the suit, bearing upon its issues and introduced in evidence against him, may be explained by him as a witness in his own behalf, and its effect upon the issues and the force of the explanation are proper subjects for the consideration of the jury. Anvil Mining Co. *v.* Humble, 153 U. S. 540.

[37] Beach *v.* Raritan, &c. R. R. Co., 37 N. Y. 463, 464.

[38] Id.

[39] Whitmore *v.* South Boston Iron Co., 2 Allen, 52, s. c., 1 Am. L. Reg. 403.

7. Requisite Memorandum under Statute of Frauds.

If the price is $50 or more, or, where no price was fixed, if the value be clearly proven to be worth that sum,[40] the statute of frauds [41] requires evidence that the agreement, or some note or memorandum thereof, was in writing, and subscribed [42] by the party to be charged therewith,[43] or his lawful agent,[44] unless part payment or delivery is shown. The writing is competent under a general allegation of contract without specifying writing.[45] If, however, the complaint does not

Where the plaintiff bases his action upon a written order and its terms are relied on for judgment for the price of the goods, parol evidence is not admissible to show that the contract is different from that contained in the accepted order. Reeves & Co. *v.* Bruening, 13 N. D. 157, 100 N. W. Rep. 241.

[40] Contracts for the exchange of goods of the value of $50 or more are within the statute. Combs *v.* Bateman, 10 Barb. 573.

[41] Personal Property Law (N. Y. Cons. Laws), § 85.

[42] The word "subscribed" contained in the old statute, and which had been construed to require a signature at the end, has been changed to "signed" by the new statute. Personal Property Law (N. Y. Cons. Laws), § 85. Probably it will be held that a signature at any place in the note or memorandum will satisfy the statute.

[43] Subscription by both is not essential, even on the ground of mutuality. Justice *v.* Lang, 42 N. Y. 493, 52 N. Y. 323, 39 Super. Ct. (7 J. & S.) 283. And see Butler *v.* Thompson, 92 U. S. (2 Otto) 412, 11 Blatchf. 533. And the fact that plaintiff added his signature, and afterward erased it, does not alone prevent his using the paper in evidence. Rhoades *v.* Castner, 12 Allen, 130.

The statute does not apply to agreements for the sale of goods to be manufactured by the seller especially for the buyer and which are not suitable for sale to others in the ordinary course of the seller's business. Personal Property Law (N. Y. Cons. Laws), § 85.

[44] Dykers *v.* Townsend, 24 N. Y. 57.

The authority of the agent to sign the memorandum need not be in writing. Id. But it must be proved by evidence outside the oral evidence of the contract of sale. Hawley *v.* Keeler, 53 N. Y. 114.

One party to the contract cannot be the agent of the other for the purpose of signing the contract. Wilson *v.* Lewiston Mill Co., 150 N. Y. 314, 44 N. E. Rep. 959, 55 Am. St. Rep. 680.

[45] Washburn *v.* Franklin, 7 Abb. Pr. s. c., 28 Barb. 27.

affimatively indicate that the contract was void under the statute, and the answer admits the contract, without alleging the facts showing it to be void under the statute, evidence of compliance with the statute is dispensed with by the admission.[46] The note or memorandum may be distinguished from the contract of which it is the evidence.[47]

It matters not how many papers must be taken together to make out the note or memorandum,[48] nor how informal they are,[49] if the statue is substantially complied with; but where several papers are resorted to, each must be subscribed by defendant, or imported, by reference or annexation, into one that is, leaving nothing to be supplied by parol, to complete the memorandum, except evidence of the identity of the paper.[50] Parol proof is competent to supply the ref-

[46] Duffy *v.* O'Donovan, 46 N. Y. 223; Spear *v.* Hart, 3 Robt. 420.

[47] Boardman *v.* Spooner, 13 Allen, 533; Benj. on S. 209; Williams *v.* Bacon, 2 Gray, 387; Marsh *v.* Hyde, 3 Id. 331. And see 56 N. Y. 503.

[48] Ryan *v.* United States, 136 U. S. 68, 83; Ridgway *v.* Wharton, 6 H. L. Cas. 238; Cave *v.* Hastings, 7 Q. B. Div. 125. As, for instance, the rules of an exchange, and the memoranda of a transaction by its members (Peabody *v.* Speyers, 56 N. Y. 230); or ordinary commercial correspondence (Thompson *v.* Menck, 4 Abb. Ct. App. Dec. 400, rev'g 22 How. Pr. 431; Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140, s. c., 12 Moak's Eng. 211).

[49] Same cases; and see Argus Co. *v.* Mayor, &c. of Albany, 55 N. Y. 495, affi'g in effect 7 Lans. 264.

[50] Pierce *v.* Corf, L. R. 9 Q. B. 210, s. c., 8 Moak's Eng. 316. Thus, defendant's assent may be proved by his writing in answer to a request from plaintiff for the contract: "I send you a copy of your *letter* of, &c.," inclosing it. This, though not intended as a recognition, is, if signed by him, a sufficient signing of a memorandum. Buxton *v.* Rust, L. R. 7 Exch. 1, 5, s. c., 1 Moak's Eng. 135, 139. Compare Hicks *v.* Cleveland, 48 N. Y. 84; Neubery *v.* Wall, 65 Id. 484; and paragraphs 43 and 44.

A letter referring to a previous letter containing the terms of the contract is not a sufficient memorandum when the second letter does not admit the making of the contract alluded to. Wilson *v.* Lewiston Mill Co., 150 N. Y. 314, 44 N. E. Rep. 959, 55 Am. St. Rep. 680.

See also, Coe *v.* Tough, 116 N. Y. 273, 22 N. E. Rep. 550.

Separate papers referring to the same subject-matter may be treated as one memorandum. Peabody *v.* Speyers, 56 N. Y. 230.

erence, where it can be done clearly and with certainty.[51] If the paper is not addressed to plaintiff, oral evidence of its delivery to him is competent; but not always essential.[52] If interlineations appear, oral evidence that they were assented to is competent.[53] The memorandum must be complete, so far as that all elements of the contract or engagement on the part of the defendant, or party sought to be charged, must be stated,[54] or legally presumable from what is stated;[55] and defects cannot be supplied by parol;[56] but the fact of its delivery,[57] and that plaintiff, in consideration,[58] promised

The fact that a memorandum contains a stipulation to reduce the contract to a formal agreement does not necessarily render the memorandum insufficient. Peirce *v.* Cornell, 117 N. Y. App. Div. 66, 102 N. Y. Supp. 102.

[51] Beckwith *v.* Talbot, 95 U. S. (5 Otto) 289, 292.

[52] Darby *v.* Pettee, 2 Duer, 139. And see 55 N. Y. 495; Peabody *v.* Speyer, 56 Id. 236.

[53] Stewart *v.* Eddowes, L. R. 9 Com. Pl. 311, s. c., 9 Moak's Eng. 405.

[54] Wright *v.* Weeks, 25 N. Y. 153, affi'g 3 Bosw. 377. The written memorandum of a contract required by the statute of frauds must contain, within itself or by reference to other writings, all the essential elements of a contract, and when it comes up to these requirements neither party will be permitted to show that the contract was other or different than that stated. Routledge *v.* Worthington Co., 119 N. Y. 592, 23 N. E. Rep. 1111.

A check of the purchaser is not a sufficient memorandum. Hessberg *v.* Welsh, 147 N. Y. Supp. 44.

[55] Id.; Warren *v.* Winne, 2 Lans. 209.

[56] Wright *v.* Weeks (above); Calkins *v.* Falk, 1 Abb. Ct. App. Dec. 291, affi'g 39 Barb. 620. But where the terms are stated, an ambiguity as to what they mean may be cleared by oral evidence, if it can be done by showing the surrounding circumstances, as distinguished from the oral stipulations of the parties. Hagan *v.* Domestic Sewing Machine Co., 9 Hun, 73. And see 25 N.Y. 153, 12 Id. 40. If, however, the writing is insufficient, but there has been such a performance as to take the case out of the operation of the statute, oral evidence is admissible to supply omissions and to establish what were the contractual relations of the parties. Routledge *v.* Worthington Co., 119 N. Y. 592, 23 N. E. Rep. 1111.

[57] See 55 N. Y. 504.

Or of subsequent parol acceptance. Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190.

[58] Where the price is agreed upon, the note or memorandum must disclose it. Cameron *v.* Tompkins, 72 Hun, 113, 25 N. Y. Supp. 305.

to perform on his part, may be proven by parol,[59] as well as the rate of payment, if the memorandum states the means of determining the rate.[60] So the performance by the plaintiff may be proved by parol; and evidence of a parol modification in this respect does not impair the effect of the memorandum.[61]

8. General Rule as to Explaining Writing by Parol.

In the present state of the law, the rule excluding parol to vary a writing, in its application, to commercial sales, amounts to little more than this principle; viz., that when the parties or their agents have embodied the terms of their agreement in writing, neither can, in an action between themselves (unless impeaching the instrument), give oral evidence that they did not mean that which the instrument, when properly read, expresses or legally implies, or that they meant something inconsistent therewith.

In more detail, the rule and its established exceptions may be stated thus: A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude oral evidence tending to show the actual transaction, in the following cases:

1. Where the action is not between the parties to the

See also Drake *v.* Seaman, 97 N. Y. 230. A seal upon a bill of sale of goods is presumptive evidence of a sufficient consideration. Carey *v.* Dyer, 97 Wis. 554, 73 N. W. Rep. 29.

[59] This is the sound principle, and goes farther than any other view to harmonize the conflict in the cases. See cases above cited, and Justice *v.* Lang, 52 N. Y. 323, and cases cited; Williams *v.* Morris, U. S. Supreme Ct. (17 Alb. L. J.) 56. But of course acceptance with modification cannot be proved by parol. Jenness *v.* Mount Hope Iron Co., 53 Me. 20; Benj. on S., § 210.

[60] As where it specified "current rates" (55 N. Y. 504), or even left the parties to a *quantum meruit*. Id. Compare Stone *v.* Browning, 68 N. Y. 598.

[61] Leather Cloth Co. *v.* Hieronimus (above). But a verbal arrangement subsequently made relating to the thing sold, or contracted for, which would vary by parol the substance of the contract cannot be shown. Hill *v.* Blake, 97 N. Y. 216, 221–222.

instrument, nor those claiming under and in privity with them.[62]

2. Where the object of the evidence is to impeach the validity of the instrument, or any part of it.[63]

3. Where the object of the evidence is to establish a separate oral agreement constituting a condition *precedent* to the existence of an obligation claimed to arise on the instrument.[64]

[62] Folinsbee *v.* Sawyer, 157 N. Y. 196, 199; 51 N. E. Rep. 994; Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. Rep. 292; Tyson *v.* Post, 108 N. Y. 217; Coleman *v.* First Nat. Bank, 53 N. Y. 388; Coleman *v.* Pike County, 83 Ala. 326, 3 Am. St. Rep. 746, 3 So. Rep. 755; Bruce *v.* Roper Lumber Co., 87 Va. 381, 24 Am. St. Rep. 657, 13 S. E. Rep. 153; De Goey *v.* Van Wyk, 97 Iowa, 491, 497, 66 N. W. Rep. 787; Roof *v.* Chattanooga Pulley Co., 36 Fla. 284, 18 So. Rep. 597. See paragraph 16.

[63] National Novelty Import Co. *v.* Moore, 171 N. C. 703, 89 S. E. Rep. 25. As, for instance, for want of due execution or delivery, or for illegality, fraud, duress, or lack of consideration, or as made under mistake (see chap. 14, and the chapters on these defenses), and the rule is the same whether the party adducing the evidence seeks to avoid the instrument, or to have it reformed. 1 Story's Eq. Jur., § 156, etc. Rule that parol evidence is inadmissible to contradict or vary written contract applies only to a written contract which is in force as a binding obligation. McFarland *v.* Sikes, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. Rep. 408.

[64] Pym *v.* Campbell, 6 E. & B. 370; Wallis *v.* Littell, 11 C. B. N. S. 369. Parol evidence is admissible to show that a writing which is in fact a complete contract, of which there has been a manual tradition, was not to and did not become a binding contract until the performance or occurrence of some condition precedent resting in parol. Reynolds *v.* Robinson, 110 N. Y. 654; Juilliard *v.* Chaffee, 92 N. Y. 529, 535; Benton *v.* Martin, 52 N. Y. 570; Brewers' G. Ins. Co. *v.* Burger, 10 Hun, 56; Ware *v.* Allen, 128 U. S. 590, 595; Burke *v.* Dullaney, 153 U. S. 228; Adams *v.* Morgan, 150 Mass. 143; Faunce *v.* State Mut. Life Ins. Co., 101 Mass. 279; Nutting *v.* Minnesota Fire Ins. Co., 98 Wis. 26, 32, 73 N. W. Rep. 432. Otherwise of a deed delivered to the party. Worrall *v.* Munn, 5 N. Y. 229. A condition *subsequent* cannot be proved by parol. Gridley *v.* Dole, 4 N. Y. 486.

It is error to permit a defendant in an action to recover the purchase price of goods sold under a contract absolute in form to testify over objection and exception, that

4. Where the object of the evidence is simply to show the surrounding circumstances of the parties, and of the subject of the contract, and the usages of language under which the instrument was written, in order to enable the court to read the instrument with the same knowledge with which the parties wrote it.[65]

5. Where the language of the instrument leaves its meaning doubtful,[66] or extrinsic facts in evidence raise a doubt in respect to its application.[67]

6. Where it appears that the instrument was not intended

plaintiff's agent, at the time of signing the contract, said: "It is not binding if you don't want the books; after you inspect them, you can send them back, you will not commit yourself in any way." German Publication Society, Inc., *v.* Pichler, 97 Misc. 644, 162 N. Y. Supp. 260.

[65] See Chapter V, paragraph 82 and notes, of this vol.; and Dana *v.* Fiedler, 12 N. Y. 40, affi'g 1 E. D. Smith, 463; Lidgerwood Mfg. Co. *v.* Robinson, etc., Co., 183 Ill. App. 431, 437; Pollen *v.* Le Roy, 30 N. Y. 549, affi'g 10 Bosw. 38; Messmore *v.* N. Y. Shot & Lead Co., 40 N. Y. 422; Staackman, Horschitz & Co. *v.* Cary, 197 Ill. App. 601. Where goods were delivered under a contract by which the purchaser agreed to pay the "ruling market rates," and it appeared there were two market rates, one for goods of the kind bought of importers and another for them as sold by jobbers, it was held competent to give in evidence the conversation of the parties and the surrounding circumstances for the purpose of showing which of the two was intended by the parties. Manchester Paper Co. *v.* Moore, 104 N. Y. 680, 10 N. E. Rep. 861.

[66] Robinson *v.* United States, 13 Wall. 363; Galland *v.* Kass, 152 N. Y. Supp. 1074. It is not enough to render parol evidence competent, that there are circumstances known to one of the parties, but unknown to the other, which might have influenced such party in making a contract, but to create an ambiguity that opens such a contract to parol explanation, it must be established by proof of circumstances known to all of the parties to the agreement, and available to all, in selecting the language employed to express their meaning. Brady *v.* Cassidy, 104 N. Y. 147, 155–156, 10 N. E. Rep. 131. Where an ambiguity in a written contract is created by extrinsic evidence, the same character of evidence is admissible in order to solve the ambiguity. McKee *v.* Dewitt, 12 App. Div. (N. Y.) 617.

[67] Moore *v.* Meacham, 10 N. Y. 207; Agawam Bank *v.* Stever, 18 N. Y. 502.

to be a complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement on a matter as to which the instrument is silent [68] and which is not contrary to its terms; [69] nor to

[68] Routledge *v.* Worthington, 116 N. Y. 592, 23 N. E. Rep. 1111. Extrinsic evidence is not admissible to show that a contract was partly written and partly oral, if the matter proposed to be made part of the contract by such evidence is inconsistent with the terms of the writing. Fawkner *v.* Smith Wall Paper Co., 88 Iowa, 169, 45 Am. St. Rep. 230, 55 N. W. Rep. 200.

[69] To bring a case within the rule admitting parol evidence to complete an entire agreement of which a writing is only a part, two things are essential: First, The writing must appear on inspection to be an incomplete contract; and, second, The parol evidence must be consistent with and not contradictory to the written instrument. Case *v.* Phœnix Bridge Co., 134 N. Y. 78, 81, 31 N. E. Rep. 254. The only criterion of its completeness or incompleteness is the writing itself. It cannot be proved to be incomplete by going outside of the writing, and proving that there was an oral stipulation entered into not contained in the written agreement. Wheaton Roller-Mill Co. *v.* Noye Mfg. Co., 66 Minn. 156, 68 N. W. Rep. 854. But, while the writing itself is the only criterion, it is not necessary that its incompleteness should appear on its face from mere inspection. It is to be construed, as in any other case, in the light of its subject-matter, and the circumstances in which, and the purposes for which it was executed, which evidence is always admissible in the construction of written contracts, in order to put the court in the position of the parties. (Id.) "Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as to import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing. Greenl. Ev. § 275." Seitz *v.* Brewers' Refrigerating Mach. Co., 141 U. S. 510, 517. A memorandum showing the sale of a specific amount of

their legal effect,[70] for whatever is implied is a part of the contract.

7. Where the object of the evidence is to show a usage legally affecting the parties, by which incidents not expressly mentioned in such contracts are annexed to or implied in them, if the usage be not repugnant either to the express terms or the legal effect of the contract.[71]

8. To show, if the contract be unsealed, that it was made for the benefit and on behalf of the party suing or sued upon it, even though he be not named in it; or, if it be sealed, that it was so made, and has been duly ratified by such party.[72]

9. To show that the date was erroneous.[73]

10. To show that the consideration was different from that stated (except for the purpose of defeating the instrument),[74] or that it was not paid, though payment was acknowledged.[75]

corn, the person to whom sold, the price thereof, and the time when payment is to be made, signed by the sellers, constitutes a contract which parol evidence is inadmissible to vary. Bulwinkle *v.* Cramer, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. Rep. 776. Whether the written contract fully expresses the terms of the agreement is a question for the court. Seitz *v.* Brewers' Refrigerating Mach. Co., 141 U. S. 510, 517.

[70] Heineman *v.* Heard, 39 N. Y. 98; Blossom *v.* Griffin, 13 N. Y. 569; Real Estate Title, &c. Company's Appeal, 125 Penn. St. 549, 11 Am. St. Rep. 920, 17 Atl. Rep. 450. Whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed, and if the contract, with what the law implies, is clear, definite and complete, it cannot be added to, varied, or contradicted by extrinsic evidence. Fawkner *v.* Smith Wall Paper Co., 88 Iowa, 169, 45 Am. St. Rep. 230, 55 N. W. Rep. 200.

[71] See paragraph 9.

[72] See paragraphs 10–12.

[73] Draper *v.* Snow, 20 N. Y. 331. And so it seems of the place of execution. Id.

[74] McCrea *v.* Purmort, 16 Wend. 460, affi'g 5 Paige, 620, S. P., 16 N. Y. 538. Compare Halliday *v.* Hart, 30 N. Y. 474.

[75] Bingham *v.* Weiderwax, 1 N. Y. 509; Fire Ins. Association *v.* Wickham, 141 U. S. 564; Juilliard *v.* Chaffee, 92 N. Y. 529; Lake Roland Elevated Ry. Co. *v.* Frick, 86 Md. 259, 37 Atl. Rep. 650; Wright *v.* Stewart, 19 Wash. 179, 52 Pac. Rep. 1020; Donyook *v.* Washington Mill Co., 16 Wash. 459, 47 Pac. Rep. 964.

11. To show that a transfer absolute on its face was given as security [76] or in trust.[77]

12. To show the mistake which caused a repugnancy appearing on the face of the instrument.[78]

13. Where the object of the evidence is to show a separate *subsequent* valid agreement to rescind, modify, extend, or waive [79] the contract or a provision of it.

The rule that the contract cannot be varied by parol, when it is applicable, excludes evidence which would vary any obligation implied by law from its terms, as well as that which would directly vary its terms.[80]

The admissibility of oral evidence under these rules is subject to the qualification that oral evidence cannot satisfy the demand of the statute of frauds for a memorandum in writing.

9. General Rule as to Proof of Usage.

The common-law rule excluding oral evidence in modification of written, depends, so far as contracts are concerned, upon the presumption that the parties intended their writing to define their rights and liabilities, and adopted the writing because they did not wish to leave any question open

[76] Horn *v.* Keteltas, 46 N. Y. 605.

[77] Britton *v.* Lorenz, 45 N. Y. 51, affi'g 3 Daly, 23. And see Chapter XV.

[78] McNulty *v.* Prentice, 25 Barb. 204.

[79] Stockwell *v.* Holmes, 33 N. Y. 53; Carroll *v.* Charter Oak Ins. Co., 1 Abb. Ct. App. Dec. 316, affi'g 40 Barb. 292; Harris *v.* Murphy, 119 N. C. 34, 36, 25 S. E. Rep. 708; Calliope Mining Co. *v.* Herzinger, 21 Colo. 482, 42 Pac. Rep. 668; but subject to the statute of frauds. Shultz *v.* Bradley, 57 N. Y. 646. In such cases the special contract will be pursued as far as it can be traced in the intention of the parties. The deviation, except where otherwise expressed or mutually understood, must be taken in its proper connection with the original contract, with reference to and in modification of which it was made. McCauley *v.* Keller, 130 Pa. St. 53, 17 Am. St. Rep. 758, 18 Atl. Rep. 607.

[80] La Farge *v.* Rickert, 5 Wend. 187; Thorp *v.* Ross, 4 Abb. Ct. App. Dec. 416; J. W. Ripy & Son *v.* Art Wall Paper Mills, 41 Okl. 20, 136 Pac. Rep. 1080, 51 L. R. A. N. S. 33.

to the uncertainty of memory. But in regard to commercial contracts, especially sales, the known and settled usages of business are relied on as a similar safeguard; and from the brevity with which commercial contracts are despatched, in the ordinary course of trade, arises another counter presumption to the effect that the parties did not intend in their memorandum to express what is defined by the usages of the trade, but only those parts of the transaction which usage would not define,[81] together also with any stipulations by which they desired to depart from the usage, and make for this transaction a different rule. The same principles are involved where a transaction is had orally, and usage is relied on to define its effect. Hence, the three chief rules as to what usage is provable to establish or vary a contract of sale.

It must be, 1. A usage which the parties knew or ought to have known; 2, one which is consistent with the general law merchant;[82] and 3, not incompatible, either with the express terms of their contract,[83] or the legal obligations which the law implies from those terms.

[81] Hutton *v.* Warren, 1 Mees. & W. 474; Wigglesworth *v.* Dallison, 1 Sm. L. Cas. [675], note in 7th Am. ed. 905.

[82] Local usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law, and make it different in the different communities into which the State is divided leads to mischievous consequences, embarrasses trade, and is against public policy. Barnard *v.* Kellogg, 10 Wall. 383.

[83] Custom or usage cannot control the legal rules applicable to the construction of a contract, and evidence that by a custom a contract means something different from what its terms clearly import is inadmissible. Bigelow *v.* Legg, 102 N. Y. 652, 6 N. E. Rep. 107; Atkinson *v.* Truesdell, 127 N. Y. 230, 27 N. E. Rep. 844. It is not competent to explain by parol the terms of a plain written order for goods, by showing the custom among merchants in ordering that class of goods. Coates *v.* Early, 46 S. C. 220, 24 S. E. Rep. 305.

It has also been said that a custom must be reasonable and just in order to be recognized by the courts. "The plaintiff attempted to prove that there was a general custom among merchants and shippers not to place a valuation upon merchandise sent by express. The proof of such a custom was insufficient, but had it been proved to

One who is engaged in a trade or business is bound to know its usages at the place where he acts, and as against himself is presumed by law to have contracted with reference to them.[84]

One who is not engaged in the business, but contracts with those who are, may be presumed, in the absence of evidence to the contrary, to have known its usages, and to have contracted with reference to them;[85] but the presumption is not conclusive, and he may prove his ignorance, even by his own testimony.[86]

Usage must be excluded, not only when adduced for the purpose of nullifying rules of law, but equally when offered for the purpose of establishing presumptivly a stipulation which would be valid if expressly made, but which is contrary to the implication which the commercial law draws from the stipulations the parties have expressed.[87]

be a general custom it should not be adopted by the courts as a rule of law, for no custom, however general, will be so engrafted into the law unless it be reasonable and just. It is neither reasonable nor just for shippers to deliver goods to a carrier on behalf of their consignees under contracts which fail to indemnify them and destroy their right of recovery for loss of the goods so consigned." Miller *v.* Harvey, 83 Misc. 59, 144 N. Y. Supp. 624.

[84] Robinson *v.* United States, 13 Wall. 363. The courts will take notice of the usual and customary manner in which general commercial business is carried on, and that in the purchase of grain or other commodity the purchaser, as a rule, is governed by the latest available quotation. Nash *v.* Classen, 163 Ill. 409, 45 N. E. Rep. 276.

[85] Walls *v.* Bailey, 49 N. Y. 464, and cases cited. Compare Whitehouse *v.* Moore, 13 Abb. Pr. 142. The extension of this doctrine is disapproved in Partridge *v.* Ins. Co., 15 Wall. 573.

[86] Walls *v.* Bailey (above). And the same presumption may be applied in respect to the usage or custom of the contracting parties. Dunbar *v.* Pettee, 1 Daly, 112.

[87] Thus, where in a sale of chattels by one not the maker or grower, and not guilty of fraud, and to a buyer having opportunity to examine, the law implies no warranty, evidence of usage is not competent to import a warranty into the contract. Barnard *v.* Kellogg, 10 Wall. 388 (BRADLEY and STRONG, JJ., dissented). See Miller *v.* Harvey, 83 Misc. 59, 144 N. Y. Supp. 624; Dickinson *v.* Gay, 11 Allen, 29; Benj. on

Usage of language in a trade may sometimes be competent when evidence of other usages of the trade would not; for where the usage is adduced, not so much to supply what is unexpressed, as to show the meaning of what is expressed, a further principle is involved, viz., that it is always competent to show by parol the usages of language of those who adopted the writing; and thus what it was in their knowledge that its terms referred to.[88] Hence, although the terms used be apparently unambiguous, evidence is competent to show that in the usage of language in the trade or business in which the words were employed, they had a different meaning.[89]

As to the *mode* of its proof,—a usage of trade cannot be proven by the understanding or opinions of witnesses as to the law, or what should be the rule,[90] but the witnesses should testify to the existence of the usage, which, if they are qualified, they may do either from their own knowledge and experience of it, or from information derived through

Sales, § 215, and see 11 Allen, 426.

[88] See paragraphs 8 and 9. Evidence of usage is admissible to apply a written contract to the subject-matter of the action, to explain expressions used in a particular sense by particular persons as to particular subjects and to give effect to language in a contract as it was understood by those who made it. Smith *v.* Clews, 114 N. Y. 190, 21 N. E. Rep. 160.

[89] Myers *v.* Sarl, 30 L. J. Q. B. 9, s. c., 7 Jur. N. S. 97. For instances see paragraphs 8 and 9. The cases which exclude usage adduced to explain *un*ambiguous terms (see Ins. Co. *v.* Wright, 1 Wall. 456, and see 15 Id. 573, affi'g 1 Dill. 139), do not overthrow the principle that it is always competent under the strictest rules of interpretation, to show the usages of speech and expression habitual to the writer. Evidence of what he meant in the contract by a certain expression is not competent; but evidence that he was accustomed to use that expression in a particular sense, is; and on the same principle, evidence that the trade in which he was engaged was accustomed to use it in a particular sense, is competent; and when such evidence has been given, the court will read the expression in the contract in the light which the usage throws upon it.

[90] Allen *v.* Merchants' Bank of N. Y., 22 Wend. 215, and see 15 Id. 482; Hawes *v.* Lawrence, 3 Sandf. 193, affi'd in 4 N. Y. 345; Collyer *v.* Collins, 17 Abb. Pr. 467.

others in the course of trade.[91] The testimony of a single witness is not insufficient to prove a usage of trade, if he has full knowledge and long experience on the subject, and testifies explicitly to the necessary extent and duration of the usage, and is uncontradicted.[92] A reported case in which the court held a commercial usage to be established by evidence, is relevant in other cases between other parties, involving the usage at the same place,[93] and within reasonable limits of proximity in time.

Cogent evidence, however, is necessary to establish the existence of a usage of trade;[94] it ought to be so clear as to leave no doubt that the parties contracted in reference to it.[95] If the usage is that of an individual, actual knowledge must be proved.[96]

10. Plaintiff the Real Party in Interest, though not so Named in the Contract.

Whatever may have been the form of the contract, unless under seal, and even in that case if it has been ratified by

[91] Allen *v.* Merchants' Bank (above), NELSON, J. But compare Mills *v.* Hallock, 2 Edw. 652. A custom or usage is a fact that may be stated by a witness in the first instance, without stating the incidents or instances within his knowledge by which he became possessed of the knowledge of the custom, the same as he may testify as to the general reputation of a witness. Conner *v.* Citizens St. Ry. Co., 146 Ind. 430, 442, 45 N. E. Rep. 662.

[92] Robinson *v.* United States, 13 Wall. 363; Vail *v.* Rice, 5 N. Y. 155.

Whether the evidence proves a custom is a question for the jury. Robeson *v.* Pels, 202 Pa. 399, 51 Atl. Rep. 1028.

[93] NELSON, J., in Allen *v.* Merchants' Bank (above). Otherwise, if the decision proceeded on the *concession* of the parties that the usage existed. Crouch *v.* The Credit Foncier of England, L. R. 8 Q. B. 374, s. c., 6 Moak's Eng. 108. How far decisions of State courts are evidence in the United States courts, of commercial usage, see Meade *v.* Beale, Taney, 339, 359.

[94] Citizens' Bank of Baltimore *v.* Grafflin, 31 Md. 507, s. c., 1 Am. Rep. 66; Randall *v.* Smith, 18 Am. Rep. 200, note 207.

[95] Dawson *v.* Kittle, 4 Hill, 107; and see Goodyear *v.* Ogden, Id. 104.

[96] Gamble *v.* Stauber Mfg. Co., 50 Neb. 463, 465, 69 N. W. Rep. 960.

the plaintiff,[97] the plaintiff may show, even by oral evidence, that a party who executed it, although apparently as the principal, did so as the agent of the plaintiff; and upon such evidence the plaintiff may recover, notwithstanding the statute of frauds applies to the contract, and requires it to be in writing;[98] subject to any question of counterclaim or set-off arising from defendant's dealings with the agent in ignorance of his agency. So, where one carries on business, and sells goods therein in the name of another (although for his own account), the promise to pay may be presumed to have been made to the one in whose name the business was done;[99] and he therefore may recover thereon; although the one by whom the sale was made might equally recover if the other did not object.[1]

Where the plaintiff was the defendant's agent, and ostensibly acted as such, he cannot convert his position into that of a principal to sell to his employer, even by evidence of a usage of trade, unless he also shows that defendant knew and assented to the dealing on the footing of such a usage.[2]

[97] Briggs *v.* Partridge, 64 N. Y. 357, and cases cited.

[98] Ballard *v.* Friedeberg, 164 N. Y. Supp. 912; Hubbert *v.* Borden, 6 Whart. (Penn.) 79; Nash *v.* Toune, 5 Wall. 703; Salmon Falls, &c. Co. *v.* Goddard, 14 How. U. S. 446; Eastern R. R. Co. *v.* Benedict, 5 Gray, 561; Alexander *v.* Moore, 19 Mo. 143, Benj. on S., §§ 210, 219, n.; and see paragraph 8, and cases cited. The rule is the same whether the agency was disclosed in the contract, or only orally, or not at all; and whether defendant was seller or buyer. Same cases. For a strong case of presumption of ratification, see Hampton *v.* Rouse, 22 Wall. 272.

In an action to recover for stock to be given under the terms of a written contract to "J. S., president of the Eastern Railroad Company," in payment for iron sold, —*Held*, that the company suing could prove that the iron belonged to it, and that its president acted merely as its agent in the transaction, and that it could maintain the action in its own name. Eastern Railroad Co. *v.* Benedict, 5 Gray, 561, Benj. on S., § 219, n.

[99] Alsop *v.* Caines, 10 Johns. 396, affi'd as Caines *v.* Brisban, 13 Id. 9.

[1] Gardiner *v.* Davis, 2 C. & P. 49, Abbott, J. Compare Paddon *v.* Williams, 1 Robt. 340, s. c., 2 2 Abb. Pr. N. S. 38; Howe *v.* Savory, 49 Barb. 403.

[2] Robinson *v.* Mollett, L. R. 7

11. Purchase by Defendant's Agent.

An allegation of sale to defendant will admit evidence of a sale to his agent, and of the agent's authority.[3] The three elements in the proof of purchase by an agent are, the fact that an agency existed,[4] that the scope of the agent's au-

H. of L. 802, 815, s. c., 14 Moak's Eng. 177, 189.

[3] For the distinction between general and special agency, see Butler *v.* Maples, 9 Wall. 766, and 5 Abb. N. Y. Dig., new ed. 243.

[4] Agency and the extent of the power of an agent, are questions of fact, and may be established by parol proof, except in those cases where a written authorization is expressly required by positive law, and may also be established by circumstantial evidence. Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. Rep. 738. When the defense in an action for goods sold and delivered to an agent of the defendant is a denial that any such sale was made, the burden is on the plaintiff throughout the case to prove every essential part of the transaction, including the authority of the alleged agent to make the alleged purchase in the manner alleged. Schutz *v.* Jordan, 141 U. S. 213. "A party who seeks to charge a principal for the contracts made by his agent must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend that they had made out a cause of action against the defendants, by proving that Hewes had made a purchase in their name. Of course they must go further, and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred. Authority to buy one class of goods would not be authority to buy another and entirely different class. Authority to buy in the usual course of business would not be authority to buy outside of that course of business. And when they rely upon contracts made with Hewes the burden is on them, and continues on them, to establish the contract which in fact was made, and that it was within the scope of his authority as agent." Id. Where circumstantial evidence is resorted to for the purpose of establishing an agency, or the facts and circumstances showing the relation of the parties, and throwing light upon the character of such relation, are admissible in evidence. Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. Rep. 738.

One partner cannot bind the partnership for the price of goods which he purchased for his own private purposes. In order to hold the partnership on such a transaction, plaintiff is bound to prove the authority of the purchasing partner to bind the firm. Vinegar Bend Lumber Co. *v.*

thority extended to such a transaction as that in question; and that in the transaction he acted as agent and on account of the defendant.[5] In the absence of direct evidence, the existence of an agency may be inferred by the jury, from the fact that the supposed agent was continuously acting in the service of the defendant in the business in which the transaction was had;[6] and the scope of his authority may be inferred from the nature of his usual service.[7] The acts and declarations of the agent cannot alone establish the fact of agency[8] nor the scope of his authority; but there must

Howard, Hooks, & Henson, 186 Ala. 451, 65 So. Rep. 172.

[5] See Beals *v.* Merriam, 11 Metc. 470.

[6] Compare Verona Central Cheese Co. *v.* Murtagh, 50 N. Y. 214, rev'g 4 Lans. 17; and Chapter XII, paragraph 7, and Chapter XV, paragraph 5, of this vol.; Bankers Life Ins. Co. *v.* Robbins, 53 Neb. 44, 73 N. W. Rep. 269. See Memphis, etc., R. Co. *v.* Atlas Powder Co., 123 Ark. 620, 185 S. W. Rep. 786.

[7] See Id.; and Larter *v.* Am. Female Guard. Soc., 1 Robt. 598. Principals having held out an agent, who paid for purchases in checks signed as agent, held liable for his purchases on credit. Morey *v.* Webb, 58 N. Y. 350, affi'g 65 Barb. 22.

The general authority of a sewing machine salesman gave him no apparent authority to enter into an agreement binding his principal to resell the machines for the purchaser, on commission. Forehand *v.* White Sewing Machine Co., 195 Ala. 208, 70 So. Rep. 147.

[8] Such declarations ought not in any event be received in evidence, unless the party tendering the same offers in good faith to supplement them by other and independent evidence of the agency; and if such offer is not made good, the declarations ought to be excluded from consideration by the jury. The safer and better practice in all cases, is to require proof of the agency before admitting such declarations at all. But the error in admitting evidence relating to transactions with one who had not been shown to be an agent is cured by subsequent proof of the agency. Phœnix Assurance Co. *v.* McAuthor, 116 Ala. 659, 22 So. Rep. 903; Abel *v.* Jarratt, 100 Ga. 732, 28 S. E. Rep. 453. And the order in which the evidence is admitted is not subject to review. C. & C. Elect. Motor Co. *v.* D. Frisbie & Co., 66 Conn. 67, 33 Atl. Rep. 604. An agency cannot be established by the declarations of the alleged agent, but must be proved *aliunde*. Taylor *v.* Hunt, 118 N. C. 168, 24 S. E. Rep. 359; Lakeside Press, &c. Co. *v.* Campbell, 39 Fla. 523, 22 So. Rep. 878; Wynne *v.* Stevens, 101 Ga. 808, 28 S. E. Rep. 1000;

either be independent evidence on those points, or there must be something to connect defendant with the particular act or declaration relied on, so as to render it competent against him without first assuming the existence of the relation it is sought to prove.[9]

Evidence of the habit and course of dealing is competent to bind the defendant, by showing his subsequent ratification of the transaction, whether there is original authority or not.[10] The principle is recognized that where an act is done by one person for the benefit of another, though without authority, the latter may be presumed in furtherance of justice to have ratified it, and may take the benefit of it as against third persons.[11] In cases where there is no evidence of original authority, the party relying on ratification must show that the principal after having knowledge of all the material facts, expressly or tacitly acquiesced;[12] but intent to ratify need not be shown.[13] Mere silence, under

Richardson & Boynton Co. *v.* School District No. 11, 45 Neb. 777, 64 N. W. Rep. 218; Dickerman *v.* Quincy Mut. Fire Ins. Co., 67 Vt. 609, 32 Atl. Rep. 489; Fisher *v.* White, 94 Va. 236, 26 S. E. Rep. 573; Anheuser Busch Brewing Assoc. *v.* Murray, 47 Neb. 627, 66 N. W. Rep. 635. Though agency cannot be proved by declarations of the alleged agent; yet he is a competent witness to prove it, and his testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject. Lawall *v.* Groman, 180 Pa. St. 532, 542, 37 Atl. Rep. 98; Nyhart *v.* Pennington, 20 Mont. 158, 162, 50 Pac. Rep. 413.

The agent may testify as to whether his contract with the principal was in force at a certain time; and, if it was not in force, when it was terminated. But he cannot testify as to the "reason why" the contract was "taken away" from him. Shepherd *v.* Butcher Tool, etc., Co., 73 So. Rep. (Ala.) 498.

[9] Howard *v.* Norton, 65 Barb. 161, s. p., Stringham *v.* St. Nicholas Ins. Co., 4 Abb. Ct. App. Dec. 322. See this principle more fully discussed in Chapter IX, paragraphs 13, 14, and 32 of this vol.

[10] 2 Greenl. Ev., 13th ed. 51.

[11] Hampton *v.* Rouse, 22 Wall. 274. Factor is trustee of express trust. Ladd *v.* Arkel, 37 Super. Ct. (5 J. & S.) 35.

[12] Id. 53; Booth *v.* Bierce, 38 N. Y. 463, rev'g 40 Barb. 114.

[13] Hazard *v.* Spears, 2 Abb. Ct. App. Dec. 353.

knowledge, only raises a presumption of ratification [14] after the lapse of a reasonable time for dissenting. Where the alleged agent was a mere stranger, intermeddling, the silence of the alleged principal does not raise a legal presumption of ratification; but at most is a circumstance for the jury.[15] The agency having been sufficiently shown, the fact that the transaction was done by the alleged agent for and on account of the defendant, may be shown by evidence of the admissions, declarations, and representations made by the agent in the performance of the transaction: [16] and such evidence is then competent for any other purpose equally as would be the declarations of the principal himself. Whether there is sufficient proof of an agency to warrant the admission of the acts and declarations of the agent in evidence against the principal, is a preliminary question for the court to determine.[17] If authority from defendant to pledge his credit is shown, it is not necessary to show that he had a beneficial interest in the business. On a sale to an agent of a known principal, the agent being insolvent, and doing business in the principal's name by the latter's permission, the presumption is that the seller gives credit to the principal, not to the

[14] Whether this presumption, in the case of agency, is one of law, or merely of fact, is disputed, see 27 Wisc. 135, and cases cited.

[15] P. W., &c. R. R. Co. *v.* Powell, 28 Penn. St. 366; whether it is even that, is questioned by Dixon, J., in 27 Wisc. 135. Ratification of an unauthorized act, to be binding, must be made with full knowledge of all material facts; and when a party relies upon ratification by acquiescence, the burden is upon him to prove it—knowledge of all material facts being an essential element thereof. Moore *v.* Ensley, 112 Ala. 228, 20 So. Rep. 744.

[16] Howard *v.* Norton, 65 Barb. 161.

[17] Cliquot's Champagne, 3 Wall. 114; Dickerman *v.* Quincy Mut. Fire Ins. Co., 67 Vt. 609, 32 Atl. Rep. 489. Compare Chapter VII, paragraph 10 and notes thereto, of this vol. The declarations of an agent are admissible only when the existence of the agency has been satisfactorily established by other competent evidence. Bennett *v.* Talbot, 90 Me. 229, 38 Atl. Rep. 112; Postal Telegraph Cable Co. *v.* Lenoir, 107 Ala. 640, 18 So. Rep. 266; Forehand *v.* White Sewing Machine Co., 195 Ala. 208, 70 So. Rep. 147.

agent. One who permits another to use his name thus is liable for the debts, although he has no beneficial interest in the business.[18]

If it be shown by plaintiff that he had been previously in the habit of dealing with the principal through the agent in question, and defendant relies on a revocation of the authority, he must show actual notice of the termination of the agency, either directly or by presumptive evidence; or circumstances which constitute, as matter of law, constructive notice, must be shown.[19]

12. Defendant Liable as Undisclosed Principal.

Plaintiff need not show that he knew he was dealing with defendant. Not only where he knew that the apparent buyer was an agent for defendant,[20] or for an undisclosed principal,[21] but equally when he supposed the one with whom he dealt to be dealing for himself,[22] he may,[23] after discovering that the latter was merely an agent for defendant, elect to proceed against defendant, unless,[24] with knowledge that he was dealing with an agent, he elected to give credit to him personally instead of relying on the agency,[25] or unless, after acquiring full knowledge as to the true principal and

[18] Ferris *v.* Kilmer, 48 N. Y. 300.

[19] Claflin *v.* Lenheim, 66 N. Y. 301, rev'g 5 Hun, 269.

[20] Hubbert *v.* Borden, 6 Whart. (Penn.) 79, 91.

[21] Truman *v.* Loder, 11 Ad. & El. 589. If the principal is not disclosed at the time the contract is signed, parol evidence is admissible to show the agency of the signer, and to charge the principal; but if in fact the agency is disclosed when the contract is signed, then such evidence is not admissible. Heffron *v.* Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. Rep. 165.

[22] Meeker *v.* Claghorn, 44 N. Y. 349; McMonnies *v.* Mackay, 39 Barb. 561

[23] Within a reasonable time. Smethhurst *v.* Mitchell, 1 E. & E. 622.

[24] The leading case is Thompson *v.* Davenport, 9 B. & C. 78, 86.

[25] Addison *v.* Gandasequi, 4 Taunt. 574; Patterson *v.* Gandasequi, 15 East, 62; Meeker *v.* Claghorn, 44 N. Y. 349; Rowan *v.* Buttman, 1 Daly, 412, and cases cited; McMonnies *v.* Mackay, 39 Barb. 561; Ranken *v.* Deforest, 18 Id. 143. And see Inglehart *v.* Thousand Isle Hotel Co., 7 Hun, 547. The fact that he knew he was dealing with an agent is not

the power of electing, he has clearly and unquestionably elected to treat the agent as alone his debtor.[26] Suing the agent to judgment, under such circumstances, is conclusive evidence of election.[27] The question whether he originally elected to give credit to the agent is one of intention, usually to be determined by the jury as a question of fact.[28] The fact that the contract of sale was in writing (if not sealed[29]) does not exclude oral evidence that defendant was the undisclosed principal of the apparent buyer,[30] even where the statute of frauds requires a writing;[31] and such evidence is competent, even though it does not appear in the body of the instrument nor in the signature that the signer acted as agent.[32] In the absence of such evidence, the mere fact that the apparent buyer was an agent and signed with the addition of agent, is not enough.[33]

alone enough, see 53 N. Y. 388, 394.

[26] Curtis *v.* Williamson, 10 Q. B. 57, s. c., 11 Moak's Eng. 149.

[27] Priestly *v.* Fernie, 3 H. & C. 977, s. p., Morris *v.* Rexford, 18 N. Y. 552; Rodermund *v.* Clark, 46 Id. 354; Goss *v.* Mather, 2 Lans. 283, 46 N. Y. 689. But the mere filing an affidavit of proof against the agent's estate in insolvency is not; though it may be evidence to go to the jury. Curtis *v.* Williamson, L. R. 10 Q. B. 57, s. c., 11 Moak's Eng. 149.

[28] Green *v.* Hopke, 18 C. B. 349, and cases cited. As to the case of foreign principal, see the opposing rules in Kirkpatrick *v.* Stainer, 22 Wend. 244, 259; Hutton *v.* Bullock, L. R. 8 Q. B. 331 s. c., 6 Moak's Eng. 89; 9 Id. 572 s. c., 10 Moak, 184; Armstrong *v.* Stokes, 7 Id. 598 s. c., 3 Moak, 217.

[29] Briggs *v.* Partridge, 64 N. Y. 357, affi'g 39 Super. Ct. (J. & S.) 339.

[30] Higgins *v.* Senior, 8 Mees. & W. 834, 844, s. p., Ford *v.* Williams, 21 How. U. S. 287; Coleman *v.* First Nat. Bank of Elmira, 53 N. Y. 388; Powell *v.* Wade, 109 Ala. 95, 97, 19 So. Rep. 300. In such an action, the burden of proof lies on the principal to show the agency, and that in the making of the contract the agent was acting for him. Id.

[31] Higgins *v.* Senior, 8 Mees. & W. 834, 844; Dykers *v.* Townsend, 25 N. Y. 57, Benj. on S., § 218.

[32] Ford *v.* Williams (above); Lerned *v.* Johns, 9 Allen, 419, Benj. on S., § 219, n. *Contra*, Fenly *v.* Stewart, 5 Sandf. 101, s. c., 10 N. Y. Leg. Obs. 40; Auburn City Bank *v.* Leonard, 40 Barb. 119; Babbett *v.* Young, 51 Id. 466.

[33] See De Witt *v.* Walton, 9 N. Y. 571.

When a written contract is made

In these cases, however, in so far as defendant can show that to compel him to pay would change the state of the accounts between him and his agent to his prejudice, plaintiff cannot recover of him.[34]

13. Defendant Liable though Acting as Agent.

In an action on a contract made by defendant in his own name,[35] although it appear that he acted as agent, plaintiff may recover against defendant as a principal,[36] provided, however, that if it appear that not only the fact of his agency, but also the name of his principal,[37] was disclosed at the time of making the contract,[38] plaintiff must show [39] that he gave credit exclusively to the defendant,[40] or that defendant had not at the time [41] the authority he assumed to have [42] or that he has received from the principal the fund to be recovered.[43] If he simply disclosed his agency without naming a principal, the presumption is, in the absence of other evidence, that credit was given to him, not to the

in the name of a principal, and signed in his name by another as his agent, it is not competent to show by parol evidence in order to recover on the contract, that in signing it, the one who purported to sign it as agent signed the name of the principal for his own benefit, with intention to bind himself. Heffron *v.* Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. Rep. 165.

[34] See Rowan *v.* Buttman, 1 Daly, 412; Curtis *v.* Williamson, L. R. 10 Q. B. 57, s. c., 11 Moak's Eng. 149.

[35] See Hegeman *v.* Johnson, 35 Barb. 200.

[36] Unless he be a public agent.

[37] Mills *v.* Hunt, 20 Wend. 431.

[38] McCoomb *v.* Wright, 4 Johns. Ch. 659.

[39] Plumb *v.* Milk, 19 Barb. 74.

[40] See Butler *v.* Evening Mail Assoc., 61 N. Y. 634; Coleman *v.* First Nat. Bank, 53 Id. 388, and cases cited; and see Hall *v.* Lauderdale, 46 N. Y. 70.

This may be a question of fact for the jury. Allaun *v.* Glen Brook Coal Co., 227 Fed. Rep. 835, 142 C. C. A. 359.

[41] Nason *v.* Cockroft, 3 Duer, 366, s. p., Rossitor *v.* Rossitor, 8 Wend. 494; Palmer *v.* Stephens, 1 Den. 471.

[42] Compare Feeter *v.* Heath, 11 Wend. 477, and Sinclair *v.* Jackson, 8 Cow. 543.

[43] Compare, on this question, Morrison *v.* Currie, 4 Duer, 79, and Hall *v.* Lauderdale, 46 N. Y. 70.

principal.[44] The fact that he was a factor for disclosed foreign principals does not raise a presumption of law that the credit was given exclusively to himself;[45] but the question whether he is personally liable is one of intention, to be gathered from surrounding circumstances, usages, etc.[46] Parol evidence is admissible of a trade usage by which, if the principal's name is not disclosed within a reasonable time, the agents, though they acted avowedly as agents, are personally liable.[47] In the absence of such evidence the agent, acting openly for a known foreign principal, is presumed not personally liable.[48]

14. Assumption of Order Originally Given by a Third Person.

Plaintiff may recover on proof of an order originally given

[44] See Chappell *v.* Dann, 21 Barb. 17. When the principal is undisclosed at the time of the signing of a contract, a third party suing thereon may show that there was a principal, in order to bind him, but the agent is not permitted to prove the same fact, in order to free himself from liability. Heffron *v.* Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. Rep. 165. 11 S. W. Rep. 165.

[45] Kirkpatrick *v.* Stainer, 22 Wend. 244, 259. But see *contra*, Story on Ag., § 268; Armstrong *v.* Stokes, L. R. 7 Q. B. 578, s. c., 3 Moak's Eng. 217; Hutton *v.* Bullock, L. R. 8 Q. B. 331, 9 Id. 572, s. c., 6 Moak's Eng. 89, 10 Id. 184. See also Hochster *v.* Baruch, 5 Daly, 440.

[46] Prof. Dwight's note to Allen *v.* Schuchardt, 1 Am. L. Reg. N. S. 17. But parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. Bulwinkle *v.* Cramer, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. Rep. 776. An agent who executes a promissory note in his own name, with nothing on the face of the instrument to disclose his agency, cannot introduce parol evidence to exonerate himself from liability on the ground that the note was executed in behalf of his principal, and that the payee was aware of the relation of the parties and of the intent with which the instrument was executed. Shuey *v.* Adair, 18 Wash. 188, 51 Pac. Rep. 388.

[47] Hutchinson *v.* Tatham, L. R. 8 C. P. 482, s. c., 6 Moak's Eng. 230.

[48] Kirkpatrick *v.* Stainer (above).

by a third person, and assumed by defendant;[49] but not (without amendment) on mere evidence that the defendant took an assignment of the subject of the order from the one who gave it.[50]

15. Question to Whom Credit was Given.

To prove that credit was given to one or another of several persons, the books of the party giving the credit are not competent evidence *in his own favor*, and against the one sought to be charged,[51] unless upon some ground which would make them competent generally,—as, for instance, where they are admissible as shop books, or as entries made in the course of duty, or against interest by a person since deceased, or as entries attested by the testimony of the maker, or as a contemporaneous memorandum by the witness which he has used to refresh memory, or as part of the *res gestæ*, or as having been communicated to the party against whom they are adduced.[52] The books of the party giving the credit are competent *against him* to show that he gave credit to another than defendant—as, for instance, that he charged the goods to the alleged agent through whom they were bought,[53] or to a third person to whom they were delivered[54]—and are strong evidence that he intended to give credit to the one he charged;[55] but in

[49] Sloan *v.* Van Wyck, 36 Barb. 335, again, 47 Id. 634.

[50] Barber *v.* Lyon, 22 Barb. 622.

[51] Somers *v.* Wright, 114 Mass. 171; Field *v.* Thompson, 119 Id. 151.

But see Gordon Malting Co. *v.* Bartels Brewing Co., 206 N. Y. 528, 100 N. E. Rep. 457, 461.

[52] See Chapter III, paragraph 66 of this vol.; and later paragraphs of this chapter; Love *v.* Ramsey, 139 Mich. 47, 102 N. W. Rep. 279.

Letters passing between the parties are admissible as bearing upon the question whether defendant purchased the goods on his own credit or merely as agent for another. Allaun *v.* Glen Brook Coal Co., 227 Fed. Rep. 835, 142 C. C. A. 359.

[53] See Foster *v.* Persch, 68 N. Y. 400.

[54] Swift *v.* Pierce, 13 Allen, 136; Champion *v.* Doly, 31 Wis. 190.

[55] Ruggles *v.* Gatton, 50 Ill. 412; Swift *v.* Pierce (above). The question is one for the jury. Wolf *v.* Solomon, 59 Pa. Super. 255.

neither case are they conclusive,[56] but may be rebutted by oral or other evidence explaining the charge. It is not necessary for the plaintiff in such a case, in order to rebut the presumption arising from the charge, to show that it was caused by mistake or fraud; but any explanation consistent with the intention to give credit only to another, may be shown.[57]

If it be uncertain, on the evidence, whether the sale was on the credit of one or another, the plaintiff, or his agent who made the sale, may testify directly that he did so on the credit of defendant,[58] and that he intended to give credit to him, although he charged another on his books;[59] but evidence of the declarations of the plaintiff made to the third person, or otherwise, in the absence of the defendant, and not part of the *res gestæ*, is not competent in plaintiff's favor.[60]

Evidence that one of such persons had no property and was entirely irresponsible is inadmissible, for it is too remote to raise a presumption that the sale was not to him.[61] But

[56] Foster *v.* Persch, 68 N. Y. 400, and cases above cited.

[57] Champion *v.* Doly, 31 Wis. 190. As, for instance, that it was so made at defendant's request (James *v.* Spaulding, 4 Gray, 451), or at the request of the third person (Burkhalter *v.* Farmer, 5 Kans. 477), or for temporary purpose, plaintiff not being informed as to the standing of the principal (Maryland Coal Co. *v.* Edwards, 4 Hun, 432), or inadvertently, the charge being posted from the order book. Fiske *v.* Allen, 40 Super. Ct. (J. & S.) 76.

[58] Georgia Cotton Co. *v.* Lee, 196 Ala. 599, 72 So. Rep. (Ala.) 158; Lee *v.* Wheeler, 11 Gray, 236.

[59] Folsom *v.* Sheffield, 53 Me. 171; Burkhalter *v.* Farmer, 5 Kan. 477. See also Munroe *v.* Mundy & Scott, 164 Iowa, 707, 146 N. W. Rep. 819.

[60] Whitney *v.* Durkin, 48 Cal. 462, s. p., Moore *v.* Meacham, 10 N. Y. 207.

[61] Green *v.* Disbrow, 56 N. Y. 334, rev'g 7 Lans. 381. *Contra*, Miller *v.* Brown, 47 Mo. 504, s. c., 4 Am. Rep. 345; Moore *v.* Meacham, above. So also of evidence that defendant, a father, had paid the son's debts to other tradesmen. Id.

But where the question was whether the defendant purchased for himself or as agent for his wife, evidence that the husband was the real owner of the business which was conducted by him in the name of his wife, has been

the fact that the insolvency was communicated to plaintiff, and treated by him as a reason for refusing to sell to the third person, is competent.[62]

16. Identifying the Thing Agreed for.

In application of the principles before stated [63] respecting oral evidence, it is to be observed that if a written contract or bill of sale specifies the thing sold, oral evidence is not competent to show that it was not intended to pass all that was specified,[64] nor to show that the writing is not satisfied by delivery of the particular lot specified;[65] but it is competent (unless inadequate by the statute of frauds) for the purpose of showing that additional articles were included in the transaction, though not specified in the writing.[66]

17. Quality and Description.

In applying the same principles to proof of the quality or description of the goods, it is well settled that extrinsic evidence is competent to show what was understood by persons engaged in the trade, by words[67] or ab-

held admissible, although the tendency of such evidence was to prove that the carrying on of his business in the name of his wife was for the purpose of defrauding his creditors. Botefuhr *v.* Rometsch, 34 Ore. 491, 56 Pac. Rep. 808.

[62] Munroe *v.* Mundy & Scott, 164 Iowa, 707, 146 N. W. Rep. 819. See Bronner *v.* Frauenthal, 37 N. Y. 166, affi'g 9 Bosw. 350. Compare chapter XII, paragraph 5, and chapter XIII, paragraph 19 of this vol.

[63] Paragraphs 8 and 9.

[64] Ridgeway *v.* Bowman, 7 Cush. 268, Benj. on S., § 202.

[65] Vail *v.* Rice, 5 N. Y. 155.

[66] Nedvidek *v.* Meyer, 46 Mo. 600, S. P., Pierce *v.* Woodward, 6 Pick. 206. Compare Cram *v.* Union Bank, 1 Abb. Ct. App. Dec. 461, affi'g 42 Barb. 426.

One of the essential elements of a contract of sale is the identity of the subject matter, and if this be not established, there can be no recovery for an alleged breach. United Roofing, etc., Co. *v.* Albany Mill Supply Co., 18 Ga. A. 184, 89 S. E. Rep. 177.

[67] Such as "gas fixtures," Downs *v.* Sprague, 1 Abb. Ct. App. Dec. 550; or the "product" of hogs, Stewart *v.* Smith, 50 Ill. 397; but probably not to show that the word "meal" was understood by the trade to signify "corn."

breviations used;[68] and for this purpose extrinsic evidence is competent to show what varieties or grades are included in the meaning of the generic term used;[69] what manufacture is designated by a particular brand;[70] that an article designated as of a particular material—such as mahogany furniture or horn chains,[71]—was by usage of trade so-called, though only partly of the material indicated, and that the parties intended such article; that the usage of measurement of the size of the articles was peculiar, as that in selling trees as of a certain height it was customary not to include the green top;[72] or that the qualifying words "with all faults" mean all that are not inconsistent with the identity of the goods;[73] and the like.

Chandler Grain & Milling Co. *v.* Shea, 213 Mass. 398, 100 N. E. Rep. 663.

It has been held that where the contract is silent as to the quality of the goods ordered, it will be presumed that the parties intended them to be merchantable, or such as are suitable for the buyer's business. Puffer Mfg. Co. *v.* Alabama Marble Quarries, 73 So. Rep. (Ala.) 415.

[68] Dana *v.* Fiedler, 12 N. Y. 40, affi'g 1 E. D. Smith, 463.

[69] As, for instance, whether "good merchantable hay" includes clover, Fitch *v.* Carpenter, 40 Barb. 40; or what is intended by "good custom cowhide boots." Wait *v.* Fairbanks, Brayt. (Vt.) 77, 139; or whether "winter strained lamp oil" means sperm oil only, or whale oil as well, Hart *v.* Hammett, 18 Vt. 127; Benj. on S., § 213, n. In order to prove what article was intended in a contract, by a name used in commerce, it is proper to ask a witness, who is an expert, "how the article is generally known in the market, and how spoken of generally." Pollen *v.* Le Roy, 10 Bosw. 38, affi'd in 30 N. Y. 549. Extrinsic evidence as to the meaning of the word "thermostat" in a contract is inadmissible, that word having a fixed and definite meaning. Murphey *v.* Weil, 92 Wis. 467, 66 N. W. Rep. 532.

[70] Pollen *v.* Le Roy, 30 N. Y. 549, affi'g 10 Bosw. 38. But not of a usage to accept an equal or better brand in lieu of that agreed for. Beals *v.* Terry, 2 Sandf. 127.

[71] Sweat *v.* Shumway, 102 Mass. 365, s. c., 3 Am. Rep. 471.

[72] Barton *v.* McKelway, 22 N. J. 165. See also City & Suburban Ry. Co. *v.* Basshor, 82 Md. 397, 33 Atl. Rep. 635.

[73] Whitney *v.* Boardman, 118 Mass. 242; Benj. on S., § 213. The meaning of characters, marks, letters, figures, words or phrases used in contracts, having purely a local or technical meaning, unintelligible to persons unacquainted with the

The fact that the articles delivered were such as to satisfy the contract may be proved by testimony to their quality, or by opinions of qualified witnesses that they corresponded with that which the contract calls for. If they are shown not to have corresponded, and to have been rejected on that account, evidence of a usage to make alterations afterward is not competent.[74]

18. Quantity.

In application of the principles already stated,[75] as to oral evidence explanatory of sales, it is held that parol evidence is admissible to show that by the word "barrels," used in a written contract, was intended vessels of a certain kind and capacity, and not a measure of quantity, and that the parties contracting had reference not to a statute barrel, but to certain vessels of uniform size of different capacity from the statute barrel.[76] So extrinsic evidence of defendant's usage to sell 2,240 lbs. to the ton, instead of the statute number of 2,000 lbs., and that the contract was made in reference to his usage, is competent.[77] So under a contract for shingles

business, may be given and explained by parol evidence, if the explanation be consistent with the terms of the contract. Atkinson *v.* Truesdell, 127 N. Y. 230, 27 N. E. Rep. 844. The court takes judicial notice of the ordinary meaning of all words in our tongue; and dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court. Nix *v.* Hedden, 149 U. S. 304.

[74] Brown *v.* Foster, 113 Mass. 136; Benj. on S., § 215.

The burden of showing that the articles delivered complied with the contract is upon the plaintiff. Skogness *v.* Seger, 35 N. D. 366, 160 N. W. Rep. 508.

[75] Paragraphs 8 and 9.

[76] Miller *v.* Stevens, 100 Mass. 518, s. c., 1 Am. Rep. 139, and cases cited; Benj. on S., § 213, n. Evidence of a usage in the trade, in sales by quantity, to estimate by measure of one barrel in every ten, taken promiscuously, is competent in an action between members of the trade. Dalton *v.* Daniels, 2 Hilt. 472.

[77] Many *v.* Beekman Iron Co., 9 Paige, 188. Compare Hall *v.* Reed, 1 Barb. Ch. 500.

Where an order was for fifty pieces of cloth goods without specifying the number of yards per piece, parol evidence was held admissible to show the understanding of the parties as to the length

by the "thousand," it may be shown that, by usage of the trade, two bundles of a certain size are sold as a thousand without regard to actual count.[78] So where the contract is for a "cargo,"[79] or a person's "crop,"[80] or for a "season,"[81] those words may be explained by parol. But if the writing, properly understood, calls for a certain quantity, evidence of a reservation of a part by parol, is inadmissible.[82]

If the contract is for a specific parcel or lot described as being of a certain quantity, "more or less," evidence of a usage that "more or less" is limited to a certain percentage, is not admissible;[83] nor is evidence that the parties' understanding was that the buyer was to have more or less as might be found necessary to make up a cargo, although it appeared that both parties knew that the goods were brought

of each piece. Galland *v.* Kass, 152 N. Y. Supp. 1074.

[78] Soutier *v.* Kellerman, 18 Mo. (3 Bennett), 509, s. p., 1 Greenl. Ev., § 281.

[79] Clark *v.* Baker, 11 Metc. 186; Hay *v.* Leigh, 48 Barb. 383; Rhoades *v.* Castner, 12 Allen, 130; Benj. on S., § 215.

"A record of the shipment by the plaintiff to the defendant of a large number of car loads of coal, which record showed the weights of each car, was offered in evidence by the defendant for the purpose of establishing, among other things, the average weight of a car load of coal, and the amount of the defendant's damages incident to the non-delivery of a certain amount of coal that should have been delivered. The plaintiff objected to the record, but we perceive no merit in the objection, inasmuch as the plaintiff's counsel admitted that the weight of the car loads of coal was correctly stated in the record. This being so, it was properly allowed to be read in evidence for the purpose of showing what amount of coal, upon the average a car would carry, and what, in the estimation of the parties, constituted a car load." Consolidated Coal Co. *v.* Polar Wave Ice Co., 106 Fed. Rep. 798, 45 C. C. A. 638. See also Knapp *v.* Hubbard, 176 Mich. 264, 142 N. W. Rep. 571; Alger *v.* Morrill, 68 Vt. 598, 35 Atl. Rep. 483.

[80] Goodrich *v.* Stevens, 5 Lans. 230. Compare McDonald *v.* Longbottom, 1 E. & E. 297, 987, s. c., 28 L. J. Q. B. 293, 29 Id. 256.

[81] Myers *v.* Walker, 24 Ill. 133.

[82] Austin *v.* Sawyer, 9 Cow. 39. See Colorado T. & T. Co. *v.* Oliver, 20 Colo. A. 257, 78 Pac. Rep. 308.

[83] Vail *v.* Rice, 5 N. Y. 155. Compare Sewall *v.* Gibbs, 1 Hall, 602; Bacon *v.* Gilman, 4 Lans. 456, s. c., 60 Barb. 640. See Mosby *v.* Smith, 194 Mo. A. 20, 186 S. W. Rep. 49.

for that purpose, and that the amount to be required was uncertain.[83a] If the contract calls for a specified quantity merely, "more or less," according to the discretion of a designated agent, the fair discretion of the agent is conclusive.[83b] A bill-head notice restricting claims for deficiencies is not relevant, if the contract was complete and binding before the delivery of the bill.[83c]

A variance between pleading and proof, as to the quantity, if it does not mislead, may be disregarded.[83d]

19. Price Agreed.

Abbreviations[83e] and ambiguous expressions[83f] as to price, in a written contract, may be explained by parol. So where the agreement is for a certain advance on "cost," extrinsic evidence is competent to show the intent of the parties in the use of such a term.[83g] A contract which was void by the statute of frauds, is good as a proposition of price, and governs, if the goods were subsequently delivered and accepted pursuant to it.[83h] Where the testimony is conflicting as to what was the price agreed upon[84] in an oral

[83a] Cabot *v.* Winsor, 1 Allen (Mass.), 546, 1 Pars. 548.

[83b] Brawley *v.* United States, 96 U. S. (6 Otto) 168.

[83c] Allen *v.* Schuchardt, 1 Am. L. Reg. N. S. 13, affi'd in 1 Wall. 359.

[83d] Potter *v.* Hopkins, 25 Wend. 417.

[83e] Taylor *v.* Beavers, 4 E. D. Smith, 215; Dana *v.* Fiedler, 12 N. Y. 40, Benj. on S., § 213, n.

[83f] Cole *v.* Wendel, 8 Johns. 116.

[83g] Gray *v.* Harper, 1 Story, 574, STORY, J.; Benj., § 213, n.; Herst *v.* De Comeau, 1 Sweeny, 590; and see Buck *v.* Burk, 18 N. Y. 337.

[83h] Sprague *v.* Blake, 20 Wend. 61. But compare Erben *v.* Lorillard, 19 N. Y. 299, rev'g 23 Barb. 82.

[84] Moore *v.* Davis, 49 N. H. 45, s. c., 6 Am. Rep. 460; Valley Lumber Co. *v.* Smith, 71 Wisc. 304, 5 Am. St. Rep. 216, 37 N. W. Rep. 412. Otherwise where there is no conflict in the evidence. Van Orden *v.* Fox, 32 App. Div. (N. Y.) 173, 175. Copeland *v.* Brockton Street Railway, 177 Mass. 186, 58 N. E. Rep. 639, 83 Am. St. Rep. 274.

In an action to recover the balance due on a sale of stock, where there was a dispute as to the agreed price, it was held that proof of the value of the assets of the corporation, and of plaintiff's pecuniary

sale, or as whether there was any agreement as to price,[85] it is competent to show the value of the property at the time of sale as tending to show what the real contract was. Under an allegation of a sale of goods worth a specified sum, plaintiff may prove that sum to have been agreed on as the price. At common law it was the better opinion that, under an allegation of goods sold for money, plaintiff might prove a sale for anything agreed to be treated as cash, or a sale to be paid for in services or goods, the burden being on plaintiff, however, to show that the buyer was in default in the special agreement.[86] Under the new procedure such a variance is to be disregarded, unless it has misled defendant to his prejudice. If the consideration was an evidence of debt or a conveyance, the contents of it may be stated for the purpose of proving that fact, without producing the instrument.[87]

The fact that defendant admitted being indebted, when payment was demanded, is not sufficient evidence of the amount of price, unless there is in the admission, or connected with it, something to indicate the amount, or data from

condition at the time of the transfer was admissible, as showing the probability of the price agreed to be paid for the stock, and the likelihood that the plaintiff negotiated a sale of the stock for a sum less than he claimed. McIntosh *v.* McNair, 63 Ore. 57, 126 Pac. Rep. 9.

[85] M. D. Wells Co. *v.* Rayworth, 153 Wis. 453, 141 N. W. Rep. 286; Brown *v.* Cahalin, 3 Ore. 45. But where plaintiff in his pleadings and in his proofs bases his claim upon an alleged sale at an agreed price, he cannot introduce evidence of the reasonableness of the price agreed upon unless the adverse party has attacked it as unreasonable. Post *v.* Voorhees, 118 Mich. 366, 76 N. W. Rep. 912.

On the question whether an auction sale at a certain figure was for cents or dollars, bystanders who were present as bidders may testify to their understanding of the bids. Ives *v.* Tregent, 14 Bankr. Reg. 60.

[86] Cowen, J., Clark *v.* Fairchild, 22 Wend. 583.

Under the Sales Act (Pers. Prop. L. N. Y. Cons. Laws, § 90) the price may be made payable in any personal property. Contracts of barter and exchange are thus brought within the scope of the statute.

[87] Reynolds *v.* Kelly, 1 Daly, 283.

which it may be computed.[88] So, although delivery of a bill of the goods, and the making of a payment on account without objection, gives it the legal effect of an account stated; it is otherwise if there be evidence, that when the defendant made the payment he objected to the bill.[89]

20. Value.

Under an allegation of an agreed price, if there is a failure to prove the agreement as to price, evidence of value is competent for the purpose of a recovery of what the article was fairly worth,[90] but not to sustain a recovery beyond the amount alleged.[91] And even in those jurisdictions where this is regarded as a variance, evidence of value is relevant on the question of agreement, if the evidence of agreement

[88] Douglas *v.* Davie, 2 McCord (So. C.), 218; Hanson *v.* McKenney, 2 Bay, 412.

Thus where the price was to be computed according to the amount delivered, it is incumbent on the vendor to prove the amount of the deliveries. French *v.* Whelden, 99 Atl. Rep. (Vt.) 232; Mach Mfg. Co. *v.* Donovan, 86 N. J. L. 327, 91 Atl. Rep. 310. (Payment on account without objection and promise to pay balance of bill.)

[89] Jacques *v.* Elmore, 7 Hun, 675. See Varley *v.* Nichols-Shepard Sales Co., 191 S. W. Rep. (Tex. Civ. App.) 611.

[90] Sussdorf *v.* Schmidt, 55 N. Y. 319.

Where the purchaser of a silo claimed that it was worthless, evidence as to what it would cost to repair the same, was held admissible. Ames Portable Silo & Lumber Co. *v.* Gill, 190 S. W. Rep. (Tex. Civ. App.) 1130.

Where plaintiff's claim, both in his pleadings and in his proofs, is based upon an alleged sale at an agreed price, the only theory upon which he can recover is a sale upon an agreed price. In such a case, it is error for the trial court to instruct the jury that, should they find that the price had not been agreed upon, they might fix the value and render judgment accordingly. Post *v.* Voorhees, 118 Mich. 366, 76 N. W. Rep. 912.

There can be no sale without a price. Therefore a complaint for goods sold and delivered must allege an agreed price or the value of the goods, and if it does not allege either it is demurrable. Sparks *v.* Ducas, 123 N. Y. App. Div. 507, 108 N. Y. Supp. 546.

[91] See Trimble *v.* Stilwell, 4 E. D. Smith, 512.

is conflicting.[91a] And under a complaint seeking to recover what the thing was justly worth, evidence of an agreed price is admissible;[92] and the agreement for price controls,[93] if within the limit marked by the allegation of value and demand of judgment. If the contract or order proved was silent as to the price,[94] or if there was no assent as to price,[95] the law implies a promise to pay at the current market rates, or the fair value. Where the party's shop books are competent in his own favor,[96] the price, if stated in the entry is *prima facie* evidence in his favor, of the value also.[97]

The value of merchandise which *has no regular market value*, and the price of which must depend on circumstances

[91a] In Copeland *v.* Brockton Street R. Co., 177 Mass. 186, 58 N. E. Rep. 639, 83 Am. St. Rep. 274, "the only question in dispute between the parties was as to the price to be paid for five hundred and thirty loads of sand, sold by the plaintiff to the defendant. The plaintiff contended that the price agreed to be paid was fifteen cents a load, and the defendant that it was ten cents a load. There was evidence that such sand had a market value, and that both parties knew it. As bearing upon the probabilities of what the contract was as to price, the judge allowed the plaintiff to show what the fair market price was there at that time; and the defendant excepted. The jury were instructed that they should consider the evidence only as bearing on the question of probability, if it furnished any, of what the contract as to price was; and also that the plaintiff could not recover the fair market value but only ten or fifteen cents a load." The court held that the evidence was rightly admitted for the purpose to which it was limited.

[92] Fells *v.* Vestvali, 2 Keyes, 152; Coleman *v.* Forrester, 178 Mo. App. 57, 163 S. W. Rep. 263.

[93] See Ludlow *v.* Dole, 62 N. Y. 617, affi'g 1 Hun, 71, 4 Supm. Ct. (T. & C.) 655. See City & Suburban Ry. Co. *v.* Basshor, 82 Md. 397, 33 Atl. Rep. 635.

[94] Konitzky *v.* Meyer, 49 N. Y. 571.

Where the contract is silent as to the price, and no evidence of the value of the goods is offered, there can be no recovery. Smith *v.* Hendelan, 161 N. W. Rep. (Minn.) 221. See Pers. Prop. L. (N. Y. Cons. Laws), § 90, subd. 4.

[95] Booth *v.* Bierce, 38 N. Y. 463, rev'g 40 Barb. 114.

[96] See paragraph 39.

[97] The Potomac, 2 Black, 581, 1 Greenl. Ev., § 118, p. 150, n.

peculiar to the single transaction, and the purchasers,[98] is to be ascertained by the probabilities of the case; founded on proof of facts which in the ordinary transaction of business would affect the mind of a dealer in similar articles in determining a price to be asked or given.[99] In doubtful cases and in the absence of better evidence, the actual cost of the thing to the seller is relevant to the question of its value, at least as evidence against him as in the nature of an admission of value, especially if the thing have no regular market value.[1] So the price named, by an agent for selling, when offering goods, is competent evidence of value as against his principal.[2] But as against evidence of an agreed price, a mere admission of less value cannot avail.[3]

Comparison of values between the thing in question and others of different quality which are not involved in the litigation is not allowable for the purpose of calculating the

[98] As in the case of military accoutrements usually bought only by government. As to "fancy prices," in case of animal pets and the like, see 3 Abb. N. Y. Dig., new ed. 81; Bennett *v.* Drew, 3 Bosw. 355. In an action to recover the value of a trotting horse, evidence of his pedigree, and that some of his blood relations have a record for speed, is competent as affecting his value. Pittsburgh, &c., Ry. Co. *v.* Sheppard, 56 Ohio St. 68, 46 N. W. Rep. 61.

[99] Sturm *v.* Williams, 38 Super. Ct. (J. & S.) 323, 343. So held on a question of overvaluation in insuring.

Evidence that a jack, the subject of the sale, had been sold for over $100 to satisfy the lien of a livery stable keeper, is admissible to show the jack's value. Monroe *v.* Arthaud, 186 S. W. Rep. (Mo. A.) 554.

[1] The cost of property is some evidence of its value. Hangen *v.* Hachemeister, 114 N. Y. 566; Smith *v.* Griffith, 3 Hill, 333; Hawver *v.* Bell, 141 N. Y. 140; Bini *v.* Smith, 36 App. Div. (N. Y.) 463, 466; Welling *v.* Ivoroyd Mfg. Co., 15 App. Div. (N. Y.) 116, 118. But compare Louisville Jeans Clothing Co. *v.* Lischkoff, 109 Ala. 136, 19 So. Rep. 436. As to proving value of corporate stock, see Moffit *v.* Hereford, 132 Mo. 513, 518, 34 S. W. Rep. 252.

[2] Cliquot's Champagne, 3 Wall. 140, 148; Banks *v.* Gidrot, 19 Geo. 421.

[3] Davis *v.* Shields, 24 Wend. 322, rev'd on another point in 26 Id. 341; Havemeyer *v.* Cunningham, 35 Barb. 515, s. c., 22 How. Pr. 87.

value of the one in question.[4] A witness cannot testify that a different article was worth a specified sum, and that the one in question was superior or inferior. And upon the same principle it is not allowable to arrive at the value by testimony that the thing in question, with certain alterations or differences, would be worth a specified sum, thereupon making allowance for the difference; nor that it was worth a different sum at another date, thereupon making allowance for the lapse of time.[5]

The three chief elements in the proof of value are, the intrinsic qualities of the particular thing sold; its usual price, or, if there be none, a valuation of it; and the qualifications of the witness called to testify to either of these points. The intrinsic qualities, and the usual price or proper valuation of a thing of such qualities, may be proved by the same or by different witnesses.

Where an article has no market value, its value may be shown by proof of such elements or facts affecting the question as may exist. Recourse may be had to the items of cost and its utility and use, and the opinion of witnesses properly informed on the subject may be given in respect to its value.[6]

[4] See Gouge *v.* Roberts, 53 N. Y. 619, s. P., Blanchard *v.* N. J. Steamboat Co., 59 N. Y. 300, affi'g 3 Supm. Ct. (T. & C.) 771; Color Printing Attacht. Co. *v.* Brown, 37 Super. Ct. (J. & S.) 433.

But where the article contracted for cannot be obtained and has no market value, in an action for damages for non-delivery, evidence of the value of the next best substitute obtainable is admissible. Tri-Bullion Smelting, etc., Co. *v.* Jacobsen, 233 Fed. Rep. 646, 147 C. C. A. 454.

Where plaintiff alleged that the defendant accepted a certain machine different from the one contracted for and demanded its value, it was held error for the court to allow the plaintiff to testify, on the question of value, as to the difference in value between the machine contracted for and the one delivered. Isbell-Porter Co. *v.* Heineman, 126 N. Y. App. Div. 713, 111 N. Y. Supp. 332.

[5] This is one of the cases where, in the present state of our law, the processes by which witnesses arrive at their opinions are not allowed to be given to the jury, on direct examination. The case of comparison of handwriting is another. How far it is allowable on cross-examination is not well settled.

[6] Sullivan *v.* Lear, 23 Fla. 463, 11

21. Market Value.

The question of market value is more frequently contested in cases of actions for breach of executory contracts or of warranties, but the rules for proving it may be most conveniently stated here, in connection with the general question of proof of value.

To constitute a *market value*, it must appear that similar articles have been bought and sold in the way of trade, in sufficient quantity or frequency.[7] If the contract or conduct of the parties fixed a day, so that the right of recovery, strictly considered, turns on the then market value, the evidence should be directed to the market value on that precise day,[8] and not extend to the ordinary market value at other times.[9] But if there were no sales then,[10] or if the sales had are shown to have been at fictitious prices, or at prices unnaturally inflated or depressed by artificial combination for the purpose of fixing a false price,[11] evidence of prices before and after the day within a reasonable limit resting in judicial discretion,[12] is competent for the purpose of in-

Am. St. Rep. 388, 2 So. Rep. 846.

Absence of market value at the time of breach will not be permitted to deprive an aggrieved vendee of his right to damages. B. P. Ducas Co. *v.* Bayer Co., 163 N. Y. Supp. 32.

[7] Harris *v.* Panama R. R. Co., 58 N. Y. 660. So held in an action against a carrier.

"'The market price is . . . a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition.' Lovejoy *v.* Michels, 88 Mich. 15, 23. Where the subject of the price is an article commonly dealt in, this price will be fixed in a more or less definite sum by the concensus of all the buyers and sellers dealing in the article." Carey Lithographic Co. *v.* Magazine & Book Co., 70 Misc. 541, 127 N. Y. Supp. 300.

[8] Dana *v.* Fiedler, 12 N. Y. 40, affi'g 1 E. D. Smith, 463.

[9] Cahen *v.* Platt, 69 N. Y. 348, 352; Belden *v.* Nicolay, 4 E. D. Smith, 14; Houghton Implement Co. *v.* Doughty, 14 N. D. 331, 104 N. W. Rep. 516.

[10] Dana *v.* Fiedler, and Cahen *v.* Platt (above).

[11] Kountz *v.* Kirkpatrick, 72 Penn. St. 376, s. c., 13 Am. Rep. 687. But the probable effect on prices, of throwing on the market so large a quantity as that contracted for, is not relevant. Dana *v.* Fiedler (above).

[12] Dana *v.* Fiedler (above). It

ferring the value on the precise day; and it is no objection to the application of this principle that it admits evidence of sales in the market made after suit brought.[13] The proper limit of time is to be determined by the principle of requiring the best evidence the circumstances permit. In case of commercial merchandise having constant market, the limit is shorter than in the case of less salable goods.[14] This excluding rule is not so strictly applied in actions for price of goods sold and delivered at successive dates, where it does not appear that the market price varied during the general period of the witness' conversance with it.[15] If the contract or the conduct of the parties fixed a place,[16] by the market rates of which the value is to be ascertained, the evidence should be confined to the market value at that place, and not extend to the value in other markets.[17] But if there were no sales there, evidence of the price at places not distant, or in other controlling markets may be given, not for the purpose of establishing the market price of such other place, but for the purpose of showing indirectly, in the absence of direct evidence, the market price at the place of de-

is competent to prove the value of property at a certain time, by showing its value at a prior and subsequent period, within reasonable limits, in the same market. Torrey *v.* Burney, 113 Ala. 496, 21 So. Rep. 348.

[13] But the motives and interest of the parties, and other circumstances of the sale, may of course be inquired into and considered by the jury in determining the weight to be given to such evidence. Kingsbury *v.* Moses, 45 N. H. 222.

[14] Thus where sales of such merchandise within two or three weeks of the precise day are shown to have been had, the market price running through two or three months should not be admitted. Dana *v.* Fiedler (above). On the other hand, in the case of secondhand household goods, the price they brought at auction within three months is relevant. Crounse *v.* Fitch, 1 Abb. Ct. App. Dec. 475. But if anything occurred in the interim materially affecting the value, it is competent for the adverse party to show it. Id.

[15] Kerr *v.* McGuire, 28 N. Y. 446, s. c., 28 How. Pr. 27.

[16] See Cahen *v.* Platt, 69 N. Y. 348.

[17] Id., and cases cited; Comer *v.* Way, 107 Ala. 300, 19 So. Rep. 966. Except when proper as corroborative. Gordon *v.* Bowers, 16 Penn. St. 226.

livery; [18] and hence, in connection with market value at other places, evidence of the expense of transportation between such places is relevant.[19] Upon the same principle, if the plaintiff's proof of market value at the precise place is uncertain, evidence of the market value in an adjoining town easily and speedily reached, is competent.[20]

The market value at a given time and place may be proved by evidence of actual sales then and there of merchandise of the same quality; [21] and it is not necessary to prove any

[18] Id., and cases cited; Harris *v.* Panama R. R. Co., 58 N. Y. 660. Where the value of personal property cannot be fixed by the proof of local markets, it may be done by proof of value at the nearest point where similar property is bought and sold, with proper addition or deduction for cost of transportation and the hazard and expense incident thereto, accordingly as the property is held for sale or for use. But evidence of the value of such property in a distant market is not admissible unless it is proved that there is no adequate local market, or that the two markets are interdependent and sympathetic. Jones *v.* St. Louis, &c. Ry. Co., 53 Ark. 27, 22 Am. St. Rep. 175, 13 S. W. Rep. 416.

[19] Wemple *v.* Stewart, 22 Barb. 154, and cases cited.

[20] Siegbert *v.* Stiles, 39 Wisc. 533.

[21] See Lawton *v.* Chase, 108 Mass. 238. Compare Roe *v.* Hanson, 5 Lans. 304; Gill *v.* McNamee, 42 N. Y. 45; Dixon *v.* Buck, 4 Barb. 70. Knowledge of a witness derived from actual sales is never a test of competency, but it is always desired and may be shown for the purpose of determining, not the competency of the witness, but the value to be given his testimony. Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 601, 48 N. E. Rep. 1058. The owner of a horse and buggy is presumed to have such a familiarity with them as to know pretty nearly, if not actually, what they were worth, although he does not buy or sell horses or carriages, and may testify to their value. Shea *v.* Hudson, 165 Mass. 43, 42 N. E. Rep. 114. In an action for the conversion of horses, a resident of the neighborhood, who owns horses and knows the horses converted and says that he knows "pretty nearly the market value of such horses at the time of the conversion," may testify as to the value; although he may say that he does not know "what the market value of the horses was." Holland *v.* Huston, 20 Mont. 84, 49 Pac. Rep. 390.

A bid submitted but not accepted is evidence of what is the reasonable value of the goods coming precisely within the bid. Lefurgy *v.* Stewart, 69 Hun, 614 mem., 23 N. Y. Supp. 537.

particular number of sales in order to establish the market value; [22] a single sale [23] is relevant and admissible in the absence of better evidence, but not always alone sufficient to establish the market value.[24] The price obtained at auction is competent evidence on the question of value; [25] though the sale is an official one, as by the sheriff.[26] For

[22] Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. Rep. 1032.

[23] See Crounse *v.* Fitch, 1 Abb. Ct. App. Dec. 475. The value for which a stock of goods may be sold at retail, standing alone, does not afford sufficient basis for determining their market value, which is what the goods could have been promptly sold for, in bulk, or in convenient lots. Needham Piano Co. *v.* Hollingsworth, 91 Tex. 49, 40 S. W. Rep. 787.

[24] Graham *v.* Maitland, 6 Abb. Pr. N. S. 327, s. c., 37 How. Pr. 307, 1 Sweeny, 149.

[25] Baker *v.* Seavey, 163 Mass. 522, 47 Am. St. Rep. 475, 40 N. E. Rep. 863; Imhoff *v.* Richards, 48 Neb. 590, 595, 67 N. W. Rep. 483; Hazelton *v.* Le Duc, 10 Tucker App. D. C. 379.

[26] Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. Rep. 1032. *Contra* Martinett *v.* Maczkewicz, 59 N. J. L. 11, 14–15, 35 Atl. Rep. 662. In the New Jersey case it was said: "When a willing seller and a willing buyer agree and fix the price of an article, it is obvious that it is reasonable to infer that such estimation approximates closely to the real value of such article; but in an official sale by auction the owner has no voice in the affair, and each bidder is striving to obtain the thing sold not at its actual worth, but at a bargain. It is vain to deny, for all experience attests the fact, that as a general thing, the attendants at a public auction of personal property are there with the expectation of acquiring the articles purchased much below their cost in the market. It is deemed that, as *criteria* of real estate, such transactions can have no effect except to mislead. Nor is the affair ameliorated to any great extent by the addition to it of the requirement of the New York courts. To show the fairness of such a procedure by the sheriff can mean nothing more than that it shall appear that there was a reasonable attendance of bidders, and that the sales were made and cried off in the usual way. The inconvenience would be great to attempt further to test the qualities of these auctions, as it would often occur that such an investigation would be more laborious than the examination of the main issue between the litigants. The result is that it is conceived that these public forced sales cannot be resorted to as affording a reasonable standard of the real value of the things thus sold, and that consequently they should not be admitted in evidence for that pur-

the purpose of proving the rates of a foreign market, statements and declarations of strangers to the action, engaged in that market, and made in the ordinary course of their business—for example, merchants' letters offering their goods at a price—are competent evidence of the market value at the time the declaration was made, without proof of the death of the declarant.[27]

22. Prices Current.

The price list or price current issued by a merchant or his agent in the ordinary course of business,[28] or corrected by him for a newspaper,[29] is competent evidence of market value as against himself. In the absence of better available evidence, regular prices current or market reports, published in course, in a commercial journal pursuant to the professional duty of the journalist to ascertain constantly from those engaged in the market the actual current rates, and tabulate and publish them for the information and guidance of the commercial world, are competent *prima facie* evidence of the contemporaneous market price, on production of the newspaper or file, preliminary proof of these conditions, and of the identity of the paper, being given.[30] Without some extrinsic evidence of the sources of the information, or the mode in which the prices current were made up, the publication is incompetent.[31]

A witness cannot testify to value or market price whose knowledge is derived merely from examining newspaper

pose. The two following cases accord with this view: Steiner *v.* Tranum, 98 Ala. 315, and Cassin *v.* Marshall, 18 Cal. 689."

[27] Fennerstein's Champagne, 3 Wall. 114, 1 Greenl. Ev., § 120.

[28] Cliquot's Champagne, 3 Wall. 114.

[29] Henkle *v.* Smith, 21 Ill. 238.

[30] Whelan *v.* Lynch, 60 N. Y. 469, 474, 1 Whart. Ev. 638, § 674. So on the question of what was the market value, in France, of the champagne of a particular maker, the price current of another maker, prepared and furnished there in the usual course of business, is relevant, and its effect, in connection with other evidence of value, is a question for the jury. Cliquot's Champagne, 3 Wall. 114.

[31] Whelan *v.* Lynch (above).

prices current.[32] But if the witness has a knowledge of the value from other proper sources, it is no objection to his testimony that it is based in part upon such prices current,[33] or even upon letters and invoices received by him in the usual course of his business.[34]

23. Opinions of Witnesses as to Quality and Value.

Questions of value are subject to the general rule that in matters requiring special experience or knowledge,[35] not presumably possessed by all the jurors, a witness shown to be peculiarly qualified by such experience or knowledge may testify to his opinion [36] on a question of fact; and a witness who has such experience or knowledge with reference to the value of things of the kind of that in question [37]—such as a dealer,[38] salesman,[39] or bookkeeper [40] in the trade—may express his opinion of values of things of the same class as that in question, even though he has not seen the particular thing itself. But a witness having only the ordinary experience of life, and none in the business in

[32] Harris *v.* Ely, Seld. Notes, No. 1, 35, s. c., 1 Liv. Law Mag. 145.

[33] Whitney *v.* Thatcher, 117 Mass. 527. Compare Sisson *v.* Cleveland & Toledo R. R. Co., 14 Mich. 489; Cleveland & Toledo R. R. Co. *v.* Perkins, 17 Id. 296; Laurent *v.* Vaughan, 30 Vt. 90.

[34] Alfonso *v.* United States, 2 Story, 421.

[35] For instance, an ordinary witness may testify to the fact that plants were dead; an expert, to his opinion as to what killed them. Stone *v.* Frost, 6 Lans. 440.

[36] It is no objection to receiving the opinion, that the witness is a party testifying in his own behalf. Dickenson *v.* Fitchburgh, 13 Gray, 546, 555.

[37] Clark *v.* Baird, 9 N. Y. 183, 196; Woodruff *v.* Imperial Fire Ins. Co., 83 N. Y. 133; Nelson *v.* First Nat. Bank, 32 U. S. App. 554, 570, 69 Fed. Rep. 798; Connell *v.* McNett, 109 Mich. 329, 67 N. W. Rep. 344. From necessity, the opinion of ordinary witnesses acquainted with the value of property is admitted, although they are not experts in matters of value. Bailie *v.* Western Assurance Co., 49 La. Ann. 658, 21 So. Rep. 736.

[38] Bush *v.* Westchester Fire Ins. Co., 2 Supm. Ct. (T. & C.) 629.

[39] Id.

[40] Kerr *v.* McGuire, 28 N. Y. 446, s. c., 28 How. Pr. 27.

which the articles are dealt in,[41] or made or used,[42] and not having bought or sold, and having no special means of information as to market rates,[43] is not qualified. The mere fact that he has once bought or sold the very article in question does not necessarily qualify him to express an opinion on its value; although the price he paid or received may be competent evidence.[44]

To testify to the *quality of a particular thing* it is presumptively enough that the witness has long been a maker of or dealer in such articles, or otherwise so engaged as to be practically familiar with the qualities involved in the inquiry,[45] even though he does not know the market prices; [46]

[41] Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279; Bush *v.* Westchester Fire Ins. Co. (above).

[42] Winter *v.* Burt, 31 Ala. 33.

[43] See Whelan *v.* Lynch, 60 N. Y. 469.

[44] Compare Chambovet *v.* Cagney, 35 Super. Ct. (J. & S.) 474, 489; Smith *v.* Hill, 22 Barb. 656; Watson *v.* Bauer, 4 Abb. Pr. N. S. 273. There is much difference of opinion and practice in reference to the degree of knowledge or experience which will qualify the witness. Some anomalous rulings are seen to be ill-considered when it is remembered, that if the question is not on the quality of the article, but on the value of articles of a given quality, conversance with the market rates is the qualification; if there is no regular market value, conversance with other things of the kind, and their uses, fitness, or cost, is the qualification; while, on the other hand, if the jury may be supposed conversant with the kind of article and its ordinary values, the object of inquiry, though in form a question as to value, may be really as to the grade or condition of the particular thing at the time of sale. In this class of cases a witness, who has in common with the jury only an ordinary knowledge of values, may by reason of his inspection of a particular thing which ordinary knowledge enables one to value, be competent to express his opinion of its value as the direct and natural way of describing his judgment of its grade and condition. In this point of view Smith *v.* Hill and Watson *v.* Bauer are sounder guides than Chambovet *v.* Cagney, (all above cited), and the ruling in Nickley *v.* Thomas, 22 Barb. 652, more satisfactory than Low *v.* Conn., &c. R. R. Co., 45 N. H. 370, § 1. See paragraphs 20 and 21.

[45] Hoe *v.* Sanborn, 36 N. Y. 93, s. c., 3 Abb. Pr. N. S. 189, 35 How. Pr. 197; Jeffersonville, &c. R. R. Co. *v.* Lanahan, 27 Ind. 171.

[46] See Beecher *v.* Denniston, 13. Gray, 354.

but he must have seen the thing within a reasonable time of the date to which evidence of value is to be addressed, a limit varying in the judicial discretion of the court, according to the permanent or perishable character of the thing; [47] and in case of a varied lot of merchandise, the witness must have made a sufficient examination in detail to speak specifically of the various parcels or grades.[48]

After the qualities or grade on which value depends have been proven, a witness qualified by special experience or knowledge to testify to the intrinsic value of the particular article,[49] or to the market price of such articles (as the case may require), may testify to its value, although he has not seen the article.[50] Such testimony may be founded on the witness having heard or read all the testimony which has been given by the party on the facts of quality, grade, etc., on which value or price depends; in which case the question may be: "Assuming that the goods were as described by plaintiff [or other testimony heard or read by the witness], what were they worth?" [51] Or it may be called forth by an hypothetical question, embracing all the same facts which may fairly be assumed to be sufficiently in evidence.[52]

A witness to *market* values must be shown to be conver-

[47] See Judson *v.* Easton, 58 N. Y. 664, affi'g 1 Supm. Ct. (T. & C.) 598.

[48] Brown *v.* Elliott, 4 Daly, 329, 333, and cases cited.

[49] Sturm *v.* Williams, 38 Super. Ct. (J. & S.) 323, 344.

[50] Mish *v.* Wood, 34 Penn. St. 451; Orr *v.* Mayor, &c. of N. Y., 64 Barb. 106; and see Draper *v.* Saxton, 118 Mass. 428. *Contra*, where the matter is not one for expert testimony. Hook *v.* Stowell, 30 Ga. 418, 422; Board *v.* Kirk, 11 N. H. 397; and see Sunderlin *v.* Wyman, 1 Supm. Ct. (T. & C.) adden. 17. It is not error to allow the expert who is familiar with the particular thing to designate the similar article he has known sold in general terms, as "like" the thing in controversy, instead of describing it and leaving the jury to judge of its similarity. Hachett *v.* Boston, &c. R. R. Co., 35 N. H. 390, 398.

[51] See McCollum *v.* Seward, 62 N. Y. 316.

[52] See Jackson *v.* N. Y. Central R. R. Co., 2 Supm. Ct. (T. & C.) 653.

sant with prices at the market in question,[53] but he need not be a resident there.[54] His testimony is not necessarily made incompetent by the fact that his knowledge of sales and prices was derived from inquiry in the trade,[55] or by examination of invoices and accounts; [56] nor by the fact that his general experience and knowledge is not aided by knowledge of sales on the very day in question; [57] nor is it made incompetent by the fact that his knowledge of market value is derived mostly from sales on credit, for by cross-examination the difference in price between cash and credit sales may be ascertained.[58] In cases where there is a market value, the usual mode of proving it is by a general question as to value or price at the particular time and place, without reference to actual sales; but in such cases inquiries as to particular sales are admitted on cross-examination, and for the purpose of testing the accuracy and extent of the witness' knowledge.[59]

24. Time for Performance or Payment.

If the time for delivery or payment is fixed by the terms of the writing, evidence of a contemporaneous oral stipulation for a different time is incompetent.[60] If by not designat-

[53] Greeley *v.* Stilson, 27 Mich. 153. But compare Lawton *v.* Chase, 108 Mass. 238.

[54] Alfonso *v.* United States, 2 Story, 421.

[55] Lush *v.* Druse, 4 Wend. 313; Cliquot's Champagne, 3 Wall. 143.

[56] Alfonso *v.* United States, 2 Story, 421.

[57] Norman *v.* Ilsley, 22 Wisc. 27; Belden *v.* Nicolay, 4 E. D. Smith, 14.

[58] Judson *v.* Easton, 58 N. Y. 664, affi'g 1 Supm. Ct. (T. & C.) 598. See as to sales in exchange for things in action, or at an inflated estimate, Sturm *v.* Williams, 38 Supm. Ct. (J. & S.) 323.

[59] Dana *v.* Fiedler, 1 E. D. Smith, 463, 474. Compare paragraph 21 (above).

[60] Parol evidence that by the custom of merchants, the words "to arrive by the 15th of Nov." meant "deliverable on or before the 15th of Nov." held incompetent. Rogers *v.* Woodruff, 23 Ohio St. 632, s. c., 13 Am. Rep. 276; see also Stewart *v.* Scuder, 4 Zab. N. J. 96; Berlin Machine Works *v.* Jefferson Wood Working Co., 173 Ky. 347, 191 S. W. Rep. 82.

Under a contract making time of its essence and requiring delivery on or about a certain date, it is sufficient if delivery be made

ing any time in their writing, the parties have made a contract which by implication of law allows a reasonable time, oral evidence of a contemporaneous stipulation fixing a date is incompetent;[61] but the circumstances and conversations of the parties at the time the contract was entered into may be proved for the purpose of showing what they regarded as a reasonable time.[62] Upon the same principle if the writing names no place of delivery, the law fixes it, and oral evidence of a contemporaneous stipulation for a different place is incompetent.[63] So if the terms of the writing contemplate a

within a reasonable time of that date. Passow *v.* Harris, 29 Cal. App. 559, 156 Pac. Rep. 997.

It is a material question sometimes to determine whether time is of the essence of the contract. By statute, in some states (see Georgia Code, § 3675, par. 8) it is provided that "time is not generally of the essence of a contract; but by express stipulation or reasonable construction, it may become so." Therefore if a time is fixed but there is no express stipulation that it is of the essence of the contract, parol evidence is admissible to show what is the proper construction. Alabama Const. Co. *v.* Continental Car, etc., Co., 131 Ga. 365, 62 S. E. Rep. 160.

[61] Greaves *v.* Ashlin, 3 Camp. 426; Hallilev *v.* Nicholson, 1 Price, 404; Cocker *v.* Franklin Hemp & Flax Manuf. Co., 3 Sumn. 530.

Under a contract silent as to time for delivery, the vendor is not placed in default by the purchaser's letter promising payment on delivery, where it fixes no time for such delivery. Weinberg *v.* Gash, 94 Misc. Rep. 303, 158 N. Y. Supp. 179.

[62] Cocker *v.* Franklin Hemp, &c. Co. (above).

"Prompt delivery" has been interpreted as requiring delivery within a few days at the latest. Acme-Evans Co. *v.* Hunter, 194 Ill. App. 542. See N. Y. Pers. Prop. Law, § 124, sub. 2.

"What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question of law." Wright *v.* Bank of Metropolis, 110 N. Y. 237, 249, 18 N. E. Rep. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356.

[63] La Farge *v.* Rickett, 5 Wend. 187, and cases cited.

As to the necessity of delivery being within a reasonable time where the contract is silent to the time for delivery. See Riegal Sack Co. *v.* Tide-water Portland Cement Co., 95 Misc. 202, 158 N. Y. Supp. 954.

It has been held that instructions for shipment to a particular place, do not in themselves establish such place as the place for delivery. Robert McLane Co. *v.* Swernemann & Schkade, 189 S. W. Rep. (Tex. Civ. App.) 282.

single quantity or delivery, oral evidence is not competent to show a contemporaneous understanding of the parties that on successive delivery in parcels payment should be made for each parcel as delivered.[64] So if the writing calls for delivery of a specified quantity of merchandise in a month or year, or in each of several successive periods without other limitation, extrinsic evidence is not competent to show that it was intended by the parties that the delivery within any period should be regulated in time and quantity by the exigencies of the purchaser's business.[65]

Upon the question whether the sale was entire, the circumstance that the bargains, though for different lots of the same kind of property, lying at different places, were all made on the same day, is entitled to some weight.[66] So is the fact that all were included in one bill.[67]

Where the contract omits to fix any time for payment, the presumption is that the delivery and payment are to be concurrent acts.[68] If a sale on credit is proved, evidence of a usage to give notes is competent, and if knowledge of it may be imputed to defendant, it will be presumed that the parties contracted with reference to such usage, there being

Where there is a question as to the place of delivery, and the contract is in writing, it is one for the court to determine, and not for the jury. Staackman, Horschitz & Co. *v.* Cary, 197 Ill. App. 601.

[64] Baker *v.* Higgins, 21 N. Y. 397. Compare Winne *v.* McDonald, 39 Id. 233; Gault *v.* Brown, 48 N. H. 183, s. c., 2 Am. Rep. 210.

[65] Curtiss *v.* Howell, 39 N. Y. 211. But extrinsic evidence of the capacity of seller's plant and his ability to deliver, is admissible as to what constitutes a reasonable time after the giving of the specifications pursuant to a contract silent as to specifications and the time for delivery. Velleman *v.* Blumenthal, 172 N. Y. App. Div. 331, 158 N. Y. Supp. 393.

[66] Biggs *v.* Whisking, 25 Eng. L. & Eq. 257. Compare Swift *v.* Opdyke, 43 Barb. 274.

[67] Id. Compare Gardner *v.* Clark, 21 N. Y. 399; Mount *v.* Lyon, 49 N. Y. 552.

[68] Tipton *v.* Feitner, 20 N. Y. 423; Curtis *v.* College Park Lumber Co., 145 Ga. 601, 89 S. E. Rep. 680; Simpson *v.* Emmons, 99 Atl. Rep. (Me.) 658. Otherwise, perhaps where the seller does not undertake to deliver, as in a contract for sand to be excavated and carried away within a year. Brehen *v.* O'Donnell, 34 N. J. Law, 408.

nothing in the contract to the contrary.[69] If a term of credit, or payment in negotiable paper, or the like, was agreed for, the seller may recover immediately, regardless of the stipulation, on proof that the defendant, on being requested to pay the amount due, or give his notes at long periods, or make some arrangement in reference to the debt, absolutely refused to perform,[70] or that defendant induced plaintiff to give the credit by fraud.[71]

25. Conditions and Warranties.

Where the obligations are concurrent, either who seeks to enforce the obligation of the other must prove performance of his own, or an offer to perform.[72] But under a stipulation to do an act if called for, or when or as directed by the other, the burden is on the latter to prove that he called for or directed the act.[73] Where there is a complete actual delivery of goods sold on a condition, the burden is on him who claims that the condition was not waived by delivery, of showing

Where the contract provides for payment in kind, but is silent as to time, the law implies that payment in such manner must be made within a reasonable time. Nelson & Wallace *v.* Gibson, 98 Atl. Rep. (Vt.) 1006.

Where goods were shipped C. O. D. and so wrapped as to make an examination by the buyer impossible, in the absence of agreement, it has been held a question for the jury whether the buyer was bound to accept the goods without an opportunity to examine them. Louisville Lithographic Co. *v.* Schedler, 63 S. W. Rep. 8, 23 Ky. Law Rep. 465.

[69] Salmon Falls Manuf. Co. *v.* Goddard, 14 How. U. S. 446.

[70] Lee *v.* Decker, 6 Abb. Pr. N. S. 392; Wills *v.* Simmonds, 8 Hun, 189, and cases cited; Hochster *v.* De La Tour, 2 Ell. & B. 678. And see Snoot's Case, 15 Wall. 36.

In the absence of a stipulation for credit, the fact that notes were taken for the price does not prevent the seller from suing on the price before the notes mature. Fuller *v.* Negus, 55 Hun, 608, 8 N. Y. Supp. 681.

[71] Weigand *v.* Sichel, 4 Abb. Ct. App. Dec. 592, affi'g 34 Barb. 84; Roth *v.* Palmer, 27 Barb. 652, and cases cited.

[72] Dunham *v.* Pettee, 8 N. Y. 508; Hanhart *v.* Labe Importing Co., 157 N. Y. Supp. 897; Pabst Brewing Co. *v.* E. Clemens Horst Co., 229 Fed. Rep. 913, 144 C. C. A. 195.

[73] Hollister *v.* Bender, 1 Hill, 150; West *v.* Newton, 1 Duer, 277.

that fact.[74] If plaintiff's evidence shows a warranty he must also show that the thing corresponded to it, or that defendant, by failing seasonably to object, or otherwise, waived it. The mode of this proof is stated in connection with warranties.

26. Options.

It is not competent for one sued upon his written contract, to show a parol agreement made prior or contemporaneously with it, that he might countermand it subsequently if he chose, and that he did so. Parol evidence that the commencement of the obligation was suspended, might be received, that is to say, of a condition precedent, but not of a defeasance or condition subsequent.[75] But a mere memorandum, unsigned, though indicating a sale, may be explained by parol evidence that it was a sale on return, or a delivery to an agent to sell.[76] Not so of a written contract.[77] But under an optional contract, for which writing is required, the option may be exercised by parol notice.[78] An optional contract for future sale is not presumed to be a gaming contract, but the burden is on him who impeaches it to show the illegal intent.[79]

[74] Smith *v.* Lynes, 5 N. Y. 41, rev'g 3 Sandf. 203.

The burden of proving acceptance of goods sold subject to trial, is upon the vendor. McMillan *v.* Jaeger Mfg. Co., 159 N. W. Rep. (Iowa) 208; Keller *v.* Strauss, 35 Misc. (N. Y.) 35, 70 N. Y. Supp. 126.

The payment of part of the purchase price does not necessarily operate as a waiver of the conditions and guarantees of the contract and an acceptance of the goods. Adkins, Young & Allen Co. *v.* Rhinelander P. Co., 199 Ill. App. 347.

[75] Wemple *v.* Knopf, 15 Minn. 440, s. c., 2 Am. Rep. 147.

Evidence of the conditional nature of other and independent transactions is inadmissible to prove that the sale in question, absolute in itself, was also conditional. Edson Keith & Co. *v.* Eisendrath, 192 Ill. App. 155.

[76] Errico *v.* Brand, 9 Hun, 654.

[77] Marsh *v.* Wickham, 14 Johns. 167; and see Depew *v.* Keyser, 3 Duer, 335.

[78] Brown *v.* Hall, 5 Lans. 177.

[79] Story *v.* Solomon, 71 N. Y. 420, affi'g 6 Daly, 531.

27. Subsequent Modification.

At common law, the fact that the contract was in writing does not exclude oral evidence of a subsequent modification, if the instrument was not under seal;[80] and even if under seal, a subsequent waiver of a stipulation as to time may be proven as an estoppel.[81] If the statute of frauds requires a writing, the modification sought to be proved must be evidenced by writing as well as the original contract.[82] A party alleging a modification of a written agreement to have been made by conduct on the other side amounting to a substitution of another arrangement, must clearly show not only his own understanding as to the new terms, but that the other party had the same understanding.[83]

28. Delivery or Offer.

In an action by a seller of goods sold to be paid for on

[80] Weigand *v.* Sichel, 4 Abb. Ct. App.

The burden of proving a subsequent oral agreement to a written contract, is upon the party setting it up. Vinegar Bend Lumber Co. *v.* Soule Steam Feed Works, 182 Ala. 146, 62 So. Rep. 279.

[81] Hadden *v.* Dimmick, 16 Abb. Pr. N. S. 140; Fleming *v.* Gilbert, 3 Johns. 528; Townsend *v.* Empire Stone Dressing Co., 6 Duer, 208.

A subsequent modification does not in itself waive a party's right to damages for a past breach, unless the terms of the modification expressly or impliedly contemplate such a waiver. Peak *v.* International Harvester Co., 194 Mo. A. 128, 186 S. W. Rep. 574.

[82] Hickman *v.* Haynes, L. R. 10 C. P. 598, 605, s. c., 14 Moak's Eng. 447, 453; Swain *v.* Semens, 9 Wall. 271, and cases cited. *Contra*, Cummings *v.* Arnold, 5 Metc. 486; Gault *v.* Brown, 48 N. H. 183; and see Benj. on S., § 216, and notes. On the ground that the terms of a sealed agreement cannot be varied by a subsequent parol contract, so as to authorize a suit on the sealed agreement, which suit without the parol contract could not be sustained; it has been held that the existence of the sealed agreement, in such a case, is no bar to a suit on the parol contract. Sinard *v.* Patterson, 3 Blackf. 353, 357.

[83] Utley *v.* Donaldson, 94 U. S. 48, and cases cited.

Where the plaintiff's case is based upon an agreement of rescission, the original contract is admissible in evidence upon the question of the probability of controverted facts. Johnson *v.* Shuford,

delivery, plaintiff must prove, not only that the buyer failed to pay, but that he himself offered to deliver the goods. The obligations of the parties to such a contract being concurrent, whichever one seeks to enforce it must show a tender of performance on his part. Until that be shown, he is himself in default.[84] If he proves a delivery at the place agreed, and that there remained nothing further for him to do, he need not show an acceptance by the buyer,[85] unless the order or contract was not strictly complied with by plaintiff.[86]

Delivery may be proved by evidence of an admission by the buyer of the correctness of the account against him, there being no dispute on the trial as to the amount;[87] and from evidence that he denied having received part of the goods, it may be inferred that he received the other articles mentioned in the bill;[88] and his admission that he had had the goods, is sufficient evidence of delivery, to go to the jury, though it appear they were, in fact, delivered to another

91 Conn. 1, 98 Atl. Rep. 333. See also Ballard *v.* Friedeberg, 164 N. Y. Supp. 912.

[84] Dunham *v.* Pettee, 8 N. Y. (4 Seld.) 508, 4 E. D. Smith, 500; Reeb *v.* Bronson, 196 Ill. App. 518; Elliott Supply Co. *v.* Green, 35 N. D. 641, 160 N. W. Rep. 1002; J. & G. Lippman *v.* Jeffords-Schoenmann Produce Co., 184 S. W. Rep. (Tex. Civ. App.) 534.

Where the contract merely obligates the seller to load the goods, their late arrival by reason of delays in their hauling is no defense in an action for the price. Nelson *v.* Miller, 195 Ill. App. 233.

[85] Nichols *v.* Morse, 100 Mass. 523.

Having proved delivery, plaintiff's *prima facie* case is not rebutted by defendant's mere proof of a return of the goods. German Publication Soc. *v.* Pichler, 97 Misc. (N. Y.) 644, 162 N. Y. Supp. 260.

But see N. Y. Pers. Prop. Law, § 144. Apparently the seller's common law right to sue for the purchase price has been limited by the Sales Act.

[86] Corning *v.* Colt, 5 Wend. 253.

Under a contract calling for payment in thirty days from delivery, a valid tender of delivery is not established by proof of the seller's offer to deliver the goods if paid for in advance. Bond *v.* Duntley Mfg. Co., 195 Ill. App. 576.

[87] N. Y. Ice Co. *v.* Parker, 21 How. Pr. 302.

[88] Power *v.* Root, 3 E. D. Smith, 70.

person,[89] especially if by his authority.[90] So his promise to pay a draft which had been drawn on him for the price of the goods is, with other evidence tending to show delivery, competent evidence of delivery.[91] An order drawn by defendant for the delivery of the goods to the bearer, or to a person shown to have had possession of the order, is, when produced from the possession of the drawee, and its execution proved, *prima facie* evidence that he delivered the goods.[92] If the order is in favor of a specified person, the receipt of such person is competent against the drawer.[93] Delivery cannot be made out by proof of a usage to treat as a delivery that which is not in law a delivery.[94] Delivery if shown is presumed, in the absence of evidence to the contrary, to be in fulfillment of the contract; but evidence is competent that it was made for the purpose of allowing examination of the goods, and in such case, evidence that this was the usual course of dealing is competent, though it would not be, in the absence of anything else to qualify legal effect of a delivery.[95] If the circumstances

[89] Griffin *v.* Keith, 1 Hilt. 58.

Where the purchaser authorizes an agent to receive the goods bought, and the agent accepts some which are not of the character contracted for, the purchaser is bound by the acceptance of his agent, although the latter had no knowledge of the terms of the contract. Gorham *v.* Dallas, etc., Ry. Co., 106 S. W. Rep. (Tex. Civ. A.) 930.

[90] Kepple *v.* Stoddard, 193 Ill. App. 301; Monroe *v.* Hoff, 5 Den. 360.

[91] Patterson *v.* Stettauer, 40 Super. Ct. (J. & S.) 54.

So also is the giving of a note for the purchase price. Consolidated Lumber Co. *v.* Frew, 162 Pac. Rep. (Cal. App.) 430.

[92] Alvord *v.* Baker, 9 Wend. 323. *Contra*, Blount *v.* Starkey, 1 Tayl. N. C. 110, s. c., 2 Hayw. 75.

[93] Rawson *v.* Adams, 17 Johns. 130.

As to the admissibility of receipts from a railway company for the goods, see Gross *v.* Feehan, 110 Iowa, 163, 81 N. W. Rep. 235.

[94] Suydam *v.* Clark, 2 Sandf. 133. And see Smith *v.* Lynes, 3 Id. 203, 5 N. Y. 41.

See, as to admissibility of evidence of usage to affect delivery under the Sales Act, Miller *v.* Harvey, 83 Misc. 59, 144 N. Y. Supp. 624.

[95] Haskins *v.* Warren, 115 Mass. 514; Hackney Mfg. Co. *v.* Celum, 189 S. W. Rep. (Tex. Civ. App.) 988.

relied on as constituting delivery or acceptance are equivocal, the person who performed either act may testify to his intent in doing it.[96]

Evidence of discrepancy in size or weights of packages is met by showing that the buyer waived it by receiving them with knowledge.[97] If the sale was subject to inspection of a third person, there should be evidence of his determination,[98] and in the form contemplated by the contract; but this may be dispensed with by a waiver.[99] Inspection duly had under such a contract is conclusive.[1]

29. Delivery through Carrier.

Evidence of the shipping of goods ordered by defendants, and the mailing of the bills of lading to defendants, and that the bills were not returned, and that at the terminus the carrier's servant delivered merchandise such as is described, to defendants, and that they paid the freight bills without objection, is *prima facie*, and, if unexplained, sufficient evi-

See Model Mill Co. *v.* Carolina, etc., R. Co., 136 Tenn. 211, 188 S. W. Rep. 936; Emery Thompson Machine & Supply Co. *v.* Graves, 91 Conn. 71, 98 Atl. Rep. 331; Robert McLane Co. *v.* Swernemann & Schkade, 189 S. W. Rep. (Tex. Civ. App.) 282; Allaire, Woodward & Co. *v.* Cole, 187 S. W. Rep. (Mo. App.) 816.

What constitutes a reasonable time depends on the facts of each particular case. Decker *v.* Braverman, 196 Ill. App. 387; Lane *v.* McLay, 91 Conn. 185, 99 Atl. Rep. 498.

[96] Hale *v.* Taylor, 45 N. H. 405; Southwestern R. R. Co. *v.* Rowan, 43 Ga. 411. Compare Folsom *v.* Batchelder, 2 Fost. (N. H.) 47.

[97] Fitch *v.* Carpenter, 40 Barb. 40.

[98] McAndrews *v.* Santee, 7 Abb. Pr. N. S. 408, s. c., 57 Barb. 193; Stephens *v.* Santee, 49 N. Y. 35, rev'g 51 Barb. 532.

[99] Clinton *v.* Brown, 41 Barb. 226; Gillespie *v.* Carpenter, 1 Robt. 65, s. c., 25 How. Pr. 203; Delafield *v.* De Grauw, 9 Bosw. 1, 1 Abb. Ct. App. Dec. 500.

[1] Severcool *v.* Farewell, 17 Mich. 308. Otherwise of mere official inspection. Clintsman *v.* Northrop, 8 Cow. 45; Williams *v.* Merle, 41 Wend. 80.

The inspection or estimate of a third person pursuant to a contract is binding only upon the parties to that contract and not upon strangers who might be brought into relation with the subject matter of the inspection or estimate. Gorham *v.* Dallas, etc.,

dence of delivery.[2] If the seller sent the goods in a manner directed by the buyer, his mistake in addressing them will not defeat his right to recover, unless there be some evidence that the loss was attributed to the error; in other words, that the error was material.[3] If the mode of transportation was not fixed by the contract, evidence of usage is competent on the question of the duty of the seller in respect to taking and forwarding a bill of lading.[4]

30. Tender.

An averment of tender (when it is an act *in pais*, not part of the contract) simply affirms that the party had done all in his power, toward fulfilling his obligation; and under this averment, proof that the other party had prevented or dis-

Ry. Co., 106 S. W. Rep. (Tex. Civ. A.) 930.

[2] Cooper *v.* Coates, 21 Wall. 110. If delivery to the carrier is full performance, receipt by the buyer need not be shown. Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272; Sethness Co. *v.* Home Ade Bottling Co., 111 Miss. 151, 71 So. Rep. 308.

Where it is the clear intent of the parties that actual delivery to the purchaser must be made, proof of mere delivery to a carrier will not sustain a recovery on the part of the vendor. Hauptman *v.* Miller, 94 Misc. 266, 157 N. Y. Supp. 1104.

Delivery of the goods by the seller to a carrier pursuant to an order from the defendant is deemed a delivery to the buyer. Bloom *v.* Edward Miller & Co., 176 S. W. Rep. (Ark.) 673.

[3] Garretson *v.* Selby, 37 Iowa, 529, s. c., 18 Am. Rep. 14.

Proof of authority to ship the goods to any one but the purchaser must be made to warrant a recovery. Cobb *v.* Riley, 190 S. W. Rep. (Tex. Civ. App.) 517.

Evidence as to how the goods were directed is admissible "not only as a step in the proof of the delivery of the goods, but in connection with the bill and letters as evidence of an admission." Bertha Mineral Co. *v.* Morrill, 171 Mass. 167, 50 N. E. Rep. 534.

[4] Johnson *v.* Stoddard, 100 Mass. 306; Putnam *v.* Tillotson, 13 Metc. 517. Compare Magruder *v.* Gage, 33 Md. 344.

Evidence of previous usage is likewise admissible as to the manner of delivery required by the contract, where the latter is silent upon the point. Hoffman Bros. Produce Co. *v.* I. V. Horn Co., 158 N. Y. Supp. 401.

Where the contract provides for delivery at the purchaser's place of business, proof of delivery to a carrier is not sufficient. Robbins

pensed with some of the legal requisites of a formal tender, is admissible.[5] Evidence that the person making the tender found at the place of business of the other party a person answering to the name, who said he was the man, and admitted the contract to be his, but refused to pay the money, is competent to go to a jury upon the question of identity, and sufficient to uphold a verdict in the absence of all evidence tending to raise any suspicion of mistake or collusion.[6] Evidence of a refusal [7] or declaration of inability [8] either by the buyer,[9] as to receiving or paying, or by the seller,[10] as

v. Brazil Syndicate R. & B. Co., 114 N. E. Rep. (Ind. App.) 707.

[5] Holmes *v.* Holmes, 9 N. Y. 525, affi'g 12 Barb. 137. Compare 5 Duer, 336; Bond *v.* Duntley Mfg. Co., 195 Ill. App. 576.

Prior to the Sales Act it was held that "upon the refusal of the vendee to accept and pay the price, the vendor, upon proper notice, may sell the property and recover the difference, or he may sue for the difference between the contract and actual price, in which case he elects to retain the property as his own, or he may recover the contract price, in which case he holds the property as trustee for the vendee, and is bound to deliver it, whenever demanded, upon receiving payment of the price." Hayden *v.* Demets, 53 N. Y. 426, 431. This remedy to sue for the purchase price where the buyer refuses to accept, has been limited by the Sales Act to purchases of goods which cannot readily be resold for a reasonable price, and to cases where, under the contract, the price is payable on a day certain, irrespective of delivery or transfer of title. Personal Property Law (N. Y. Cons. Laws), § 144.

[6] Howard *v.* Holbrook, 9 Bosw. 237, s. c., 23 How. Pr. 64.

[7] Dana *v.* Fiedler, 1 E. D. Smith, 463; Wolfe City Milling Co. *v.* Ward, 185 S. W. Rep. (Tex.) 663; Torkomian *v.* Russell, 90 Conn. 481, 97 Atl. Rep. 760; Riegal Sack Co. *v.* Tidewater Portland Cement Co., 95 Misc. 202, 158 N. Y. Supp. 954.

In like manner proof of a formal tender is not a condition precedent to the vendor's right of recovery, where the purchaser was not present at the time and place set for delivery by the contract. Gaines *v.* R. J. Reynolds Tobacco Co., 171 Ky. 783, 188 S. W. Rep. 847.

[8] Wheeler *v.* Garcia, 40 N. Y. 584, affi'g 2 Robt. 280; Passow *v.* Harris, 29 Cal. App. 559, 156 Pac. Rep. 997.

[9] Bunge *v.* Koop, 5 Robt. 1; Gaines *v.* R. J. Reynolds Tobacco Co., 171 Ky. 783, 188 S. W. Rep. 847.

[10] Wheeler *v.* Garcia (above). Weinberg *v.* Gash, 94 Misc. 303, 158 N. Y. Supp. 179.

to delivery, made to the other party [11] on his due demand,[12] dispenses with proof of formal tender.

31. Packing and Freight.

In the absence of agreement there is no implied promise to pay for the packing done for the purpose of making delivery as agreed, even though the goods were put into the buyer's cases or bags.[13] But evidence of usage is competent for the purpose of showing which party is chargeable with expenses of packing, wrappers or cases, and freight.[14]

32. The Passing of the Title.

The question whether the property had passed at any given time is one of intention, which, if not expressed, is to be collected from all the circumstances, and no single circumstance is necessarily conclusive in all cases, but the conclusion to be drawn must depend on a balance of the various circumstances on one side and the other.[15] The following

[11] Otherwise of a mere declaration to a stranger. McDonald *v.* Williams, 1 Hilt. 365.

[12] Wheeler *v.* Garcia (above). As to a refusal deliberately made in anticipation of the time for a demand, and with intent that it may be acted on, see 17 Q. B. 127, s. c., 15 Jur. 877, 6 Eng. L. & Eq. 230, 2 El. & B. 678, s. c., 17 Jur. 972, 20 Eng. L. & Eq. 157, 42 N. Y. 246, 61 Id. 362, 69 Id. 293, 16 Abb. Pr. N. S. 428, 1 Abb. New Cas. 93.

[13] Cole *v.* Kerr, 20 Vt. 21. *Contra*, Burr *v.* Williams, 23 Ark. 244.

Subdivision 5 of § 43 of the Uniform Sales Act provides: "Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller."

A sale f. o. b. cars obligates the seller to secure the cars and load the merchandise thereon. Culp *v.* Sandoval, 159 Pac. Rep. (N. M.) 956, L. R. A., 1917, A. 1157.

[14] Robinson *v.* United States, 13 Wall. 363; Howe *v.* Hardy, 106 Mass. 329; Benj. on S., § 698. See Martin *v.* Sclafani, 159 N. Y. Supp. 41.

[15] Terry *v.* Wheeler, 25 N. Y. 520. The court in this case said: "The questions which arise in such cases, as to sales, are questions of intention, such as arise in all other cases of interpretation of contracts, and when the facts are ascertained, either by the written agreement of the parties or by the findings of a court, as they are here, they are questions of law." A stipulation for "cash on bill of lading" would, in the absence of other circumstances, be sufficient evidence that title was not to pass

are the rules provided by the Uniform Sales Act for ascertaining the intention: [16]

1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.[17]

2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.[18]

3. When goods are delivered to the buyer "on sale or return," or, on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.[19] When goods are delivered to the buyer

before payment; but it may be countervailed by such circumstances as that the goods were packed in the buyer's sacks, that part payment had been made in earnest, and that the goods were deliverable free on board. Ogg *v.* Shuter, L. R. 10 C. P. 159, s. c., 11 Moak's Eng. 316; R. H. Thomas Co. *v.* Lewis (W. Va.), 90 S. E. Rep. 816.

This question is now fully covered by the provisions of the Uniform Sales Act.

The mere giving of an option to purchase with an exchange of possession at the time does not pass title. McKey *v.* Clark, 233 Fed. Rep. 928, 147 C. C. A. 602.

[16] Personal Property Law (N. Y. Cons. Laws), § 100.

[17] This is substantially a restatement of the rule at common law. Sanitary Carpet Cleaner *v.* Reed Mfg. Co., 159 App. Div. 587, 145 N. Y. Supp. 218.

[18] This rule is also a restatement of a common-law principle. Blossom *v.* Shotter, 59 Hun, 481, 13 N. Y. Supp. 523, aff'd in 128 N. Y. 679, 29 N. E. Rep. 145. See Automatic Time Table Advertising Co. *v.* Automatic Time Table Co., 208 Mass. 252, 94 N. E. 462; Anderson *v.* Morice, L. R. 10 C. P. 609, 618, rev'g 11 Eng. Rep. 252, s. c., 14 Moak's Eng. 455, 463; Ganson *v.* Madigan, 15 Wis. 144; Dexter *v.* Norton, 47 N. Y. 62, 64, 7 Am. Rep. 415.

[19] This part of the third rule is also in conformity with the common law of New York. Greacen

on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer: (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.[20]

4. Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section one hundred and one. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

v. Poehlman, 191 N. Y. 493, 84 N. E. Rep. 390, 14 Ann. Cas. 329; Fiss, etc., Horse Co. *v.* Schwartzchild, 121 N. Y. Supp. 292.

[20] Rule 3, paragraph 2, does not change the common law of New York. See Fiss, etc., Horse Co. *v.* Kiernan, 108 N. Y. Supp. 1105; Russell *v.* Wolff, 19 Misc. 536, 43 N. Y. Supp. 1077.

On the other hand, if the express contract or the acts of the parties manifest a clear intent to vest the title immediately in the buyer, its passing is not postponed by the fact that the seller undertook to make a delivery,[21] or procure necessary authority for the shipment,[22] or even that there had been no actual separation of the thing sold from an entire mass of which it was part.[23]

On the question of the intent of the parties in the acts performed by them, their declarations, part of the *res gestæ*, are competent,[24] and so is the testimony of each to his unstanding at the time of the transaction, if such understanding does not conflict with law.[25] In the absence of express proof of the terms of the contract, evidence is admissible of the course of business in former dealings between the parties, of the same character, in order to show whether, in the acts done under the sale in question, there was an intent to pass title.[26]

33. Delivery to Satisfy the Statute of Frauds.

Where delivery is relied on for the purpose of proving a

[21] Terry *v.* Wheeler, 25 N. Y. 520. And see Stiles *v.* Howland, 32 Id. 309; Bradley *v.* Wheeler, 44 N. Y. 495, affi'g 4 Rob. 18. But see Robert McLane Co. *v.* Swernemann (Tex. Civ. A.), 189 S. W. Rep. 282.

[22] Waldron *v.* Romaine, 22 N. Y. 368.

[23] Kimberly *v.* Patchin, 19 N. Y. 330; Russell *v.* Carrington, 42 N. Y. 118. Thus title to a share in growing corn may pass, without an actual assumption of possession by the vendee. Payne *v.* Brownlee, 196 Ill. App. 108.

See Chandler Grain & Milling Co. *v.* Shea, 213 Mass. 398, 100 N. E. Rep. 663, as to passing of title to meal which had not been designated or ascertained.

[24] See Clark *v.* Rush, 19 Cal. 393.

On an issue of title to property which had been contracted for, but which was destroyed by fire before delivery, it was held that the conduct of the seller in striking from its claim for property covered by its insurance the particular property in question in the action was a mere declaration in its own interest, and inadmissible. Chandler Grain & Milling Co. *v.* Shea, 213 Mass. 398, 401, 100 N. E. Rep. 663.

[25] Prescott *v.* Locke, 51 N. H. 94, s. c., 12 Am. Rep. 55. Compare Foley *v.* Mason, 6 Md. 37; Benj. on S., § 213.

[26] Lelar *v.* Brown, 15 Penn. St. 215. So held in trespass for seizing

valid contract, under the Statute of Frauds, in the absence of a writing or part payment, stricter proof may be required. Mere words of delivery, though the thing were present and pointed out, will not suffice.[27] The delivery of a bill of lading or other written evidence of property and dominion is not enough, unless it is shown or may be inferred that both parties intended that it should pass the property. If it was obtained from the seller without intent on his part to deliver it,[28] or left with the buyer without intent on his part to accept the goods thereby,[29] the statute is not satisfied. Delivery by the seller to a third person pursuant to the buyer's direction is enough,[30] unless the buyer had a right of examination before acceptance,[31] and even then is enough, if such third person was authorized by him to accept so as to conclude him.[32]

Evidence of a delivery to a general carrier not selected by the buyer is not enough; although it might be if there were a valid contract otherwise proved.[33] Evidence of delivery to a carrier designated for the purpose by the buyer is enough, if coupled with evidence that the buyer had previously accepted the goods,[34] or that the carrier had express authority to accept so as to conclude as to quality; [35] otherwise not.

the goods as the sellers. Compare Richards *v.* Millard, 56 N. Y. 574.

[27] Shindler *v.* Houston, 1 N. Y. 261.

[28] Brand *v.* Focht, 1 Abb. Ct. App. Dec. 185, s. c., 5 Abb. Pr. N. S. 225, affi'g 6 Robt. 426, 30 How. Pr. 313.

[29] Quintard *v.* Bacon, 99 Mass. 185; and see Rodgers *v.* Phillips, 40 N. Y. 519.

[30] Munroe *v.* Mundy & Scott, 164 Iowa, 707, 146 N. W. Rep. 819; Dyer *v.* Forest, 2 Abb. Pr. 282.

[31] See Stone *v.* Browning, 51 N. Y. 211, rev'g 49 Barb. 244; again 68 N. Y. 598.

[32] Allard *v.* Greasert, 61 N. Y. 1.

[33] Rodgers *v.* Phillips, 40 N. Y. 519. See also Shepherd *v.* Butcher, etc., Co., 73 So. Rep. (Ala.) 498.

[34] Cross *v.* O'Donnell, 44 N. Y. 661.

[35] Allard *v.* Greasert, 61 N. Y. 1; Grimes *v.* Van Vechten, 20 Mich. 410. Delivery to carrier, if sufficient at common law, is enough under a contract made and to be performed in another State, unless the statute of frauds of that State

Symbolical delivery of bulky articles may be proved by any act importing a surrender on one side and acceptance on the other,[36] such as delivering a schedule of them,[37] or the keys of the repository,[38] with that intent.

It is not essential that a delivery to satisfy the statute be shown to have been contemporaneous with the oral agreement. A delivery even several months afterward may be proved.[39]

Any acts of the parties indicative of ownership by the buyer may be given in evidence by the seller to show the receipt and acceptance of the goods. Conduct, acts and declarations are all competent.[40] An attempt on the part of the buyer in good faith, immediately on receipt and examination of the goods, to communicate to the seller a message declining to accept, is competent as a part of the *res gestæ*, and material as qualifying the act of receiving and retaining the goods.[41] In whatever way the fact is proved, the evidence must show both delivery and acceptance of the thing sold, or some part of it, and that they were intended by the parties to effect a final and complete change of property.[42] If

is proved as a fact. Wilcox Silver Plate Co. *v.* Green, 9 Hun, 347.

[36] Stanton *v.* Small, 3 Sandf. 230.

[37] Dixon *v.* Buck, 42 Barb. 70.

[38] Parker *v.* Jervis, 3 Abb. Ct. App. Dec. 449; Gray *v.* Davis, 10 N. Y. (6 Seld.) 285.

[39] McKnight *v.* Dunlop, 5 N. Y. 537.

[40] Where the goods were liquors, and labels intended to be put on the bottles were sold with them as a part of the contract:—*Held*, the delivery and acceptance of the labels was evidence to go to the jury of acceptance of all under the statute of frauds, in connection with a letter from defendants admitting the existence of a contract and implying that the liquors had been sold. Garfield *v.* Paris, 96 U. S. (6 Otto) 557; Illinois Glass Co. *v.* Ozell Co., 197 Ill. App. 626; M. Hommel Wine Co. *v.* Netter, 197 Ill. App. 382.

[41] Caulkins *v.* Hellman, 47 N. Y. 449.

[42] Hewes *v.* Jordan, 39 Md. 472, s. c., 17 Am. Rep. 578.

A law library was owned in equal interests by A and B. The former was indebted to the latter and an oral agreement was entered into whereby B purchased A's interest in the library and agreed to apply the purchase price upon the indebtedness. After this agreement was entered into, and A having died, B accepted A's interest and caused to be pasted on the

the circumstances be such that the buyer is not finally precluded from objecting that the goods do not correspond with the contract, they are not enough.[43]

34. Part Payment to Satisfy the Statute of Frauds.

Upon the same principles mere words of agreement, however effectual they might be, independent of the statute, to establish an accord and satisfaction or payment by application of indebtedness, cannot satisfy the statute.[44] There must be an act of payment or written evidence.[45] But an actual payment made for the purpose of binding the parties, though not made at the time of the oral agreement, is a renewal of it, and effectual.[46]

35. Various Rules Admitting Documents Otherwise Incompetent.

There are several principles of growing importance in the present state of the law, under which entries or memoranda

back of the books leather labels with his name printed thereon; he took possession and assumed ownership of the books and gave A credit for the purchase price on the indebtedness:—*Held*, that there was no delivery and acceptance sufficient to satisfy the statute. Young *v.* Ingalsbe, 208 N. Y. 503, 102 N. E. Rep. 590. The court said: " . . . The statute renders essential to the proof of a valid contract of sale, not only evidence of the verbal contract, but also evidence of a receipt and acceptance by the vendee of a part of the goods, or of a payment at the time the oral agreement was made. The contract must be authenticated by a prescribed act of the parties in pursuance and part performance of it. The act may originate with the vendor or vendee; with the vendor if a delivery of part of the goods and their acceptance by the vendee is the ground for validating the contract; with the vendee if part payment is relied upon. In either case the participation and assent of both parties to it is necessary."

[43] Id.

[44] Mattice *v.* Allen, 3 Abb. Ct. App. Dec. 248, rev'g 33 Barb. 543. See Young *v.* Ingalsbe, 208 N. Y. 503, 102 N. E. Rep. 590.

[45] Brabin *v.* Hyde, 32 N. Y. 519, rev'g 30 Barb. 265.

[46] Bissell *v.* Balcom, 39 N. Y. 275, rev'g 40 Barb. 98; Allis *v.* Read, 45 N. Y. 142.

A note given by the purchaser does not constitute payment within the statute but the accept-

which are not in themselves competent, are admissible as auxiliary to oral testimony.

36. Contemporaneous Memoranda.

When a witness has testified that he made a memorandum of a transaction had in his presence, the memorandum may be read in evidence,[47] if it was read to or by the parties and assented to as embodying their agreement, or certain terms of it, or if the making of it was part of the *res gestæ* of an act of the witness already properly in evidence.[48] But if neither, the mere fact that it was a contemporaneous memorandum does not render it competent.[49]

37. Memoranda Refreshing Memory.

A witness whose recollection is not sufficient to enable him to answer a question [50] may, notwithstanding he is under examination at the time, refresh his memory by referring to a writing or other record or document [51] as a memorandum, in the following cases:

1. If the memorandum was made by himself (or by another person at his dictation),[52] at the time of the transac-

ance of the note of a third person is sufficient, if given in satisfaction of the debt. Combs *v.* Bateman, 10 Barb. 573.

[47] Lathrop *v.* Bramhall, 64 N. Y. 372.

[48] See Chapter IX, paragraph 49 of this vol.

Memoranda made by the witness, plaintiff's agent, subsequent to the alleged transaction, and not in the presence of the defendant, may be used to refresh the recollection of the witness (subject to the right of the other party to cross-examine), but cannot be used for the purpose of establishing the facts therein contained. Binner-Wells Co. *v.* J. P. Smith Shoe Co., 174 Ill. App. 261.

[49] Flood *v.* Mitchell, 68 N. Y. 507; Moore *v.* Meacham, 10 N. Y. 207.

[50] The use of memoranda to refresh memory is confined to cases where the witness' memory is at fault without it. Young *v.* Catlett, 6 Duer, 437; Sackett *v.* Spencer, 29 Barb. 180. He should be allowed time. Key *v.* Lynn, 4 Litt. 338, 340.

[51] Any memorandum (Guy *v.* Mead, 22 N. Y. 462), even such as his marks on a board. See Marcly *v.* Shults, 29 N. Y. 351, where, however, the memorandum offered was excluded on other grounds.

[52] Filkins *v.* Baker, 6 Lans. 518; or from his memoranda, and subject to his immediate supervision;

tion [53] concerning which he is questioned, or so soon afterward that the judge considers it likely that the transaction was at that time fresh in his memory; [54] or if made by any other person, and read by the witness within the same limits as to time, and if, when he read it, he knew it to be correct.[55] If the witness testifies that he knew the writing to be correct at the time he made or read it,[56] the competency of testimony made by its aid is not impaired by the fact that he relies not on his memory of the fact itself, but on his confidence in the accuracy of the memorandum.[57]

A memorandum which is proper under this rule, and is used accordingly, becomes competent, and may be read as evidence of the facts testified to from it,[58] if it be the original

Krom *v.* Levy, 1 Hun, 173. The witness may use the memorandum to refresh his recollection, though not made by himself, if he can identify it upon inspection and testify that he recollects it as one made at the time of the transaction. Hazer *v.* Streich, 92 Wis. 505, 509, 66 N. W. Rep. 720.

[53] When it does not appear that such a memorandum was made contemporaneously with the happening of the events which it describes, it should not be submitted to the jury. Bates *v.* Preble, 151 U. S. 149. The recollection of a witness concerning a fact in issue cannot be corroborated by the contents of a memorandum made by himself, long after the circumstances, showing his recollection at a former date. Jones *v.* State, 54 Ohio St. 1, 42 N. E. Rep. 699.

[54] Steph. Dig. Ev. Art. 136.

[55] Id.

[56] Lewis *v.* Ingersoll, 3 Abb. Ct. App. Dec. 55; Van Buren *v.* Cockburn, 14 Barb. 181.

[57] Cole *v.* Jessup, 10 N. Y. 96, 9 Barb. 395, s. c., 10 How. Pr. 515; Filkins *v.* Baker, 6 Lans. 518.

[58] Halsey *v.* Sinsebaugh, 15 N. Y. 485. The Supreme Court of the United States is not committed to the general doctrine that written memoranda of subjects and events, pertinent to the issues in a case, made contemporaneously with their taking place, and supported by the oath of the person making them, are admissible in evidence for any other purpose than to refresh the memory of that person as a witness. Bates *v.* Preble, 151 U. S. 149. If a memorandum, made in a book containing other matter relating to the issues which is not proper for submission to the jury, be admitted in evidence, the leaves containing the inadmissible matter should not go before the jury. Bates *v.* Preble, 151 U. S. 149. In such a case it is not enough to direct the jury to take no notice of the objectionable matter, but the leaves containing it should

entry, not a copy,[59] and if the witness' memory, after being refreshed, does not enable him to testify to the facts without the memorandum.[60] It is not error, however, to allow a copy made by the witness from his original entry, or reproduced by him in substance, from memory, after the loss of the original, to be read to the jury, not as evidence of the facts contained in it, as in case of an original entry, but as a statement in detail of what the witness has testified to directly.[61]

Hence in an action for goods sold, a witness who testifies that he made correct original entries of the transaction, and he has forgotten the transaction, may be shown his original entries, and read them as evidence.[62] The correctness of the entries may be shown either by his testimony of his own knowledge, or his testimony that he entered correctly what others told him, if such others are produced and testify that they gave him, correctly, facts within their own knowledge.[63]

be sealed up and protected from inspection by the jury before the book goes into the conference room. Id.

[59] Marcly *v.* Shults, 29 N. Y. 348; and see 49 N. Y. 316.

[60] Id. The memorandum is inadmissible if the witness is able to recall the facts without the aid of it. The primary common-law proof is then furnished, and the necessity for evidence of the lesser degree does not arise. Nat. Ulster Co. Bank *v.* Madden, 114 N. Y. 280, 284, 285, 21 N. E. Rep. 408; Hicks *v.* British America Ass. Co., 13 App. Div. (N. Y.) 444, 448.

[61] McCormick *v.* Pennsylvania Central R. R. Co., 49 N. Y. 316.

[62] Philbin *v.* Patrick, 3 Abb. Ct. App. Dec. 605, s. p., 9 Hun, 347, and cases cited. It is not necessary that the memorandum be a formal account. Any record, however rude, made to mark the event or as an aid to memory may serve. See Marcly *v.* Shults (above).

[63] Payne *v.* Hodge, 7 Hun, 612. It has been recently held in Shear *v.* Van Dyke, 10 Hun, 528, in extension of this rule, that, a witness having testified that a quantity, which he had now forgotten, he had, at the time of delivery, reported correctly to another, the other might be called and testify as to what was the quantity thus reported; that is to say, a human memory may serve as a book of original entries. So, where a temporary memorandum, made by a witness who had since forgotten what was written, had been destroyed by another witness who in

2. Original memoranda made contemporaneously with the fact,[64]—usually such as accounts, bills of parcels, and the like,—although not shown to have been made by the witness,[65] and copies or abstracts made by him from his inspection of such memoranda,[66] may be referred to by him while on the stand, if his memory, refreshed by them, enables him to testify from recollection of the original facts, independent of his confidence in the accuracy of the memoranda.[67] He is not in such case to read from the memorandum, nor does the memorandum become admissible in corroboration.[68]

3. In cases requiring many details of date, quantity, etc., it is common practice to allow a witness to consult, but not to read from, memoranda made by him of facts within his own knowledge, to which he cannot speak in sufficient detail without such aid, although the memoranda were made in preparation for trial. But such memoranda, if not within the preceding rules, are not admissible in evidence,[69] unless they are of a character—such as maps, diagrams, or tabular statements—reasonably necessary to render the testimony intelligible, and are proven to be correct.

Any thing referred to by a witness to refresh memory must, if required, be shown to the adverse party; and he may cross-examine the witness thereupon,[70] but is not bound to put the paper in evidence.[71]

the course of duty transcribed it in more permanent form, the latter was permitted to produce his copy and testify to what he transcribed. Adams *v.* People, 3 Hun, 654.

[64] This contemporaneous character is not always strictly to be required.

[65] Sturm *v.* Atlantic Ins. Co., 38 Super. Ct. (J. & S.) 286, 296, 318; Huff *v.* Bennett, 6 N. Y. 337.

[66] Howland *v.* Sheriff Willetts, 5 Sandf. 221. And see Sturm *v.* Atlantic Ins. Co. (above).

[67] Wilde *v.* Hexter, 50 Barb. 448.

[68] Russell *v.* Hudson River R. R. Co., 17 N. Y. 134. Compare note 61, above.

[69] Stuart *v.* Binuse, 7 Bosw. 195.

[70] Peck *v.* Lake, 3 Lans. 136; Steph. Dig. Art. 137; Tibbetts *v.* Sternberg, 66 Barb. 201.

[71] Peck *v.* Lake (above).

38. Memoranda Made by a Third Person in the Usual Course of Business.

An entry or memorandum, whether in a book or in any other form,[72] made in the usual course of business,[73] and at or about the time of the transaction, by a person not a party to the action, who is shown to have had means of personal knowledge[74] of the fact recorded, is competent evidence of such fact:

1. If the person who made it is produced, and verifies the handwriting as his own,[75] and testifies that it was so made,

[72] Livingston *v.* Arnoux, 56 N. Y. 518.

Not a copy. James *v.* Wharton, 3 McLean, 492.

[73] It must appear to have been made in the regular course of business, under such circumstances as to import trustworthiness; and it is for the judge to say, in the first instance, whether the record is of such a character; and his decision will not be interfered with unless clearly wrong. Riley *v.* Boehm, 167 Mass. 183, 45 N. E. Rep. 84.

Entries made by a receiver a year after the transaction in question are inadmissible. Starke *v.* Stewart, 33 N. D. 359, 157 N. W. Rep. 302.

[74] The entries are not admissible under this rule if made on information received from a third person, although communicated by him in the course of duty; Thomas *v.* Price, 30 Md. 483; White *v.* Wilkinson, 13 La. Ann. 359; even though the person who made the entry testify that his informant (not shown to be deceased) saw and corrected it. In such case the latter should be produced. See Gould *v.* Conway, 59 Barb. 355; Chenango Bridge Co. *v.* Lewis, 63 Id. 111. The informant not having adopted the entry as his own, the mere fact that he is dead does not admit the entry made by the witness on his information. Brain *v.* Price, 11 Mees & W. 773. As to the effect of ignorance of some of the entries, see Burke *v.* Wolfe, 38 Super. Ct. (J. & S.) 263.

[75] Gilchrist *v.* Brooklyn Grocers' Assoc., 59 N. Y. 499.

In an action to recover a balance due under a contract requiring payment on proper certificates of weight from a public weigher, the plaintiff produced undated and unidentified scraps of paper bearing figures in lead pencil and testified that they were given to him "by the man from the scales." There was no evidence that this man was a public weigher and his identity was not established. The court held that the papers were inadmissible as memoranda. Goldfarb *v.* Goldman, 141 N. Y. Supp. 479.

and correct when made, although he may have no present recollection whatever of the transaction;[76] or,

2. If the person who made it is dead, and his signature or handwriting is proved, and he does not appear to have had any interest to falsify. If living, though he be without the jurisdiction, he must be produced.[77]

It is not necessary that the person should have been under an absolute duty to make the entry; it is enough if it was the natural concomitant of the transaction to which it relates, and usually accompanies it.[78]

[76] Price *v.* Torrington, Salk. 285, s. c., 1 Smith's L. Cas. 390; Merrill *v.* Ithaca, &c. R. R. Co., 16 Wend. 586. The rule applies, although the entries were only of each order in gross, without stating the items. Gilbert *v.* Sage, 57 N. Y. 639, affi'g 5 Lans. 287. But see Binner Wells Co. *v.* J. P. Smith Shoe Co., 174 Ill. App. 261.

[77] Ocean Nat. Bank *v.* Carll, 55 N. Y. 440; again, 9 Hun, 239, and cases cited. In some States permanent insanity, in others permanent absence from the State, is equivalent to death for this purpose. For instances, see 1 Smith's L. Cas. 139; note to Price *v.* Torrington. A ledger may be admitted in evidence, to prove an account, upon proof of the handwriting of the bookkeeper, who is shown to be beyond the jurisdiction of the court, and place of residence unknown, when original books of entry are proved to have been destroyed. Rigby *v.* Logan, 45 S. C. 651, 24 S. E. Rep. 56. At common law it was necessary, in order to make books of account admissible in evidence, that the entries therein should be proved by the clerk or servant who made them, if he was alive and could be produced, and that they should have been made by a person whose duty it was to make them, and that they were made in the ordinary course of business, and contemporaneously with the delivery of the goods, so as to form a part of the *res gestæ*. The Illinois statute has simply enlarged this rule without repealing it, by permitting the owner who keeps the books to testify to the original entries made therein. House *v.* Beak, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. Rep. 1065.

[78] Fisher *v.* Mayor, &c. of N. Y. 67 N. Y. 77; Morrow *v.* Ostrander, 13 Hun, 219. Entries made by a jailer of a public jail in Alabama, in the record book kept for that purpose, of the dates of the receiving and discharging of prisoners kept therein, made by him in the discharge of his public duty as such officer, are admissible in evidence in a criminal prosecution in the Federal courts, although no statute of the State requires them. White *v.* United States, 164 U. S. 100. It has been held that in a

39. Shop Books and Other Accounts of a Party Offered in His Own Favor.

The statutes allowing parties to testify have revolutionized the practice, by making the party the witness and allowing him commonly to use his book as a memorandum to refresh his memory;[79] but the rule admitting his account as primary evidence, with certain preliminary proof, is still in force;[80]

conflict of evidence as to whether the witness performed an alleged act, his book, testified to by him to be a complete record of all his transactions of the nature of that alleged, is admissible, for the purpose of inferring, from the absence of an entry of the alleged transaction, that it did not occur. Morrow *v.* Ostrander, 13 Hun, 219.

Alterations, etc., seriously impair the credit of the entry. Gilchrist *v.* Brooklyn Grocers' Assoc., 59 N. Y. 499, but do not necessarily render it incompetent. Adams *v.* Couilliard, 102 Mass. 167.

[79] Henry *v.* Martin, 1 Weekly Cas. (Pa.) 277; Barnet *v.* Steinbach, Id. 335.

[80] Stroud *v.* Tilton, 4 Abb. Ct. App. Dec. 324; Burke *v.* Wolfe, 38 Super. Ct. (J. & S.) 263. "Since a party may testify in his own behalf it must be considered that he, as well as his clerk or bookkeeper, may refresh his memory from entries made by him or under his eye, and then testify as to the facts with his memory thus refreshed. Now in cases of an account composed of many items, all this means nothing more than reading the book in evidence. This we all know from daily experience in the trial courts. It is out of all reason to say that a merchant or his clerks can recall each item of the account, and a fair-minded witness will generally decline the attempt. Account-books are admitted in evidence for the person by whom they are kept when the entries are made at the time, or nearly so, of doing the principal fact, because entries made under such circumstances constitute a part of the *res gestæ*. An entry thus made is more than a mere declaration of the party. It is a verbal act following the principal fact in the orderly conduct of business. Such is certainly the custom and course of business at the present day. We, therefore, conclude that an account-book of original entries, fair on its face, and shown to have been kept in its usual course of business, is evidence, even in favor of the party by whom they are kept." Anchor Milling Co. *v.* Walsh, 108 Mo. 277, 32 Am. St. Rep. 600, 18 S. W. Rep. 904. Memoranda purporting to show items of shortage in goods purchased are inadmissible in evidence in the absence of testimony to prove their correctness. Pabst Brewing Co. *v.* Lueders, 107 Mich. 41, 64 N. W. Rep. 872. One party to a disputed contract cannot prove it by show-

and it is convenient to rely upon it in some cases where the right to read the account, as having refreshed the witness's memory, may be doubtful.[81] It is not essential under this rule to produce the party himself as a witness, even since the disqualification of parties has been removed.[82]

ing as an independent item of evidence that, for the consideration, he entered a charge against himself in his own book. Fifth Mutual Building Society of Manayunk *v.* Holt, 184 Pa. St. 572, 39 Atl. Rep. 293. Where the clerk who makes original entries in books of account has no knowledge of their correctness, but makes them as the items are furnished by another, it is essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof from other sources should be produced before the books are admissible in evidence. House *v.* Beak, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. Rep. 1065. Resort may be had to schedules containing abstracts of voluminous books or documents which have been put in evidence, where those schedules are verified by the witness who made them, and their assistance will render the original documentary proofs more readily comprehensible by judge, jury or referee. Boston & Worcester R. Corporation *v.* Dana, 1 Gray, 83, 104; Jordan *v.* Osgood, 109 Mass. 457, 464; Von Sachs *v.* Kretz, 72 N. Y. 548; Van Name *v.* Van Name, 38 App. Div. 451, 456; Masonic Mut. Ben. Soc. *v.* Lackland, 97 Mo. 137, 10 Am. St. Rep. 298, 10 S. W. Rep. 895. Account book, kept by one unable to write, in which only entries are straight marks to indicate the number of loads of sand delivered, is admissible in evidence, when supported by oath; and at all events, such person has the right to use the book as a memorandum to refresh and aid his memory. Miller *v.* Shay, 145 Mass. 162, 1 Am. St. Rep. 449, 13 N. E. Rep. 468.

[81] The value and importance of the party's account are asserted in Butler *v.* Cornwall Iron Co., 22 Com. 360, and denied in Larue *v.* Rowland, 7 Barb. 107, and Tomlinson *v.* Borst, 30 Id. 46.

[82] Tomlinson *v.* Borst, 30 N. Y. 42. This is the New York rule. In those jurisdictions where the suppletory oath of the party himself is required, the general rule is that if part of the transaction was done by one partner, and part by another, as where one delivered the goods and another made the entries, each may testify to his own share in the transaction. If the person who kept the books is dead, the suppletory oath may be made by the executor or administrator speaking to the best of his knowledge and belief; and testifying also that the books came to his hands as the genuine and only account books of the deceased; but in such case there must also be proof of the handwriting of the deceased. If the person who kept

The general rule is that in actions for goods sold (and some others), not founded on special contract,[83-91] the party's books of account are admissible in evidence for the consideration of the jury, in his own favor, upon due preliminary proof: 1. That they are his books of account kept in the regular course of business; 2. That there was a course of dealing between the parties; 3. That some article or service charged was actually furnished; 4. That the party had no clerk or bookkeeper; 5. That he kept fair and honest accounts.[92]

the books is insane, the question of insanity being one for the judge, the books are admissible on the like suppletory oath of the committee or guardian, with proof also of handwriting.

[83-91] Merrill *v.* Ithaca, &c. R. R. Co., 16 Wend. 586. *Contra*, Cummings *v.* Nichols, 13 N. H. 420. The rule does not apply to books or entries relating to cash items or dealings between the parties. Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. Rep. 54. Bank books of accounts and original entries shown to have been accurately kept and written up each day are admissible in evidence in favor of the bank. Robinson *v.* Smith, 111 Mo. 205, 33 Am. St. Rep. 510, 20 S. W. Rep. 29.

[92] Vosburgh *v.* Thayer, 12 Johns. 461; Stroud *v.* Tilton, 4 Abb. Ct. App. Dec. 324; Knight *v.* Cumington, 6 Hun, 100; Foster *v.* Coleman, 1 E. D. Smith, 85; and see further, 1 Smith's L. Cas. 142, 1 Greenl. Ev., § 118, 1 Whart. Ev., §§ 678, &c. 700. The books must show that they are kept in the regular routine of business. In re Fulton's Estate, 178 Pa. St. 78, 87, 88, 35 Atl. Rep. 880. When a party to an account keeps his own book of original entries, it is admissible to sustain an account therein composed of many items upon proof that some of the articles were delivered at or about the time the entries purported to have been made; that such entries were in the handwriting of the party producing the book; that he kept no clerk at the time; and that his customers had settled by the book and found it to be fair and correct. House *v.* Beak, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. Rep. 1065.

An account from a loose-leaf ledger may be admitted in evidence, where it is shown that the entries appearing in the account were made contemporaneously with the transactions which they purported to record in the usual course of business and that the account was accurately kept, so as to make the same admissible under the doctrine relating to the admissibility of books of account generally. McDonough *v.* Commercial State Bank (Ala. A.), 73 S. 754; Gentry *v.* S. A. Rider Jewelry Co. (Mo. A.), 194 S. W. 1057.

In more detail observe: 1. The record must be shown to have been the party's account, kept in the regular course of business. Formal bookkeeping is not important. The record derives whatever respect it receives, from the fact that it is the personal record of the party, kept according to his usage and degree of intelligence, for the purpose of preserving the memory of moneys due him for goods or labor.[93] The account is not to be excluded because kept

In such a case the original leaf of the ledger may be admitted. Shepherd *v.* Butcher Tool, etc., Co. (Ala.), 73 S. 498.

A typical statute authorizes the introduction in evidence of the books of account of any merchant, shop-keeper, physician, blacksmith or other person doing a regular business and keeping daily entries thereof as proof of such accounts upon these conditions: (1) That he keep no clerk, or else that the clerk is dead or is otherwise inaccessible, or that from any cause the clerk is disqualified from testifying; (2) that proof is made (the parties' oath being sufficient) that the book tendered is book of original entries; and (3) that there is investigation by the court to see if the books are free from any suspicion of fraud. Shepherd *v.* Butcher Tool, etc., Co. (Ala.), 73 S. 498.

A memorandum about ten inches long, eight inches wide and three-eighths of an inch thick, from which many pages had been torn, and which contains memoranda of some kinds and other matters not in regular chronological order, is properly excluded, although the witness testifies that it was an account book of his own, that all the daily transactions were entered in this book, and that this was the only account book kept by him, where the book itself did not indicate that it was a book in which was regularly kept accounts by witness, or that it was kept in the regular course of his business. Wilcox *v.* Downing, 88 Conn. 368, 91 A. 262.

So where memorandum entries in pencil are made in small memorandum books at the time of sales of goods, and each item is shortly thereafter transcribed upon what is called the ledger, there being in no cases a delay of more than a week in transcribing entries, and the only purpose of the so-called ledger being to separate into distinct accounts purchases made by different persons, such ledger is admissible under a statute relating to the admissibility of books of original entry. Harper *v.* Hammond, 13 Ga. A. 238, 79 S. E. 44.

[93] Thus, a notched stick kept for this purpose was admitted in Rowland *v.* Burton, 2 Harr. (Del.) 288; scraps of paper in Smith *v.* Smith, 4 Id. 632, 533; Taylor *v.* Tucker, 1 Ga. 231. But these are exceptional cases. See Hall *v.*

in ledger form, so that the charges against defendant are on a separate page from those against others;[94] although entries scattered through an account in the journal or day-book form are more cogent evidence. But if shown not to be the book of original entries, it is not competent without producing or accounting for those entries.[95] If it appear either from the books themselves, or extrinsic evidence,[96] that they are a part of a system of books involving others which may be necessary to a complete view of the state of accounts,[97] the others must be produced or accounted for.[98] Thus where the ledger is relied on, a day-book shown to have been kept must be produced.[99] But the fact that according to the merchants' custom, the charges were made in the first instance upon slips of paper and the same day transferred to a day-book, does not take away from the day-book, its character as a book of original entry.[1] The charge

Glidden, 39 Me. 445; Jones *v.* Jones, 21 N. H. 219. On the other hand, a pocket memorandum book has been excluded. Richardson *v.* Emery, 23 N. H. (3 Fost) 220.

[94] Shepherd *v.* Butcher, etc., Co., 73 So. Rep. (Ala.) 498; Faxon *v.* Hollis, 13 Mass. 428. A tabular form may be admissible. Mathes *v.* Robinson, 8 Metc. 269. And alterations are suspicious. Lloyd *v.* Lloyd, 1 Redf. 399.

[95] Vilmar *v.* Schall, 35 Super. Ct. (J. & S.) 67.

[96] Pendleton *v.* Weed, 17 N. Y. 72. See also Schenck *v.* Wilson, 2 Hilt. 92.

[97] As, for instance, where a journal is produced, and it bears marks indicating that the entries have been posted into a ledger. Prince *v.* Sweet, 2 Mass. 569. Compare Hervey *v.* Hervey, 15 Me. 357.

[98] And the testimony of a witness that the reference, in the book produced, to others not produced, was a mistake, does not justify the admission of the former alone. Larue *v.* Rowland, 7 Barb. 107.

[99] McCormick *v.* Elston, 16 Ill. 204.

[1] Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. Rep. 294. An account book is a book of original entries, when the marks therein are transferred the same day from marks on a cart made by a servant who delivered the loads. Miller *v.* Shay, 145 Mass. 162, 1 Am. St. Rep. 449, 13 N. E. Rep. 468. "To prepare the way for the introduction of these books, it was proved that the bookkeeper daily weighed the iron and took an account of the work, and made the entries in the books; and in respect to the correctness of the items so taken by him, and as to whose account they were applicable, the evidence

should be made under an existing right to charge, not merely in anticipation of such a right,[2] and must appear to have been made for the purpose of charging,[3] for specific things,[4] the person upon whose credit the transaction was had,[5] as distinguished from memoranda of orders, or deliveries, or of things to be subsequently done.[6]

2. There must have been some course of dealing between the parties. A single sale, though of more than one article, is not enough to constitute that relation between the parties which allows the books to be admitted.[7]

3. Independent evidence that some article or service charged was furnished, is indispensable.[8] Proof of this prior to the time covered by the account is insufficient.[9] One article delivered and one item of work done, as charged satisfy this requirement.[10]

of the foreman having charge of the work and employes in the shops, was given as well as that of some of the members of the firm by way of verification of the charges as so entered; and further evidence of persons who had made settlements with the firm of their accounts upon the books was given bearing upon the character and correctness of the accounts kept by them. The firm had in their service a large number of workmen; and it was the duty of the bookkeeper, aided by the foreman, to ascertain what the work was, and for whom it was done, and make entries of it daily in the books. The method by which the evidence tended to prove this was accomplished was such as to render competent as evidence the entries in the books within the rule applied in Mayor, &c. of N. Y. *v.* Sec. Av. R. Co. (102 N. Y. 572); West *v.* Van Tuyl (119 N. Y. 620); In re McGoldrick *v.* Traphagen (88 N. Y. 334)." Cobb *v.* Wells, 124 N. Y. 77, 80, 81, 26 N. E. Rep. 284.

[2] Heughley *v.* Brewer, 16 Serg. & R. 133. And should bear some date, though not necessarily the day. Cummings *v.* Nichols, 13 N. H. 420.

[3] Lynch *v.* Petrie, 1 Nott & McC. 130; Walter *v.* Bolman, 8 Watts, 544.

[4] Hughes *v.* Hampton, 2 Const. 745.

[5] Rogers *v.* Old, 6 Serg. & R. 454. Mistake in the person may be explained. Schettler *v.* Jones, 20 Wis. 412.

[6] Fairchild *v.* Dennison, 4 Watts (Pa.), 258; Bradley *v.* Goodyear, 1 Day (Conn.), 104; Terrill *v.* Beecher, 9 Conn. 344.

[7] Corning *v.* Ashley, 4 Den. 354.

[8] Morrill *v.* Whitehead, 4 E. D. Smith, 230.

[9] Conklin *v.* Stawler, 8 Abb. Pr. 395, s. c., 2 Hilt. 422.

[10] Linnell *v.* Sutherland, 11 Wend.

4. The rule we are now considering does not apply to admit the books of a party to the suit, if they were kept by a regular clerk or bookkeeper,[11] whose business it was to notice sales and enter them in the books; [12] such entries are admissible under other rules already stated. But the books of daily entries made by the party himself are not rendered incompetent by the fact that his servant, porter or messenger noted in temporary form the deliveries made by him, and reported them to the party, who, upon such information, or copying from the temporary memoranda, made the entries in question.[13] If there were partners, it is enough to produce the one who kept the book; but if he is dead, the book may be admitted on the oath of the other, if he can testify to his knowledge of the correctness of the entries.[14]

5. To show that the party kept fair and honest books,

568. A servant is a competent and necessary witness to support charges and prove delivery, when goods are delivered by a servant, and his entries or marks are transferred to the master's account book, which is offered in evidence. Miller *v.* Shay, 145 Mass. 162, 1 Am. St. Rep. 449, 13 N. E. Rep. 468.

[11] Gould *v.* Conway, 59 Barb. 355; Merrill *v.* Ithaca, &c. R. R. Co., 16 Wend. 587.

[12] Sickles *v.* Mather, 20 Wend. 72. "We think that the clerk intended was one who had something to do with and had knowledge generally of the business of his employer in reference to goods sold or work done, so that he could testify on that subject. It evidently means an employe whose duty it is to attend to the details of business, and thus is able to prove an account, and not one who from his isolated position as a bookkeeper can have but little means of knowledge personally as to the transactions done, or information relating thereto, except what is mainly derived from others." McGoldrick *v.* Traphagen, 88 N. Y. 334, 338. The wife of a dealer, who makes entries in his books of account from memoranda, made by the dealer at the time of the sale, and subsequently furnished by him to her, is not a clerk within the meaning of the rule relative to the proof which makes the books of a merchant competent evidence of a sale. Smith *v.* Smith, 13 App. Div. (N. Y.) 207.

[13] Within reasonable limit of time for the keeping of such accounts, see Id.; Stroud *v.* Tilton, 4 Abb. Ct. App. Dec. 324; Hauptman *v.* Catlin, 1 E. D. Smith, 729.

[14] Krom *v.* Levy, 1 Hun, 172. And see Butler *v.* Cornwall Iron Co., 22 Conn. 360.

the testimony of one witness is enough, who has dealt with the party, and settled with him by his account;[15] and he may be an employee who has dealt with the employer,[16] or a witness to settlement by customers.[17]

A settlement by the ledger is enough, though the witness did not see the day-books.[18] The evidence of fair and honest accounts should be directed, in part at least, to the period covered by the dealings in question.[19]

The competency of an account under these rules is a preliminary question for the court.[20]

An account offered in evidence under these rules should be submitted to the judge for inspection.[21] But if the books are shown to have been lost or destroyed, secondary evidence of their contents may be received.[22] Without laying

[15] Beattie *v.* Qua, 15 Barb. 137.

[16] McGoldrick *v.* Traphagen, 88 N. Y. 334, 337. In this case it was said: "The rule in regard to this subject is that the party shall prove by those who have dealt and settled with him that he keeps fair and honest accounts. (Vosburgh *v.* Thayer, 12 Johns. 461.) We do not discover any reason why a bookkeeper who has an account with his employer is not a competent witness within the rule stated. He deals with the employer, has an account which he has settled from the books and ought to be able to state whether the accounts were honestly and fairly kept. The rule is a general one and no reason exists why it should be restricted in its operation so as to exclude any one who deals with the party." See also Smith *v.* Smith, 13 App. Div. (N. Y.) 207.

[17] McAllister *v.* Real, 4 Wend. 483. Or any witness who can prove actual accuracy. Woodruff, J., in Foster *v.* Coleman, 1 E. D. Smith, 85.

[18] Stroud *v.* Tilton, 4 Abb. Ct. App. Dec. 324.

[19] Foster *v.* Coleman, 1 E. D. Smith, 85.

[20] Larue *v.* Rowland, 7 Barb. 107. Objections to its admissibility must be made on the trial, or they cannot be considered on appeal. Peck *v.* Richmond, 2 E. D. Smith, 380; Brahe *v.* Kimball, 5 Sandf. 237. Where the books of a party are read in evidence for him without objection, they are evidence by consent, and are to be weighed by the jury. Brahe *v.* Kimball, 5 Sandf. 237.

[21] It cannot be proved by deposition without production in court. Churchill *v.* Fulliam, 8 Iowa, 45.

[22] Holmes *v.* Marden, 12 Pick. 169. And see Hilderbrant *v.* Crawford, 6 Lans. 600; Prince *v.* Smith, 4 Mass. 455. Books of

a foundation for secondary evidence, a copy is not admissible.[23] Abbreviations [24] and symbols [25] may be explained by parol, by testimony other than that of the party himself.[26] The party may explain by stating his usage, not by stating a secret intent. The fact that the book has been mutilated in a part not appearing to be material to the issue, such as having leaves torn out, etc., does not make it incompetent, but goes to its credit.[27] But apparent alterations or erasures in a part material to the cause must be explained before the account can be admitted.[28] Any fact showing the books unworthy of credit may be proved, such as bad method of bookkeeping; or bad *business* character of the party; or erasures, mutilations, etc.[29] But not the *general* bad moral character of the party.[30]

An account properly in evidence under this rule is competent evidence of the facts of sale, of the dates,[31] of the price or value,[32] and of the delivery; [33] but not evidence of

account are not the best evidence, so as to render inadmissible oral testimony as to payments credited therein, and their application. Christman *v.* Pearson, 100 Iowa, 634, 69 N. W. Rep. 1055.

[23] Reddington *v.* Gilman, 1 Bosw. 235.

[24] Curnen *v.* Crawford, 4 Serg. & R. 3.

[25] Rowland *v.* Burton, 2 Harr. (Del.) 288.

[26] Cummings *v.* Nichols, 13 N. H. 420. His own testimony for this purpose ought to be received if it goes to show habitual usage, not merely a secret intent on the particular case.

[27] Jones *v.* Dekay, 2 Penn. 995, N. J. (Ed. of 1835, p. 695). Account books are not discredited for the purpose of evidence by the fact that some entries are made therein for items which cannot be allowed by the court, if there is nothing to indicate that they were fraudulently or dishonestly made. Chisholm *v.* Beaman Machine Co., 160 Ill. 101, 43 N. E. Rep. 796.

[28] Churchman *v.* Smith, 6 Whart. 106.

[29] Larue *v.* Rowland, 7 Barb. 107.

[30] Tomlinson *v.* Bort, 30 Barb. 42.

[31] Sickles *v.* Mather, 20 Wend. 72.

[32] Morrill *v.* Whitehead, 4 E. D. Smith, 239.

It has been held that an itemized account, duly sworn to, raises a *prima facie* case as to the amount thereby appearing to be due. Carr *v.* Alexander, 169 N. C. 665, 86 S. E. Rep. 613.

[33] See also paragraphs 4 and 28.

any other matter than the issue of debt and credit between the parties.[34]

Pass books, kept by one party and written up by the other, are competent, irrespective of whether the entries were original memoranda, or copies.[35]

40. When Using Part of an Account Admits the Rest.

If a party uses books of account against his adversary, he makes them evidence for the adversary on the same subject. They are like any declaration or admission by writing or orally; if part is used, the whole qualifying the same matter is admissible. He cannot offer his books in evidence, to establish some things, under the restriction that they should not be received to prove others, to show which they were equally competent.[36] After they have been introduced in evidence, they are available as the property of both parties, as evidence, and he who adduced them cannot withdraw them from the consideration of the jury, without consent of the adverse party.[37] Hence when one party has used the account to establish credits in his favor, it is competent for the other plaintiff to read from the same books, entries, although they were made by himself, which show that those credits have been exhausted by counter-charges of debit, made at about the same time and afterward.[38]

41. Memoranda as Part of the Res Gestæ.

In connection with the last few paragraphs reference should be had to the rule admitting entries and declarations

[34] Batchelder *v.* Sanborn, 22 N. H. (2 Fost.) 325, rev'g cases.

[35] Burke *v.* Wolfe, 38 Super. Ct. (J. & S.) 263. The entries in a pass book which has been continuously in the possession of the customer are presumptively correct, and the book is admissible without further proof of its correctness. Wilshusen *v.* Binns, 19 Misc. (N. Y.) 547.

[36] Pendleton *v.* Weed, 17 N. Y. 72; Winans *v.* Sherman, 3 Hill, 74. But he may contradict items. Walden *v.* Sherburne, 15 Johns. 409.

[37] Clinton *v.* Rowland, 24 Barb. 634, and cases cited.

[38] Dewey *v.* Hotchkiss, 30 N. Y. 497. Detached items in accounts, however, are not necessarily so connected that the one drags in the other. 1 Whart. Ev. 591, § 620.

as part of the *res gestæ* of an act already properly in evidence, a rule which has been sufficiently illustrated elsewhere.[39]

42. Admissions and Promises to Pay.

In proving oral admissions, etc., the witness must state the facts, and the conversation in substance at least; and not his own conclusion derived therefrom.[40] An admission or declaration made by a party in writing[41] is competent against him, without calling him. If a memorandum of defendant's admission was made by plaintiff or his agent, it need not be produced, unless it was communicated to defendant.[42] Upon the question, whether a transaction was a sale or not, it is competent to prove an entry made by the plaintiff in his books, of the transaction as a sale, if accompanied by proof that the entry was subsequently read to the defendant, and he admitted its correctness.[43] The existence, and defendant's knowledge of the demand being shown by other evidence, defendant's acknowledgment of an indebtedness is presumed to have referred to the demand proven, in the absence of proof that other demands existed, to which the acknowledgment might apply.[44] A promise "to settle," if made in reference to a demand of a liquidated amount, is equivalent to a promise to pay.[45] On a promise to pay in a

[39] Chapter VI, paragraph 9; chapter XII, paragraph 16, chapter XIII, paragraphs 5 and 18; chapter XIV, paragraph 2; chapter XV, paragraph 3; and see Arms *v.* Middleton, 23 Barb. 571.

[40] Parsons *v.* Disbrow, 4 E. D. Smith, 547.

[41] Even though dictated to plaintiff's agent, and unsigned by defendant. Wollenweber *v.* Ketterlinus, 17 Penn. St. 389.

The writing may be explained provided it can be done without verifying its effect. Ellwood *v.* McDill, 105 Iowa, 437, 75 N. W. Rep. 340.

[42] Parsons *v.* Disbrow, 1 E. D. Smith, 547.

[43] Tanner *v.* Parshall, 4 Abb. Ct. App. Dec. 356, s. c., 5 Abb. Pr. N. S. 373, and 35 How. Pr. 472.

[44] McNamee *v.* Tenny, 41 Barb. 495; Sugar *v.* Davis, 13 Ga. 462. The sufficiency of this evidence, alone, is questionable.

[45] Barker *v.* Seaman, 61 N. Y. 648.

Where the vendor agreed to deliver on a certain date but delivery was not made until some days later and thereafter the vendor informed the purchaser that the property had been shipped

contingency, though indefinite—such as to pay when able—plaintiff should show that the contingency has occurred.

The admissions and declarations of defendant's agent are competent only when shown to have been made by him at the time of making the agreement about which he was employed, or while acting within the scope of his authority.[46] Upon proof that defendant referred plaintiff or his agent to a third person for information,[47] the admissions and declarations of the latter, made pursuant to the reference to him, are competent against defendant.[48]

An admission of a distinct fact, such as the correctness of an account presented to the party, may be proved against him, though made during a negotiation for settlement, and coupled with an offer to allow the account on a condition;[49] and after the correctness of the items has thus been proved, the account, and entries and vouchers concerning the items, are admissible.[50]

43. Auction Sales.

An auctioneer suing in his own name need not prove that he has a special property or interest, for that follows from his position as an auctioneer.[51]

Under the statute of frauds, as applicable to auctions,[52] one who has to prove compliance with the statute must pro-

and the latter replied that he would remit the "first payment" upon the arrival of the property, it was held that in the absence of any consideration for the statement in the letter, or that the vendor had acted upon it, it did not constitute, as a matter of law, a waiver of any right of the purchaser to claim damages for the delay. Alabama Const. Co. *v.* Continental Car Co., 131 Ga. 365, 62 S. E. Rep. 160.

[46] Vail *v.* Judson, 4 E. D. Smith, 165; McClave-Brooks Co. *v.* Belzoni Oil Works, 74 So. Rep. (Miss.) 332. (Admissions of corporate officer.)

[47] Bank of New York *v.* Am. Dock & Trust Co., 143 N. Y. 559, 566, 38 N. E. Rep. 713; Low *v.* Hart, 90 N. Y. 457, 461; Allen *v.* Killinger, 8 Wall. 480.

[48] Folsom *v.* Batchelder, 2 Fost. (N. H.) 47.

[49] Bartlett *v.* Tarbox, 1 Abb. Ct. App. Dec. 120.

[50] Id.

[51] Minturn *v.* Main, 7 N. Y. 220.

[52] Personal Property Law, § 31, am'd by L. 1911, c. 571.

duce or account for the memorandum,[53] and show that it was made by the auctioneer or his clerk at the time of the sale,[54] that is to say, before other business intervened after the auction, so that nothing was left to memory.[55] In case of a continued sale of many parcels, it is sufficient to prove that the memorandum was kept complete as to everything but subscription, as the sale progressed from day to day, and was subscribed (where necessary) immediately upon the close of the sale.[56]

The memorandum must show everything necessary to establish the existence of the contract without having recourse to extrinsic evidence.[57] For the purpose of making out the facts required by the statute of frauds, the printed terms of sale or other separate papers cannot be used, unless referred to in the memorandum which was subscribed,[58] or unless physically annexed at the time of sale.[59] A coincidence in the contents of separate papers is not enough to connect them;[60] nor is evidence that the papers were actually intended by the parties to be read together.[61] A mistake in the given name of the buyer may be corrected by parol, if, rejecting the erroneous words or letters, enough remains to identify the person by, with the aid of extrinsic evidence.[62] And the identity of the property may be ascertained if the

[53] Davis *v.* Robertson, 1 Mill (S. C.), 71.

[54] Frost *v.* Hill, 3 Wend. 386; Price *v.* Durin, 56 Barb. 647; Hicks *v.* Whitmore, 12 Wend. 548; Walker *v.* Herring, 21 Gratt. 679, s. c., 8 Am. Rep. 616.

[55] Hicks *v.* Whitmore (above); Goelet *v.* Cowdrey, 1 Duer, 140.

[56] Price *v.* Durin, 56 Barb. 647.

[57] First Baptist Church *v.* Bigelow, 16 Wend. 31, and cases cited.

[58] Norris *v.* Blair, 39 Ind. 90, s. c., 10 Am. Rep. 135.

[59] Tallman *v.* Franklin, 14 N. Y. 588, rev'g 3 Duer, 395.

[60] So held of a mere coincidence of dates, between the catalogue containing terms of sale of specified lots for a day named, and a memorandum of sale of a lot by the catalogue number. Peirce *v.* Corf, L. R. 9 Q. B. 210, s. c., 8 Moak Eng. 316; and see First Church *v.* Bigelow, 16 Wend. 32.

[61] Johnson *v.* Buck, 35 N. J. 338, s. c., 10 Am. Rep. 243, and cases cited.

[62] Pinckney *v.* Hagadorn, 1 Duer, 97.

memorandum contains the means of identification by aid of extrinsic evidence.[63]

The written or printed terms of sale cannot be varied by evidence of the parol declarations of the auctioneer.[64] The quantity or amount of property offered in a lot may be proved by parol; [65] and so may the fact that misdescriptions in the catalogue were publicly corrected.[66] But the rules excluding oral evidence to explain or vary the contract, which have already been stated in the case of other modes of contract under the statute of frauds, apply to sales by auction.

44. Sales through a Broker.

The broker's authority must be shown,[67] if his entry or memorandum is relied on as the evidence of the sale; but it need not be in writing.[68] If it appears that he was employed by one party, the question whether he was also agent for the other, is usually one of fact; and the presumption that he was, if any such arises from his character of broker, is repelled by evidence that the other party had another agent or broker in the transaction.[69] Although his original authority was only from one, his authority to bind the other may be shown by the ratification by the latter of his act.[70]

In respect to the mode of proving the contract, especially where the statute of frauds requires a memorandum, the following rules are guides:

[63] Tallman *v.* Franklin, 14 N. Y. 584, rev'g 3 Duer, 395.

[64] Shelton *v.* Livius, 2 Crompt. & J. 411; Wright *v.* Deklyne, Pet. C. C. 199. Compare Hadley *v.* Clinton, 13 Ohio St. 502.

[65] Wright *v.* Deklyne (above).

[66] Eden *v.* Blake, 13 M. & W. 614.

[67] Moses *v.* Banker, 7 Robt. 441.

[68] Merritt *v.* Clason, 12 Johns. 102, affi'd in 14 Johns. 484.

[69] Dilworth *v.* Bostwick, 1 Sweeny, 588, MONNELL, J.

[70] Hankins *v.* Baker, 46 N. Y. 666. It may be proved by evidence that he sent a note of the bargain to the buyer, who kept it without objection until called on to fulfill the contract, when he objected merely on the ground that the broker did not sign it, Thompson *v.* Gardiner, 1 C. P. Div. 777, s. c., 18 Moak's Eng. 328; or sent

1. The broker's entry in his book, subscribed by him,[71] satisfies the statute. If authorized, it constitutes the contract between the parties, and is binding on both.[72] And it need not be shown that he communicated it to the defendant,[73] if it be shown that he was authorized to make it by defendant.[74] And if communicated, a variance in the terms as communicated, does not impair its validity.[75]

2. If the broker subscribed such an entry, bought and sold notes, delivered by him, do not constitute the contract.[76]

3. The bought and sold notes, when they correspond with each other and state all the terms of the contract, are complete and sufficient evidence to satisfy the statute, even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry.[77]

4. Though the broker made such an entry, if he did not subscribe it, and did not deliver a note, the terms of the contract may be proved by parol if the statute of frauds can be otherwise satisfied.[78]

5. Either a bought or sold note alone may satisfy the

a warehouse order, which he retained, and upon which he authorized an effort to sell the goods. Hankins *v.* Baker (above).

[71] Davis *v.* Shields, 26 Wend. 341.

[72] Sivewright *v.* Archibald, 17 Q. B. 115, s. c., 20 L. J. N. S. Q. B. 529; Benj. on S., § 290, etc. (*Contra*, I Tayl. Ev. 416. Stephen says the question is unsettled. Steph. Dig. Ev., Art. 64, n.) Unless apparently made only for another purpose. Gallagher *v.* Waring, 9 Wend. 28. A memorandum made, for his own convenience of charges, by a broker who merely brought together the parties who contracted, is not the contract. Aguirre *v.* Allen, 10 Barb. 74, affi'd, on other points, in 7 N. Y. 543.

[73] Merritt *v.* Clason, 12 Johns. 102, 14 Id. 484; Sivewright *v.* Archibald (above).

[74] See Davis *v.* Shields, 26 Wend. 341, 350.

[75] Sivewright *v.* Archibald (above).

[76] Same authorities and same conflict.

[77] Id. "Bought and sold notes," such as are commonly used by brokers in making their sales, are competent evidence to establish a contract. Murray *v.* Doud, 167 Ill. 368, 47 N. E. Rep. 717.

[78] Waring *v.* Mason, 18 Wend. 425.

statute;[79] and though both are shown to have been delivered, the plaintiff need only produce the one delivered to him, unless a variance appears.[80]

6. Where one note only is offered in evidence, the party sought to be charged has a right to offer the other note, or the subscribed entry in the book, to prove a variance.[81]

7. If the bought and sold notes correspond with each other, but vary from the subscribed entry in the book, the jury may find that the acceptance by the parties of the bought and sold notes constituted a new contract modifying that which was entered in the book.

8. If the bought and sold notes differ with each other in substance,[82] and there is no subscribed entry showing the terms of the contract in the broker's book, the papers do not satisfy the requirement of the statute.[83]

The understanding of a mere mutual agent, not a broker, as to the terms of sale, unless communicated by him to one party, and acceded to, or not objected to, by the other, is not evidence of a contract which will bind both.[84]

If the broker was agent for only one of the parties, parol evidence is competent to show that the contract he actually made with the other was not truly stated in the memorandum.[85] If he was agent for both parties such parol evidence is not competent;[86] but it may be shown by parol that the terms stated in the memorandum exceeded his authority.[87] If all the terms appear on the notes, the question whether

[79] This conclusion seems supported by the doctrine of Butler *v.* Thompson, 92 U. S. (1 Otto) 416; and Parton *v.* Crofts, 16 C. B. N. S. 11 (recognized in 42 N. Y. 520); Hankins *v.* Baker, 46 N. Y. 666.

[80] Durrell *v.* Evans, 1 H. & C. 174, s. c., 31 L. J. Ex. 337, 1 Tayl. Ev. 416.

[81] Sivewright *v.* Archibald (above).

[82] Variances may be explained by parol to be not material. Bold *v.* Rayner, 1 Mees. & W. 343; Kempson *v.* Boyle, 3 Hurlst. & C. 763.

[83] Sivewright *v.* Archibald (above).

[84] Fiedler *v.* Tucker, 13 How. Pr. 9, MITCHELL, J.

[85] See Davis *v.* Shields, 26 Wend. 341.

[86] Coddington *v.* Goddard, 16 Gray, 436.

[87] Id.; Peltier *v.* Collins, 3 Wend. 459.

the transaction was a sale or for some other purpose, may be determined by the aid of a separate writing though addressed to a third person, if subscribed by the party to be charged.[88]

45. Demand.[89]

The fact that the contract fixed a time and place for payment, does not require plaintiff to prove demand before suit;[90] but if the contract is so expressed as to make demand a condition precedent,[91] or the price was payable in specific articles, to be furnished by the debtor, a demand and refusal must be shown,[92] unless the contract is so expressed as to put him in default without them. And where the defendant is entitled to a reasonable time to comply with a demand, the demand must be made a reasonable time before suing.[93]

46. Interest.

Unless a credit is proven, a sale is presumed to have been for cash,[94] and if it be shown that the price was fixed, either by the contract[95] or by the buyer promising, on receiving information of the amount, that he would pay,[95a] interest is recoverable from the time of demand.

A draft drawn by plaintiff upon defendant for the price, which he refused to accept, is equivalent to a demand of payment for this purpose.[96]

Where there is a general usage in the particular trade or branch of business, or among merchants of the place, to charge and allow interest, parties having knowledge of the

[88] Peabody *v.* Speyers, 56 N. Y. 230.

[89] See also chapter XIII, paragraph 20, and chapter XV, paragraph 10 of this vol.

[90] Locklin *v.* Moore, 57 N. Y. 360, affi'g 5 Lans. 307.

[91] Id.

[92] Smith *v.* Tiffany, 36 Barb. 23; Hunt *v.* Westervelt, 4 E. D. Smith, 225.

[93] Boutwell *v.* O'Keefe, 32 Barb. 434, 439.

[94] Pollock *v.* Ehle, 2 E. D. Smith, 541; Knapp *v.* Hubbard, 176 Mich. 264, 142 N. W. Rep. 571.

[95] Beers *v.* Reynolds, 11 N. Y. 97, affi'g 12 Barb. 288.

[95a] Pollock *v.* Ehle (above).

[96] Cooper *v.* Coates, 21 Wall. 111.

usage are presumed to contract in reference to it.[97] Evidence that the buyer was one of the seller's customers, and that plaintiff always charged interest after a certain time, is *prima facie* enough.[98]

47. Non-payment.

Unless the contract is special, plaintiff need not allege[99] or prove[1] non-payment; but the sale and delivery being proved or admitted, the burden is on defendant of proving payment if he rely on that fact.[2] Negotiable paper of the buyer,[3] or of his agent,[4] or of either of several joint buyers,[5] received by the seller, for price, whether at the time of the

[97] Esterly *v.* Cole, 3 N. Y. 502.

[98] Reab *v.* McAllister, 8 Wend. 109, affi'g 4 Id. 483. The admission of evidence of the usages does not become improper, because the party fails subsequently to furnish the necessary proof that the other had knowledge of the usage. Esterly *v.* Cole (above); but compare Trotter *v.* Grant, 2 Wend. 413; Wood *v.* Hickok, 2 Id. 501; and cases cited under paragraph 9, above.

[99] Salisbury *v.* Stimson, 10 Hun, 242.

[1] Id., Buswell *v.* Poineer, 37 N. Y. 312.

[2] The defense of payment must be established by a preponderance of evidence. Baine *v.* Groat, 171 N. Y. App. Div. 708, 157 N. Y. Supp. 750; Christian *v.* Bryant, 102 Ga. 561, 27 S. E. Rep. 666.

See Schwall *v.* Higginsville Milling Co., 195 Mo. A. 89, 190 S. W. Rep. (Mo.) 959. See Southern States Co. *v.* Long, 73 So. Rep. (Ala. App.) 148; Hughes *v.* Eastern Ry., etc., Co., 93 Wash. 558, 161 Pac. Rep. 343.

Under the Georgia statute, notice of intention to resell must be given to the original purchaser. United Roofing Co. *v.* Albany Mill Supply Co., 18 Ga. A. 184, 89 S. E. Rep. 177.

[3] Murray *v.* Gouverneur, 2 Johns. Cas. 438.

A purchaser does not establish payment by mere proof of the mailing of a check to his vendor. Cantasano *v.* Courtney, 98 Misc. 623, 163 N. Y. Supp. 156.

The giving by the purchaser of a check, on which payment was stopped, does not, in the absence of an agreement that the check should constitute payment, amount to a payment within the statute of frauds. Hessberg *v.* Welsh, 147 N. Y. Supp. 44.

[4] Porter *v.* Talcott, 1 Cow. 359; Davis *v.* Allen, 3 N. Y. 168; Higby *v.* N. Y. & Harlem R. R. Co., 3 Bosw. 497, s. c., 7 Abb. Pr. 259.

[5] See Bates *v.* Rosecrans, 37

sale or at any other time, or negotiable paper of any other person [6] received by the seller after the sale, at a time when the price may be regarded as a pre-existing debt,[7] is presumed not to have been received in payment. Negotiable paper of another than the buyer or his agent, received at the time [8] of sale and delivery, it is presumed was received in payment.[9]

These presumptions may be rebutted by evidence of an express agreement to the contrary,[10] even though a receipt was passed acknowledging that the paper was given in payment.[11] Such an agreement may be inferred from circumstances, such, for instance, as that the buyer guaranteed the paper.[12] But the fact that the buyer did not indorse the paper does not raise a presumption that there was no agreement to take it in payment.[13]

If negotiable paper given did not amount to payment under these rules, the seller must produce and offer to sur-

N. Y. 409, s. c., 4 Abb. Pr. N. S. 276, affi'g 23 How. Pr. 98.

[6] Vail *v.* Foster, 4 N. Y. 312; Smith *v.* Applegate, 1 Daly, 91.

The acceptance by the seller of notes from a mere volunteer having no privity with the purchaser, and the bringing of suit thereon when due, do not relieve the purchaser from liability upon the contract. Gordon Malting Co. *v.* Bartels Brewing Co., 206 N. Y. 528, 100 N. E. Rep. 457, 461.

[7] See Gibson *v.* Tobey, 46 N. Y. 637, 53 Barb. 191.

[8] Gibson *v.* Tobey, 46 N. Y. 637, 53 Barb. 191, and cases cited.

[9] Noel *v.* Murray, 13 N. Y. 167, affi'g 1 Duer, 385; see also Darnall *v.* Morehouse, 45 N. Y. 64, rev'g 36 How. Pr. 511; Combs *v.* Bateman, 10 Barb. 573.

[10] Young *v.* Stahelin, 34 N. Y. 258; Steamer St. Lawrence, 1 Black, 522, 532.

[11] So held of a receipt attached to a bill of parcels, acknowledging that the seller has "received payment by note." Buswell *v.* Poineer, 37 N. Y. 312, s. c., 4 Abb. Pr. N. S. 244, 35 How. Pr. 447. Otherwise of a receipt "on account, without recourse." Graves *v.* Friend, 5 Sandf. 568; see also Richard *v.* Wellington, 66 N. Y. 308.

[12] Butler *v.* Haight, 8 Wend. 535. Even though the guaranty was void, for not expressing a consideration (Monroe *v.* Hoff, 5 Den. 360), for it shows the intent equally well.

[13] Whitbeck *v.* Van Ness, 11 Johns. 409.

render it at the trial,[14] or prove that it is lost or destroyed.[15] If he produces it for cancellation, the fact that it had meanwhile been held by another does not avail.[16]

Evidence that the seller agreed, as part of the contract of sale, to receive negotiable paper of a third person in payment,[17] unless he agreed to take the risk,[18] does not preclude him from refusing a tender of it, if the insolvency of the makers became known thereafter and before delivery.[19] In such case he may recover the price. Otherwise, if it was not known to either party till after delivery.[20] Evidence that, after the sale, he expressly accepted the note as payment of the pre-existing debt, does not preclude him from proving that the maker was then insolvent, and that he was ignorant of the fact; and thereupon he may recover the price.[21]

II. DEFENDANT'S CASE

48. Denial of Contract.

Under a general denial,[22] or denial of the making of the contract alleged,[23] evidence is admissible that the goods

[14] Holmes *v.* D'Camp, 1 Johns. 34; Burdick *v.* Green, 15 Johns. 247.

[15] Id.

[16] Patterson *v.* Stettauer, 40 Super. Ct. (J. & S.) 69.

[17] Benedict *v.* Field, 16 N. Y. 595.

[18] Id. And even then if he was induced to do so by fraud. Pierce *v.* Drake, 15 Johns. 475.

[19] Id.

[20] Des Arts *v.* Leggett, 16 N. Y. 582.

[21] Roberts *v.* Fisher, 43 N. Y. 159. Moreover, under a contract providing for payment partly in cash and partly by a transfer of real property, unreasonable neglect of the purchaser to tender a deed entitles the vendor to recover a money judgment for the balance due, without demanding a deed. Goodwin *v.* Heckler, 252 Pa. 332, 97 Atl. Rep. 475.

[22] Manning *v.* Winter, 7 Hun, 482.

[23] Wheeler *v.* Billings, 38 N. Y. 263; Hawkins *v.* Borland, 14 Cal. 412; Marsh *v.* Dodge, 66 N. Y. 533, rev'g 4 Hun, 278.

Under a general denial, the defendant has been allowed to show that the goods were furnished upon the understanding that, if defendant would secure for plaintiff a discount on goods purchased from his principal, the goods would be given free. In this case it was held that the burden was on the plaintiff

were delivered under a special contract which was substantially and materially different from that alleged, and was unperformed by plaintiff.[24] The rules as to contradicting an apparent written agreement of sale have already been stated.[25] If the seller has testified as a witness to prove his sale, he may be impeached on cross-examination by asking if he has not offered to sell again.[26]

49. Set-off against Plaintiff's Agent.

To let in the state of the accounts between defendant and an alleged agent of plaintiff, with whom defendant dealt as if he were the principal, it should be shown that the plaintiff had intrusted the alleged agent with the possession of the goods, that such person had sold them as his own, in his own name; that defendant dealt with him as, and believed him to be, the principal in the transaction, and that before he was undeceived the set-off accrued. It is not necessary for defendant to show that he had no means of knowing that such person was only in appearance the owner.[27] The fact that the alleged agent charged the defendant a commission, and the fact that in the invoice rendered to defendant he did not charge him as purchaser from him, but for goods bought by his order and on his account, are relevant; but not conclusive against letting in the state of the accounts between the defendant and the agent.[28]

to show the agreement as alleged, and under the general denial the defendant could introduce any evidence controverting plaintiff's theory of the case. General Auto Supply Co. *v.* Rockwell, 162 N. Y. Supp. 210.

[24] Manning *v.* Winter (above). If the answer sets up that defendant was to pay when he could, the burden of the proof is upon him to make out the defense. Johnson *v.* Plowman, 49 Barb. 472; General Auto Supply Co. *v.* Rockwell, 162 N. Y. Supp. 210.

[25] See paragraphs 8, 9, &c.; Lent *v.* Hodgman, 15 Barb. 274; Groot *v.* Story, 44 Vt. 200; George *v.* Foy, 19 N. H. 544.

[26] Knight *v.* Forward, 63 Barb. 311.

[27] Borries *v.* Imperial Ottoman Bk., L. R. 9 C. P. 38, s. c., 7 Moak's Eng. 138.

[28] Armstrong *v.* Stokes, L. R. 7 Q. B. 598, s. c., 3 Moak's Eng. 217.

50. Denial of Agency Binding Defendant.

Under a general denial defendant may contest the authority of a person who is claimed to have bought as his agent, and may show that the agency, once existing, had been revoked, and that plaintiff had notice of such revocation.[29] Evidence of the way in which the alleged agent carried on business is competent for that purpose.[30] But if the existence of agency is admitted, excess of authority is not provable unless alleged in the answer.[31] If it appear that the goods were purchased on credit by a known agent, for use of a known principal, the presumption is that the credit was given to the principal and he can rebut this by affirmative evidence that it was given exclusively to the agent.[32] This fact must appear clearly.[33] The fact that the alleged agent has not recognized the claim as his debt, is not competent in favor of defendant.[34]

51. Plaintiff an Agent for Defendant.

If it appear that plaintiff was the agent of defendant to buy, he must prove that he made a full disclosure to plaintiff of the fact that he was the owner of the goods charged, or the nature of his adverse interest in the transaction.[35] It is not enough to prove that he made such statements as should put the principal on inquiry.[36] Agency and failure to disclose interest being shown, the facts that the agent acted without compensation, and without intent to defraud,

[29] Heir *v.* Grant, 47 N. Y. 278.

[30] Id.

[31] See Merchants' Bank *v.* Griswold, 9 Hun, 561.

[32] Butler *v.* Evening Mail Assoc., 61 N. Y. 634, rev'g 34 Super. Ct. (J. & S.) 58.

[33] Meeker *v.* Claghorn, 44 N. Y. 349.

[34] Turner *v.* See, 57 N. Y. 667. Compare Springer *v.* Drosch, 32 Ind. 486, s. c., 2 Am. Rep. 356.

[35] Conkey *v.* Bond, 36 N. Y. 427, s. c., 3 Abb. Pr. N. S. 415, affi'g 34 Barb. 276; Dunne *v.* English, L. R. 18 Eq. Cas. 524, 10 Moak's Eng. 837. For this purpose the testimony of the agent is not alone enough to countervail that of the principal to the contrary, if their credibility appears equal. Dunne *v.* English (above).

[36] Dunne *v.* English (above).

and made no false representation,[37] or acted according to a usage of trade, not shown to be known to, and assented to by the defendant,[38] are not material. The fact that plaintiff, made, or assented to a charge for commissions, is conclusive against him to show that to some extent the relation of principal and agent existed.[39]

52. Defendant not the Buyer, but Agent for Another.

Under a general denial, defendant may show that, in making an oral contract sued on, he acted as agent for another, and on his credit, plaintiff knowing of the agency;[40] and for this purpose defendant may prove the relations between himself and his alleged principal; [41] but the subsequent admissions of the latter, that he was the real debtor, if not part of the *res gestæ* of an act properly in evidence, are not competent against the plaintiff.[42] If, however, the contract was in writing, and defendant appears in it as principal, parol evidence cannot be admitted for the purpose of exonerating him, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed; [43] or even that he was known to the other party to be an auc-

[37] Conkey *v.* Bond (above).

[38] Robinson *v.* Mollett, L. R. 7 Ho. of L. 802, s. c., 14 Moak's Eng. 177.

[39] Armstrong *v.* Stokes, L. R. 7 Q. B. 598, s. c., 3 Moak's Eng. 217.

[40] Merritt *v.* Briggs, 57 N. Y. 651.

A suit against an individual will not be sustained where it appears that the goods were shipped and charged to a corporation, of which the individual was an officer. To maintain such an action the plaintiff would have to prove that the company was not a corporation. Wolf *v.* Solomon, 59 Pa. Super. 255.

[41] McDougall *v.* Hess, 68 N. Y. 620; Fuller *v.* Wilder, 61 Me. 525.

[42] Wilson *v.* Sherlock, 36 Me. 295. Compare Black *v.* Richards, 2 Stew. & P. (Ala.) 338.

[43] Gordon Malting Co. *v.* Bartels Brewing Co., 206 N. Y. 528, 100 N. E. Rep. 457, 461; Nash *v.* Towne, 5 Wall. 703; Higgins *v.* Senior, 8 Mees. & W. 844; Babbett *v.* Young, 51 Barb. 466. Except, perhaps, where he or his principal was a public officer, and known to be dealing as such. Walker *v.* Christian, 21 Gratt. (Va.) 291.

tioneer or broker, who is usually employed in selling or buying property as agent,[44] or an attorney for a party named on the record.[45]

53. By Bidding at Auction.

Where a buyer at auction defends on the ground of by bidding, the burden of proof is on him to prove the fraud; but if there be proof that the fraud was practiced for the purpose by the auctioneer, it is not essential that he should prove that the owner knew of it.[46] But it should appear that defendant was actually misled; though this may be inferred by the jury from the intent to mislead, and the nature of the method pursued.[47]

54. Rescission.

When the maker, or seller, of an article takes it back after delivery, because the price remains unpaid, the legal presumption is that the sale is rescinded, unless there is some evidence to show an intent to take it for the purpose of resale on the buyer's account, or otherwise not to discharge the debt for the price.[48] Even if a modification or rescission of an excutory contract may be proved by parol, notwith-

[44] Mills *v.* Hunt, 20 Wend. 431; McComb *v.* Wright, 4 Johns. Ch. 659.

[45] Chappell *v.* Dann, 21 Barb. 17.

[46] Curtis *v.* Aspinwall, 114 Mass. 187, s. c., 19 Am. Rep. 332.

[47] Id.

[48] Sloan *v.* Van Wyck, 4 Abb. Ct. App. Dec. 250, affi'g 47 Barb. 634, and rev'g 36 Id. 335.

Where a return of the goods has been accepted pursuant to an agreement to rescind, the validity of such agreement cannot be attacked for want of consideration. Battle *v.* Holmes, 146 Ga. 245, 91 S. E. Rep. 32.

If the fact of rescission is set up by the defendant, he may show that he tendered the machines back and afterward held them subject to the plaintiff's order. Evidence of conversations between one of the parties and the agent of the other as to the terms of rescission is also admissible. Osborne & Co. *v.* Ringland & Co., 122 Iowa, 329, 98 N. W. Rep. 116.

As to whether and how the seller may rescind the sale under the Sales Act, see Personal Property Law (N. Y. Con. Laws), § 142.

standing the statute of frauds, still, after a sale has been executed, the taking back is a new contract within the meaning of the statute, and its terms must be proved by the statute evidence.[49] Evidence of the insolvency of the buyer, and notice of it given by him, coupled with the facts that after such insolvency no steps were taken indicating an intention to stand by the contract, and that time for several installments passed without delivery or payment, will sustain an inference that the seller had a right to conclude that the insolvent had abandoned the contract, and if he did so conclude, had a right to abandon it himself.[50] Where the seller has been defrauded, lapse of time without rescinding is some evidence that he has determined to affirm the contract; and when the laspe of time is great, it may be treated as sufficient evidence to show that he has so determined.[51]

A general agent to buy (though in a particular business only), is presumed to have had power to rescind.[52] Otherwise, of a special agent.

[49] Blanchard *v.* Trim, 38 N. Y. 228. Compare 9 Wall. 272, and paragraph 27 of this chapter.

The burden of proving rescission is on the purchaser, and unless he establish it, there can be no recovery of partial payments made on the purchase price, on the theory that the sale was rescinded. Brookside Laundry *v.* Daley, 161 N. Y. Supp. 259.

[50] Morgan *v.* Bain, L. R. 10 C. P. 15, s. c., 11 Moak's Eng. 220, and cases cited. Compare Freeth *v.* Burr, L. R. C. P. 208, s. c., 9 Moak's Eng. 393.

[51] Clough *v.* London & North Western R. Co., L. R. 7 Exch. 26, 35, s. c., 1 Moak's Eng. 148, 158. See Manchester Sawmills Co. *v.* A. L. Arundel Co., 73 So. Rep. (Ala.) 24; St. Louis Carbonating & Mfg. Co. *v.* Loevenhart, 190 S. W. Rep. (Mo. App.) 627; Brown *v.* Domestic Utilities Mfg. Co., 172 Cal. 733, 159 Pac. Rep. 163; Bayer *v.* Winton Motor Car Co., 160 N. W. Rep. (Mich.) 642.

"It has been held that in all sales the seller has a right to assume that the purchaser intends to pay for the goods purchased, and that when an insolvent purchaser, with knowledge of his insolvency, purchases property on credit, with the preconceived and formed intention of not paying for them, this constitutes such a fraud upon the seller as will enable him to rescind the contract." Scandinavian, etc., Co. *v.* Skinner, 56 Ind. App. 520, 105 N. E. Rep. 784.

[52] Nelson, Ch. J. Anderson *v.*

55. Recoupment.

The breach of a valid agreement between the same parties, which might itself be subject of a cross action against the plaintiff, may always be given in evidence (under proper pleading), either in mitigation of damages or in bar of an action on the agreement of which it formed either the whole or part of the consideration. If the stipulation on plaintiff's part was a condition precedent to defendant's obligation, evidence of its breach is generally admissible, under a general denial; but otherwise should be pleaded by defendant.[53]

56. Defects in Title, Quantity or Quality.

If delivery or acceptance is in issue on the pleadings, evidence that the thing tendered did not correspond with the contract, or that plaintiff could not give title, will be admissible, though not specially pleaded; but if acceptance is admitted, or proved, and a price fixed by contract is relied on by plaintiff, evidence of deficiency in quality is not admissible, unless set up in the answer.[54] If the plaintiff sues

Coonley, 21 Wend. 279. And see Dillon *v.* Anderson, 43 N. Y. 231; Osborne & Co. *v.* Ringland & Co., 122 Iowa, 329, 98 N. W. Rep. 116.

Under a provision declaring that the contract can be modified only by a certain officer of a company, he alone can consent to a change. M. S. Sulunias Banana Co. *v.* Fruit Dispatch Co., 18 Ga. A. 306, 89 S. E. Rep. 376.

[53] The leading cases are Reab *v.* McAllister, 8 Wend. 110; Batterman *v.* Pierce, 3 Hill, 171; Harrington *v.* Stratton, 22 Pick. 510. Compare Seymour *v.* Davis, 2 Sandf. 239. See Adkins, etc., Co. *v.* Rhinelander Paper Co., 199 Ill. App. 347.

[54] McCormick *v.* Sarson, 1 Sweeney, 161, s. c., 38 How. Pr. 190; Fetherly *v.* Burke, 54 N. Y. 646; Levine *v.* Kosher Matzoths Baking Co., 95 Misc. 565, 195 N. Y. Supp. 845; M. Hammel Wine Co. *v.* Netter, 197 Ill. App. 382; Polson Logging Co. *v.* Neumeyer, 229 Fed. Rep. 705, 144 C. C. A. 115.

Where the purchaser's contract entitles him to delivery of a definite quantity, he is not bound to accept a tender of a lesser quantity. Owensboro Wheel Co. *v.* Trammell, 172 Ky. 564, 189 S. W. 702; Weinmann *v.* Fellman, 162 N. Y. Supp. 131.

Where, in an action to recover the price of goods, it appeared that the goods had been obtained by the plaintiffs through a thief, who had stolen them from the defendant, it was held that the plaintiffs

on a *quantum meruit*, evidence of deficiency in quality is admissible, if alleged, even though acceptance under a contract fixing a price be proved.[55] If the defendant sets up warranty,[56] or false representation,[57] either directly, or by denying that there was a purchase except upon terms specified in the answer,[58] the burden is on him to prove the defense.

The mode of proving defects is stated below.

57. Deceit.

The rules regulating the mode of proof of false representations are substantially the same as in an action for damages.[59]

58. Inconsistent Remedies.

The pendency of replevin by the same plaintiff to recover the goods, goes in bar of an action subsequently brought for the price.[60] The pendency of a mechanic's lien foreclosure, for the same goods, against the same defendant, is also a defense.[61]

were not entitled to recover, notwithstanding that the defendant, in order to obtain possession of the goods from the plaintiffs, had promised to pay a price therefor, such promise being without consideration. Marcus *v.* Mayer, 147 N. Y. Supp. 973.

[55] Moffett *v.* Sackett, 18 N. Y. 522.

Where the article furnished by the seller is different from the one contracted for and defendant accepts the same in lieu of the article bought, the seller may recover on a count for damages for the breach of the buyer's contract to accept any pay for the article. Vinegar Bend Lumber Co. *v.* Soule Steam Feed Works, 182 Ala. 146, 62 So. Rep. 279.

[56] Purity Ice Co. *v.* Hawley Down Draft Furnace Co., 22 App. (D. C.) 573, 594.

[57] Dorr *v.* Fisher, 1 Cush. 271; Lane *v.* McLay, 91 Conn. 185, 99 Atl. Rep. 498.

A purchaser of goods may base his right to rescind upon a breach of warranty. Craven *v.* Quillin, 73 So. Rep. (Ala.) 413.

[58] Goodwin *v.* Hirsch, 37 Super. Ct. (J. & S.) 503; Bronge *v.* Mowat, 29 Cal. App. 388, 155 Pac. Rep. 827.

[59] See paragraphs 68, &c., and the Chapter on ACTIONS FOR DECEIT.

[60] Morris *v.* Rexford, 18 N. Y. 552. Compare Kinney *v.* Kiernan, 49 N. Y. 164.

[61] Ogden *v.* Bodle, 2 Duer, 611.

59. Wager Contract.

Unless the terms of the contract show the contrary, it is presumed that delivery was intended.[62] The burden is on defendant [63] to show that neither party [64] intended delivery. What was said at the time of contracting is competent; [65] and a party may be asked what was his intent.[66] The buyer's lack of means to pay,[67] if known to the seller,[68] or the fact that both were endeavoring to make "a corner" [69] is relevant; but the seller's lack of the property, though known to the buyer,[70] or that one party made wager contracts with other persons,[71] is not.

III. ACTION AGAINST BUYER FOR DAMAGES FOR NOT ACCEPTING

60. General Principles.

Plaintiff may be put to proof of the contract, the performance of all conditions precedent on his part, the refusal to receive, and the amount of damage.[72] The rules already stated as to the mode of proof of these facts are in general applicable. Indeed, under a complaint alleging sale and delivery, plaintiff may recover on proof of sale and wrongful refusal to accept, if defendant is not misled to his prejudice, for the variance is amendable.[73]

[62] Story *v.* Salomon, 71 N. Y. 420, affi'g 6 Daly, 538.

[63] Bigelow *v.* Benedict, 70 N. Y. 206, affi'g 9 Hun, 429; Clarke *v.* Foss, 7 Biss. 540.

[64] Gregory *v.* Wendell, 40 Mich. 432, s. c., 9 Cent. L. J. 76; Warren *v.* Hewitt, 45 Geo. 501; Clarke *v.* Foss (above); Pixley *v.* Boynton, 79 Ill. 351; Rumsey *v.* Berry, 65 Me. 570.

[65] Caisard *v.* Hinman, 6 Bosw. 14.

[66] Yerkes *v.* Salomon, 11 Hun, 471.

[67] Kilpatrick *v.* Bonsall, 72 Penn. St. 155.

[68] *In re* Green, 7 Bill. 338.

[69] Ex p. Young, 6 Biss. 53.

[70] Rumsey *v.* Berry (above).

[71] Gregory *v.* Wendell (above).

[72] Rosc. N. P. 495.

In the event of an anticipatory breach on the part of the buyer, the seller may elect to rescind. Wetkopsky *v.* New Haven Gas Light Co., 90 Conn. 286, 96 Atl. 950; Goodman *v.* Whiting Lumber Co., 62 Pa. Super. Ct. 230.

[73] See paragraph 1, this chapter.

61. Readiness to Perform.

Where delivery and payment were to be concurrent acts, an averment that at the time and place fixed plaintiff was ready and willing to deliver, etc., is enough;[74] and under this allegation, if put in issue, plaintiff must show he had the article ready for delivery, and that it corresponded with that contracted for,[75] and either that he offered to deliver, or that defendant dispensed with delivery, or made it an idle and useless form to attempt to deliver. The averment involves the ability of the plaintiff to deliver.[76] Evidence that a sufficient quantity of goods were at the place fixed for delivery, without proving that they were plaintiff's property,[77] or that he had a right to sell them,[78] is not enough to show performance. Excuse for breach is not admissible under an allegation of performance. But if the defendant notified of his intention to refuse, and forbade the

[74] Rosc. N. P. 510.

[75] Boyd *v.* Lett, 1 C. B. 222. In an action to recover the difference between the contract and the market price of wheat, which the purchaser has refused to accept on the ground that it was not merchantable as stipulated for by the contract, the burden of proof is upon the plaintiff to show that it had offered to deliver the kind of wheat called for by the contract. Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315, 44 Pac. Rep. 544.

See, as to demurrability of a complaint which fails to allege the market value of the property when default was made, Fletcher *v.* Southern, 41 Ind. App. 550, 84 N. E. Rep. 526.

[76] Id. citing Lawrence *v.* Knowles, 5 N. C. 399; De Medina *v.* Norman, 9 M. & W. 820; Spotswood *v.* Barrow, 1 Exch. 804; Riegal Sack Co. *v.* Tidewater Portland Cement Co., 95 Misc. Rep. 202, 158 N. Y. Supp. 954.

In an action on an executory contract to recover the price of property, plaintiff cannot recover unless he has tendered a delivery of the property and is able to perform. Security Title & Trust Co. *v.* Stewart, 154 N. Y. App. Div. 434, 139 N. Y. Supp. 74.

[77] Cobb *v.* Williams, 7 Johns. 24.

Where, under the contract, the buyer is to give shipping directions to the seller and fails to do so after proper demand, there is a breach of the contract to accept and pay for the goods. Gordon Malting Co. *v.* Bartels Brewing Co., 206 N. Y. 528, 100 N. E. Rep. 456, 461.

[78] See Nixon *v.* Nixon, 21 Ohio St. 114.

plaintiff to deliver goods ordered to be made, then plaintiff need not proceed to complete the contract on his part, and may show this under an allegation of refusal to accept, although the goods were not ready for delivery, and could not be delivered; for the plaintiff is thereby discharged from proceeding further; and such a notice to the plaintiff will support an allegation that the defendant prevented and discharged the plaintiff from supplying the goods and executing the contract.[79] To support an allegation of plaintiff's readiness to manufacture articles ordered by defendant, it is enough, in the first instance, to show that defendant had countermanded the manufacture while in progress and after delivery of some, and had notified his refusal to accept any more.[80]

IV. ACTION AGAINST SELLER FOR NON-DELIVERY

62. General Principles.

The general principles which apply to the various facts to be proved are already stated. It only remains to notice some rules specially applicable in this class of actions.

63. Orders and Acceptance.

Evidence that defendant, in acknowledging the receipt of an order, added qualifications as to undertaking to fill it, rebuts the presumption of assent raised by retaining the order, and throws on plaintiff the burden of showing that he communicated to defendant his assent to any new conditions thus made.[81] The holder, by assignment, of an order on defendant, may recover, on parol evidence, that defendant had verbally accepted the order when in the hands of

[79] Rosc. N. P. 511, citing Cort *v.* Ambergate Ry. Co., 17 Q. B. 127, 144.

[80] Id. citing also Baker *v.* Farminger, L. J. 28 Ex. 130. See also paragraph 30.

[81] Briggs *v.* Sizer, 30 N. Y. 647.

Where defendant in accepting plaintiff's offer to furnish certain materials, requested that a portion thereof be rushed, such request did not vitiate the acceptance as it did not constitute a counter offer. Simpson *v.* Emmons, 99 Atl. Rep. (Me.) 658.

the payee, and that the latter's assignee had stipulated to and had duly performed the conditions of it.[82] A variance in the consideration is not material, unless shown to have misled defendant to his prejudice.[83]

64. Readiness to Perform.

Under an agreement to deliver at a particular place, for payment on delivery, the buyer must allege [84] and prove [85] readiness and willingness to receive and pay at that place, or show that so doing was waived or prevented by some act of the seller;[86] and this is so whether the defendant was at the place ready to deliver or not.[87] But he need not prove tender and demand.[88] Any satisfactory evidence that plaintiff was able and willing to fulfill the terms of the contract,

[82] Bailey *v.* Johnson, 9 Cow. 115. But a written acceptance of a written order for mere delivery of goods is not a sale, but a promise to deliver on request; and so to be declared on. Burrall *v.* Jacot, 1 Barb. 165.

[83] See, for instance, Meriden Britannia Co. *v.* Zingsen, 4 Robt. 312, affi'd in 48 N. Y. 247. At common law, evidence of a sale, and payment by a sight-draft, duly paid, will support a declaration of a sale for so much "in hand paid." Nash *v.* Towne, 5 Wall. 690.

[84] Clark *v.* Dales, 20 Barb. 42.

[85] Topping *v.* Root, 5 Cow. 404; Vail *v.* Rice, 5 N. Y. 155; Bronson *v.* Wiman, 8 Id. 182.

[86] Cornwell *v.* Haight, 8 Barb. 327. In strictness, such waiver or prevention is not appropriate evidence under an allegation of readiness. Crandall *v.* Clark, 7 Barb. 169, 171; Cherrey *v.* Newby, 11 Tex. 457. But, properly, it is a question of variance, to be disregarded or amended, unless defendant is misled.

It has been held that a tender of payment in performance of a condition of the contract is sufficient without bringing the money into court. Bendix *v.* Staver Carriage Co., 194 Ill. App. 310.

[87] Porter *v.* Rose, 12 Johns. 209.

[88] Coonley *v.* Anderson, 1 Hill, 519; Crosby *v.* Watkins, 12 Cal. 85. Compare Dunham *v.* Pettee, 8 N. Y. (4 Seld.) 508; Baltimore Roofing & Asbestos Mfg. Co. *v.* Rubber Roofing Mfg. Co., 160 N. Y. Supp. 1006. According to the English authorities, a demand of the goods is sufficient evidence that the plaintiff was ready and willing to pay. Wilks *v.* Atkinson, 1 Marsh. 412; Levy *v.* Herbert, Lord, 7 Taunt. 318; and this, though the demand may be by the plaintiff's servant; Squier *v.* Hunt, 3 Price, 68, cited in Rose. N. P. 517.

on his part, is sufficient.[89] If the seller refused to deliver, and put it out of his power to do so, it is unnecessary for the buyer to offer to pay the unpaid price before suing;[90] and if having put it out of his own power ever to perform, he disavows and repudiates the contract, this, although done before the time for performance, is a breach without further demand.[91] Under an allegation of defendant's non-delivery, evidence of his tender properly refused by plaintiff, is admissible, unless defendant shows he was actually misled.[92]

65. Object of Buying.

Plaintiff may prove that defendants were informed that the object of the order was to enable plaintiff to fill a contract made by him with others, and that defendants contracted in reference to that fact, as evidence affecting the rule of damages.[93]

66. Defendant's Case—Only an Agent.

If the nominal seller, in contracting, did not disclose his principal, he may, if he disclosed the fact that he was acting as agent, exonerate himself from liability by showing a payment over to his principal, or other special circumstances

[89] Vail *v.* Rice, 5 N. Y. 155.

[90] Hawley *v.* Keeler, 53 N. Y. 114, affi'g 62 Barb. 231; La France *v.* Desautels, 225 Mass. 324, 114 N. E. Rep. 312.

[91] Sears *v.* Conover, 4 Abb. Ct. App. Dec. 179; *contra*, Daniels *v.* Newton, 114 Mass. 530, s. c., 19 Am. Rep. 384.

[92] Seaman *v.* Low, 5 Barb. 337.

In like manner, where a purchaser counterclaims for non-delivery of goods within the time agreed, it may be shown in rebuttal that plaintiff's failure to deliver as agreed was due to defendant's own breach. Lam *v.* Earlington Mach. Works, 170 Ky. 384, 186 S. W. Rep. 152.

In an action against the seller for non-delivery, the burden of proving such non-delivery is upon the plaintiff. B. P. Ducas Co. *v.* Bayer Co., 163 N. Y. Supp. 32.

[93] Messmore *v.* N. Y. Shot & Lead Co., 40 N. Y. 422; Gorham *v.* Dallas, etc., Ry. Co., 106 S. W. Rep. (Tex. Civ. A.) 930. Prospective profits, so far as they can properly be proved, and which would certainly have been realized but for defendant's default, are allowable as damages, although the amount is uncertain. Wake-

rendering it inequitable, as between the parties, to hold him responsible.[94]

67. Intermediate Destruction of Thing Sold.

Under an executory contract of sale, the presumption is, in the absence of evidence of a different intent, that the parties contemplated the continued existence of the thing sold, until the time for delivery, so that if it is destroyed by accident before delivery, without the seller's fault, he is not liable for failure to fulfill.[95]

V. ACTIONS AND DEFENCES ARISING ON BREACH OF WARRANTY

68. Grounds of the Action.

For a false warranty the action may be either on contract or for deceit.[96] If warranty, as distinguished from a mere representation,[97] is alleged and proved, scienter need

man *v.* Wheeler & Wilson Manuf. Co., 101 N. Y. 205, 4 N. E. Rep. 264. See paragraph 85, *infra.*

[94] Morrison *v.* Currie, 4 Duer, 79; and cases cited. Where the vendee brings an action for damages because of the vendor's failure to deliver goods sold, the vendor is entitled, with a view to reducing the damages, to show that the vendee could have obtained from a third party goods of the same kind and character as were called for by the contract at the contract. price. Saxe *v.* Penokee Lumber Co., 11 App. Div. (N. Y.) 291.

[95] Dexter *v.* Norton, 47 N. Y. 62, affi'g 55 Barb. 272. Compare 52 Id. 96.

The Sales Act (N. Y. Pers. Prop. Law, § 89) apparently has not changed the rule as announced in the text. Under the present statute it has been held that where a seller agrees to deliver certain goods, part of which are destroyed by fire, he is obliged to deliver the balance undestroyed no matter how expensive it may be. International Paper Co. *v.* Rockefeller, 161 N. Y. App. Div. 180, 146 N. Y. Supp. 371.

[96] Schuchardt *v.* Allens, 1 Wall. 368, and cases cited.

Some jurisdictions do not recognize the right to rescind for mere breach of warranty where the contract is silent upon the question and there has been no fraud. Dravo Doyle Co. *v.* Sulzberger & Sons Co., 197 Ill. App. 547. Elliott Supply Co. *v.* Johnson, 34 N. D. 632, 159 N. W. Rep. 2; Rimmele *v.* Huebner, 190 Mich. 247, 157 N. W. Rep. 10.

[97] Quintard *v.* Newton, 5 Robt.

not be averred, nor proved if averred;[98] but plaintiff may recover on proof of the false warranty, express or implied, if alleged as his cause of action, although allegations of fraud are unproved.[99] If the complaint is so framed as to make fraud the cause of action, a warranty being alleged as the means of the fraud, the warranty should be proved;[1] and plaintiff cannot abandon the charge of fraud and recover on mere false warranty.[2] A recovery for fraud alone, however, may be sustained.[3] If the complaint sets forth only a warranty, recovery for fraud alone is not allowable.[4]

69. Pleading.

Warranty, if relied on, must be alleged,[5] even though it be implied by law;[6] but, under an allegation not stating whether the warranty was express or implied, proof of either is admissible, and sufficient.[7] Evidence of a warranty is not to be excluded because the language proved does not

72. The fact that a representation made by a seller was false raises no presumption that he knew that it was false. Southern Development Co. *v.* Silva, 125 U. S. 247.

[98] Schuchardt *v.* Allens (above); Case *v.* Boughton, 11 Wend. 106; Holman *v.* Dord, 12 Barb. 336.

[99] Ledwich *v.* McKim, 53 N. Y. 307, affi'g 35 Super. Ct. (J. & S.) 304; Ross *v.* Terry, 63 N. Y. 613. *Contra*, now by N. Y. Code Civ. Pro., § 549. Where, in an action for damages for breach of a warranty in the sale of chattel property the petition also alleges that the defendant knew the warranty to be false, the plaintiff, upon proof of the warranty and its breach, may recover the damages to him thereby sustained, though he fail to prove the defendant's knowledge of the falsity of the warranty. Gartner *v.* Corwine, 57 Oh. St. 246, 48 N. E. Rep. 945.

[1] Snell *v.* Moses, 1 Johns. 96; and see Perry *v.* Aaron, Id. 129.

[2] Ross *v.* Mather, 51 N. Y. 108, rev'g 47 Barb. 582.

[3] Indianapolis, &c. R. R. Co. *v.* Tyng, 63 N. Y. 653, affi'g 2 Hun, 311.

[4] Fisher *v.* Fredenhall, 21 Barb. 82. For other illustrations, and the reasons of these distinctions, see Chapter XIV, paragraph 7; Chapter XV, paragraph 2; and paragraph 1 of this chapter.

[5] Diefendorff *v.* Gage, 7 Barb. 18; Merchants' Nat. Bank, etc., *v.* Nees, 112 N. E. Rep. (Ind.) 904.

[6] Prentice *v.* Dike, 6 Duer, 220.

[7] Hoe *v.* Sanborn, 21 N. Y. 552; Hannum *v.* Richardson, 48 Vt. 508, s. c. 21 Am. Rep. 152.

strictly follow the allegation;[8] and if there be a substantial variance, an amendment should be allowed, unless the adverse party has been misled to his prejudice.

70. Warranty of Things in Action.

On a transfer of negotiable paper, or things in action, for a valuable consideration, there is, unless circumstances raise a contrary presumption, an implied warranty, not only of title, but of genuineness, and that there is no defense arising out of the seller's own act,[9] and that he has no knowledge of any fact which makes it worthless, such as usury,[10] payment, insolvency of the maker,[11] &c. There is, however, no implied warranty as to legal validity, beyond this.[12]

71. Warranty of Title.

In a contract to sell, or a sale, there is an implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the prop-

[8] Oneida Manuf. Soc. *v.* Lawrence, 4 Cow. 440; Hastings *v.* Lovering, 2 Pick. 214. *Contra*, Summers *v.* Vaughan, 35 Ind. 323, s. c., 9 Am. Rep. 741.

[9] Delaware Bank *v.* Jarvis, 20 N. Y. 226.

A purchaser of goods has no action for breach of warranty against a bank holding a draft for the purchase price, with non-negotiable bill of lading attached, where the bank received the same from the seller and gave credit therefor. American Nat. Bank *v.* Warren, 96 Misc. Rep. 265, 160 N. Y. Supp. 413. See Neg. Inst. Law (N. Y. Cons. Laws), § 115.

[10] Fake *v.* Smith, 7 Abb. Pr. N. S. 106.

[11] Brown *v.* Montgomery, 20 N. Y. 287.

[12] The authorities are not agreed. Compare Ross *v.* Terry, 63 N. Y. 615; and Otis *v.* Cullom, 92 U. S. (2 Otto) 447. According to the latter case, the only liability, *ex contractu*, is for title and genuineness; and any other liability is in tort for bad faith. On an assignment of a judgment for value, without disclosing payments, there is an implied warranty that it is unpaid. Furniss *v.* Ferguson, 15 N. Y. 437; 34 Id. 485; but not that it will not be reversed. Glass *v.* Reed, 2 Dana (Ky.), 168. See Neg. Inst. Law (N. Y. Cons. Laws), § 115.

erty is to pass.[13] It is otherwise where the circumstances are such as to give rise to a contrary presumption.[14-15]

72. Express Warranty.

To constitute an express warranty, there must be some expression by the seller amounting to an unequivocal affirmation, relied on by the buyer, that the goods are of some certain quality. It is not enough to prove mere expressions of opinion.[16] But it is not necessary that the word "warrant" should be used. Any affirmation amounting to it is sufficient.[17] No particular phraseology is necessary. Any dis-

[13] Pers. Prop. L. (N. Y. Cons. Laws), § 94. Prior to the Sales Act a warranty of title was implied only where the seller was in possession of the goods. In Scranton *v.* Clark, 39 N. Y. 220, 224, it was said: " . . . If the property sold be at the time of the sale in the possession of a third party, and there be no affirmation or assertion of ownership, no warranty of title will be implied. In these circumstances, in order to attach any liability to the vendor upon a sale, there must be an affirmation which will amount to a warranty of the title."

[14-15] As where the seller merely sells such right as he has, without either having or undertaking to give actual or constructive possession, Id.; or is a pawnbroker, selling unredeemed pledges. Moreley *v.* Attenborough, 3 Exch. 500.

[16] Swett *v.* Colgate, 20 Johns. 196, 1825; Oneida Manuf. Soc. *v.* Lawrence, 4 Cow. 440; Martin *v.* Shoub, 113 N. E. Rep. (Ind. App.) 384; Alexander *v.* Stone, 29 Cal. App. 488, 156 Pac. Rep. 998.

The Sales Act, Pers. Prop. L. (N. Y. Cons. Laws), § 93, defines an express warranty as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

"It is elementary that, in order to entitle the plaintiff to maintain an action for breach of an express warranty, it must be established that the warranty was relied on." Crocker-Wheeler Electric Co. *v.* Johns-Pratt Co., 29 App. Div. 300, 302, 51 N. Y. Supp. 793, aff'd 164 N. Y. 593, 58 N. E. Rep. 1086.

[17] Whitney *v.* Sutton, 10 Wend. 412, 1835; Cook *v.* Mosely, 13 Id. 277; Wilbur *v.* Cartwright, 44 Barb. 536; Wells *v.* Selwood, 61 Id. 238.

A statement by the vendor that he was selling the goods "to the

tinct assertion of the quality of the thing, made by the seller as an inducement to purchase, and relied on by the buyer, may be ground for finding a warranty.[18] Evasive or equivocal language may be left to the jury, to determine whether it was intended to be understood as a warranty or affirmative representation.[19] Any positive affirmation, understood and relied on by the buyer, is a warranty, or, at least, evidence to go to the jury.[20] The description of the goods, in a bought and sold note, advertisement, bill of parcels, invoice, or in an oral assurance to the buyer, is evidence of a warranty.[21]

If the words used were such as might have been understood and intended by the parties as a warranty, the question whether they actually were, is a question of fact for the jury.[22] If the contract be in words clearly constituting a warranty, the seller cannot avoid it by evidence that he did not intend to be understood as intending what his language declares.[23]

best house in the city," is no warranty. Wasserstrom *v.* Cohen, 165 N. Y. App. Div. 171, 150 N. Y. Supp. 638.

[18] Chapman *v.* Murch, 19 Johns. 290; Gallagher *v.* Waring, 9 Wend. 20; Mason *v.* Crabtree, 186 S. W. Rep. (Mo. App.) 553; Peterson *v.* Denny-Renton Clay & Coal Co., 89 Wash. 141, 154 Pac. Rep. 123. (Brick sold as "highway paving brick," held subject to a warranty that it would be highway paving brick.)

[19] See, for instance, Cook *v.* Mosely, 13 Wend. 277; Burge *v.* Stroberg, 42 Geo. 88.

[20] Hawkins *v.* Pemberton, 51 N. Y. 198, rev'g 6 Robt. 42, and modifying earlier cases. Loper *v.* Lingo, 97 Atl. Rep. (Del.) 585.

[21] Id.; Wolcott *v.* Mount, 9 Vroom, N. J. 496, s. c., 20 Am. Rep. 425, affi'g 13 Am. Rep. 438; Dounce *v.* Dow, 64 N. Y. 16, rev'g 6 Supm. Ct. (T. & C.) 653. So of an order for a specified kind of goods, followed by delivery of a thing as such. White *v.* Miller, 7 Hun, 427. See Purity Ice Co. *v.* Hawley Down Draft Furnace Co., 22 App. (D. C.) 573 (dictum).

[22] Duffee *v.* Mason, 8 Cow. 25; Whitney *v.* Sutton, 10 Wend. 412; Blakeman *v.* McKay, 1 Hilt. 266; Hawkins *v.* Pemberton, 51 N. Y. 198, rev'g 6 Robt. 42.

[23] Hawkins *v.* Pemberton, 51 N. Y. 198, rev'g 6 Robt. 42; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. Rep. 372, 16 Am. St. Rep. 753.

Neither can the purchaser extend the effect of an express war-

Where the sale was oral, evidence of everything that took place between the parties, upon the subject, before and at its final completion, is competent.[24] If the warranty relied on was made after the seller had completed the sale, so that the consideration already given had been exhausted by a transfer without warranty, a new consideration must be proved.[25]

Upon a sale with *express* warranty, whether the sale be executed or executory, the buyer is not bound to rescind and return, on discovering a breach,[26] but in such case clearer proof of breach is required than if he did return the thing.[27] In respect to defects that were not open and visible, the buyer, with express warranty, is not bound to prove that he applied tests before consuming it in use.[28]

73. Agent's Authority to Warrant.

Evidence of authority conferred on an agent, general or special,[29] or a broker,[30] to sell (restrictions not appearing), raises a legal presumption of authority to warrant. Other-

ranty by parol evidence. Colt *v.* Demarest & Co., 159 N. Y. App. Div. 394, 144 N. Y. Supp. 557.

[24] Pierson *v.* Hoag, 47 Barb. 243; Cunningham *v.* Parks, 97 Mass. 172.

[25] Summers *v.* Vaughan, 35 Ind. 323, s. c., 9 Am. Rep. 741.

[26] Day *v.* Pool, 52 N. Y. 416, affi'g 63 Barb. 506; Ross *v.* Terry, 63 N. Y. 613.

[27] Day *v.* Pool (above).

[28] Dounce *v.* Dow, 57 N. Y. 16, rev'g 6 Supm. Ct. (T. & C.) 653; Gautier *v.* Douglass M'fg Co., 13 Hun, 514.

But one who purchases goods for resale is under an obligation to test the goods before using them and to reject them if found unmerchantable. Leiter *v.* Innis, 138 N. Y. Supp. 536.

[29] Schuchardt *v.* Allens, 1 Wall. 369, and cases cited.

The provisions of a seller's printed order form to the effect that no warranties had been made by the salesman which are not expressly stated in the order, warrants an inference that the salesman is authorized to change the contract by making representations not expressed therein. King *v.* Edward Thompson Co., 56 Ind. App. 274, 104 N. E. Rep. 106.

But see Fulton *v.* Sword Medicine Co., 145 Ala. 331, 40 So. Rep. 393, holding that such a provision shows "that the agent has no authority to make any verbal agreements varying the terms of the written contract."

[30] Nelson *v.* Cowing, 6 Hill, 336.

wise of a mere servant.[31] But the presumed authority is not to be stretched to unusual warranties.[32] Evidence of the usage of the trade is admissible as one means of defining the scope of the apparent authority of the agent or broker.[33] If there was neither express nor implied authority, it is not enough to show that the principal received and retained the price, without showing that he knew of the unauthorized warranty.[34]

74. Implied Warranty on an Executed Sale.

An *executed* sale of chattels—that is, a sale executed when made—does not of itself imply any warranty of quality. To establish such an implied warranty under the Sales Act there must be evidence of circumstances not ordinarily essential to sale, which afford ground for presuming a warranty to have been within the intention of the parties.[35] An im-

[31] Woodin *v.* Burford, 2 Cr. & M. 391. Persons executing a contract of sale as apparent principals will not be permitted to show by parol evidence that they were acting as agents of another, when sued on a warranty implied by such contract. Bulwinkle *v.* Cramer, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. Rep. 776.

[32] Smith *v.* Tracy, 36 N. Y. 79, 2 Greenl. Ev., 13th ed. 50 n.

"An agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty." Smith *v.* Tracy, 36 N. Y. 79.

[33] 2 Whart. Ev., § 967. *Contra*, Dodd *v.* Farlow, 11 Allen, 421.

An agent's authority to warrant may be proved in one of two ways, viz: by evidence that it is the usual custom for an agent to warrant such goods, or by proof of express authority. Cafre *v.* Lockwood, 22 N. Y. App. Div. 11, 47 N. Y. Supp. 916.

[34] Smith *v.* Tracy, 36 N. Y. 79. Compare Brower *v.* Lewis, 19 Barb. 574; Sweet *v.* Bradley, 24 Id. 549.

[35] Pers. Prop. L. (N. Y. Cons. Laws), § 96. See Readhead *v.* Midland R. Co., L. R. 4 Q. B. 379, 5 E. R. C. 436; Bywater *v.* Richardson, 1 A. & E. 508, 28 E. C. L. 246, 110 Reprint, 1301; Dravo Doyle Co. *v.* Sulzberger & Sons Co., 197 Ill. App. 547; International Harvester Co. *v.* Law, 105 S. C. 520, 90 S. E. Rep. 186; Glover Mach. Works *v.* Cooke-Jellico Coal Co., 173 Ky. 675, 191 S. W. Rep. 516; Slinger *v.* Totten, 160 N. W. Rep. (S. D.) 1008.

plied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.[36] Evidence that the buyer's purpose was communicated, does not alone rise an implied warranty that the thing was fit, for the purpose,[37] for it is enough if the known, defined, described thing bought, was delivered.[38] Neither the silence of the seller at the time of sale,[39] nor the fact that a sound price was paid,[40] will alone imply a warranty. But if the article was contracted to be furnished for a particular use, and it appears that the buyer relies on the seller's skill or judgment, there is an implied warranty that it should be suited for that use.[41]

The exposure or offer of goods for sale by a *manufacturer* as being of his build or workmanship (whether truly so or

[36] Pers. Prop. L. (N. Y. Cons. Laws), § 96, sub. 5. The Sales Act seems to change the common law of New York on this point. See Beirne *v.* Dord, 5 N. Y. 95, 102, 103, 55 Am. D. 321, where it is stated that a warranty "cannot be established by proof that it was a general custom or usage of persons dealing in the article thus to contract."

[37] Crogate's Case, 1 Sm. L. Cas. 247, 250; Jones *v.* Just, L. R. 3 Q. B. 197; Bartlett *v.* Hoppock, 34 N. Y. 118. But see, Lichtenthaler *v.* Samson Iron Works, 162 Pac. Rep. (Cal. App.) 441.

[38] See Dounce *v.* Dow, 64 N. Y. 416; Perine Machinery Co. *v.* Buck, 90 Wash. 344, 156 Pac. Rep. 20, Ann. Cas. 1917, C. 341; General Electric Co. *v.* United States, 50 Ct. Cl. 287; City & S. Ry. Co. *v.* Basshor, 82 Md. 397, 406, 33 Atl. Rep. 635.

[39] Caley's Case, 1 Sm. L. Cas. 241, 243.

[40] Wright *v.* Hart, 18 Wend. 449, affi'g 17 Id. 267.

[41] Pers. Prop. Law (N. Y. Cons. Laws), § 96, sub. 1. Under the common law of New York, a warranty of fitness for purpose was implied only where the seller was the manufacturer or grower of the goods. See Bartlett *v.* Happock, 34 N. Y. 118, 88 Am. D. 428; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13. Under the Sales Act the warranty may be implied irrespective of whether the seller is a grower or manufacturer or not. The following cases have construed this section of the Sales Act. Marx *v.* Locomobile Co. of America, 82 Misc. 468, 144 N. Y. Supp. 937; G. B. Shearer Co. *v.* Kakoulis, 144 N. Y. Supp. 1077; Bonwitt Teller *v.* Kinlen, 165 N. Y. App. Div. 351, 150 N. Y. Supp. 966; Monroe *v.* Arthond, 186 S. W. Rep. (Mo. A.) 554.

not), implies a warranty or representation that they are made properly, and that the fault, if any, is a latent one, arising from causes which he could not control.[42] Hence even on an executed sale by one assuming to be the maker, he is liable upon an implied warranty that the article is free from any defect produced by the manufacturing process itself.[43] Where the defect in the article arises from a defect in the materials employed, the warranty is implied, for the same reason, only where he is shown, or may be presumed to have known, the defect.[44]

In the case of *provisions*, for human food, there is an implied warranty that they are sound and wholesome, if they are sold for domestic consumption,[45] but not if they are sold as *merchandise*, and not for immediate domestic use.

Where there is no other liability as to quality, none is

[42] Chandelor *v.* Lopus, 1 Sm. L. Cas. 299, 316. A purchaser, having waived all warranties, express or implied, cannot recover for latent defects. Daniel *v.* Burson, 18 Ga. A. 25, 88 S. E. Rep. 745.

[43] Hoe *v.* Sanborn, 21 N. Y. 552. Compare Beck *v.* Sheldon, 48 N. Y. 365; Bartlett *v.* Hoppock, 34 N. Y. 118.

[44] Hoe *v.* Sanborn, 21 N. Y. 552. Compare Beck *v.* Sheldon, 48 N. Y. 365; Bartlett *v.* Hoppock, 34 N. Y. 118.

By the insertion in the Sales Act of the words: "Whether he be the grower or manufacturer or not" the distinction formerly existing between growers and manufacturers and other dealers has been done away with. Pers. Prop. L. (N. Y. Cons. Laws), § 96, sub. 1 and 2.

[45] Van Bracklin *v.* Fonda, 12 Johns. 468; Jones *v.* Murray, 3 Monr. (Ky.) 83; Moses *v.* Mead, 5 Den. 617; and see Divine *v.* McCormick, 50 Barb. 116; Flessher *v.* Carstens Packing Co., 93 Wash. 48, 160 Pac. Rep. 14; D. Rosenbaum's Sons *v.* Davis, etc., Co., 111 Miss. 278, 71 So. Rep. 388; Race *v.* Krum, 163 N. Y. App. Div. 924, 147 N. Y. Supp. 818 (ice cream purchased from a dealer for consumption); Leahy *v.* Essex Co., 164 N. Y. App. Div. 903, 148 N. Y. Supp. 1063 (chocolate pie purchased as food); Rinaldi *v.* Mohican Co., 171 App. Div. 814, 157 N. Y. Supp. 561 (sale of pork by retail dealer, who was held liable although he sold the pork in the same package in which he received it and although it bore the stamp of the United States Government inspector that it was sound and wholesome).

implied from a warranty of quantity; but the quantity is made up by unsound and sound together.[46]

In aid of evidence of an implied warranty, the buyer may testify to the fact that he purchased relying on the existence of the supposed quality.[47]

Where the warranty is an implied one, or the breach is a condition of the sale, as distinguished from a warranty, retaining the article after opportunity to ascertain the defect raises a presumption of acquiescence in the quality,[48] which is usually conclusive, unless induced by fraud.[49] If fraudulent acts inducing acceptance are alleged, and proved, it is no objection that other such acts also alleged remain unproved.[50]

75. — on Sale Partly or Wholly Executory.

An executory contract, unless the circumstances indicate a different intent, implies a warranty that the thing delivered shall be of such quality as to be merchantable or salable— that is, at least of medium quality or goodness.[51]

[46] Jones *v.* Murray, 3 Monr. (Ky.) 83.

[47] Ross *v.* Terry, 63 N. Y. 615.

[48] Reed *v.* Randall, 29 N. Y. 358; Purcell *v.* International Harvester Co. of America, 37 S. D. 517, 159 N. W. Rep. 47; Glover Mach. Works *v.* Cooke-Jellico Co., 173 Ky. 675, 191 S. W. Rep. 516.

It has been held that where an article was sold under circumstances giving rise to an implied warranty of fitness for the purpose, and the article proved worthless for any purpose, the buyer may defeat recovery of the purchase price, though he did not return the article. Monroe *v.* Arthaud, 186 S. W. Rep. (Mo.) 554.

[49] Dutchess Co. *v.* Harding, 49 N. Y. 324.

At common law in New York an implied warranty did not survive acceptance, but under the Uniform Sales Act, acceptance of the goods does not terminate a vendor's liability for breach of an implied warranty, provided the vendee notifies him of the defect within a reasonable time. Regina Co. *v.* Gately Furniture Co., 171 N. Y. App. Div. 817, 157 N. Y. Supp. 746.

[50] Id.

[51] Howard *v.* Hoey, 23 Wend. 350; J. B. Madsen & Co. *v.* Hogans, 189 Ill. App. 589; Renaud *v.* Peck, 2 Hilt. 137; Lawton *v.* Kiel, 61 Barb. 558; Hamilton *v.* Ganyard, 2 Abb. Ct. App. Dec. 314,

76. Sale by Sample.

The mere exhibition of a sample at the time of sale is not evidence of a sale by sample; it is evidence only of a representation that the sample has been taken from the bulk in the usual way.[52] If such a sale was not expressly agreed to be by sample, it is a question of intent whether it was a sale by sample.[53] When the contract is in writing, and nothing therein indicates that a sample was used or referred to, parol evidence is not admissible to show a sale by sample.[54]

A sale, though evidenced by a bill of parcels,[55] or a bought and sold note,[56] not referring to a sample, may be shown by parol to have been by sample, especially if the designation in the writing is not a sufficient description; [57] and evidence of the usage of the trade to make all such sales by sample, is competent for this purpose.[58] But if the circumstances of the sale are such that there was no express warranty, and the law does not imply one, a warranty cannot be established (even to the extent of conformity to samples exhibited), by mere proof of a usage of the trade to contract, with such warranty, in the manner proven.[59] Whether the sale was

affi'g 34 Barb. 204. Compare Chandelor *v.* Lopus, 1 Sm. L. Cas. 299, 318 [251].

[52] Waring *v.* Mason, 18 Wend. 425, 434; Hargous *v.* Stone, 5 N. Y. 85, 90; Henry *v.* Talcott, 175 N. Y. 385, 67 N. E. Rep. 617.

[53] Waring *v.* Mason (above).

"Even if the word 'sample' is used in a written order for goods to be manufactured, the sale is not by sample if the order contains minute specifications and descriptions, involving a great number of changes, variations and differences between the article to be made and the sample shown." Henry *v.* Talcott (supra).

[54] Harrison *v.* McCormick, 89 Cal. 327, 23 Am. St. Rep. 469; 26 Pac. Rep. 830.

[55] Bradford *v.* Manly, 13 Mass. 139.

[56] Boorman *v.* Jenkins, 12 Wend. 566, 18 Id. 435; Koop *v.* Handy, 41 Barb. 454.

[57] Pike *v.* Fay, 101 Mass. 134. Otherwise under special contract. Thomas *v.* Hunt, 4 Abb. Ct. App. Dec. 416.

[58] Syers *v.* Jonas, 2 Exch. 111.

[59] Beirne *v.* Dord, 5 N. Y. 102. See Greenwood Cotton Mill *v.* Tolbert, 105 S. C. 273, 89 S. E. Rep. 653, Ann. Cas., 1917, C. 338; Robert McLane Co. *v.* Swernemann & Schkade, 189 S. W. Rep. (Tex. Civ. App.) 282; Regina Co.

by sample or not, is a question of fact, on which evidence of usage is competent; but the liability resulting is a question of law, on which usage can have no weight. But no usage can be sustained in opposition to the established principles of law, so as to make the seller of manufactured goods, by sample, liable to the purchaser for damages occasioned by latent defects in the goods sold, not discoverable either in them or the sample by ordinary care.[60] Sale by sample, and warranty may both be proved, and one does not necessarily merge or supersede the other.[61] Sale by sample is only one kind of warranty, and does not preclude others.

To have the effect of proving sale by sample, the evidence must show that the parties mutually understood that they were dealing with the sample upon an agreement on the part of the seller that the bulk of the commodity corresponded with the sample.[62] If the sale is by agent, in the ordinary course of trade, special authority to use a sample, or other-

v. Gately Furniture Co., 171 N. Y. App. Div. 817, 157 N. Y. Supp. 746.

[60] Randall *v.* Smith, 63 Me. 105, s. c., 18 Am. Rep. 200, and cases cited, s. p., Barnard *v.* Kellogg, 10 Wall. 383.

[61] Murray *v.* Smith, 4 Daly, 273; and see Sands *v.* Taylor, 5 Johns. 410; but a written agreement of sale may exclude oral evidence of warranty.

[62] Beirne *v.* Dord, 5 N. Y. 95; Robert McLane Co. *v.* Swernemann & Schkade, 189 S. W. Rep. (Tex. Civ. App.) 282.

See Pers. Prop. L. (N. Y. Cons. Laws), § 97 for implied warranties on sales by sample. It will be seen that the Sales Act does not affect the pre-existing rules of law with respect to the requirement that intent should be shown. A contract for the manufacture and delivery of wrenches to be made in a first class manner and "in every way equal to a model," is not a sale by sample. Ideal Wrench Co. *v.* Garvin Mach. Co., 92 N. Y. App. Div. 187, 87 N. Y. Supp. 41, aff'd 181 N. Y. 573, 74 N. E. Rep. 1118. See also Smith *v.* Coe, 170 N. Y. 162, 63 N. E. Rep. 57. But it has been held that "a contract of sale which points out a known and ascertainable standard by which to judge the quality of goods sold, is, for all practical purposes, a sale by sample, and renders the vendor liable for damages upon a breach of warranty, although there has been an acceptance after opportunity to inspect the goods." Zabriskie *v.* Central

wise warrant, need not be proved, even though the agency be special.[63]

77. Presumption of Knowledge.

The law presumes that every dealer in articles brought to market is acquainted with all the circumstances, such as tendencies to deterioration, usually[64] attendant on cargoes composed of those articles; but a mere dealer is not presumed to know the precise quality of goods of a particular brand.[65]

78. Parol Evidence of Warranty on Written Sale.

If the parties have reduced their contract to writing, the instrument cannot be varied by oral evidence of a warranty[66] or representation[67] not expressed or implied in the writing,[68]

Vermont R. R. Co., 131 N. Y. 72, 29 N. E. Rep. 1006.

[63] Andrews *v.* Kneeland, 6 Cow. 354; see also Boorman *v.* Jenkins, 12 Wend. 572.

[64] Hargous *v.* Stone, 5 N. Y. 94.

[65] Dounce *v.* Dow, 57 N. Y. 16, rev'g 6 Supm. Ct. (T. & C.) 653.

Probably this distinction between dealers bringing articles to market, and "mere dealers," has been affected by the provisions of the Sales Act. See note 44, paragraph 74.

[66] Dean *v.* Mason, 4 Conn. 428; De Witt *v.* Berry, 134 U. S. 306, 312; Wheaton Roller-Mill Co. *v.* Noye Manuf. Co., 66 Minn. 156, 68 N. W. Rep. 854; Van Ostrand *v.* Reed, 1 Wend. 424; Lamb *v.* Crafts, 12 Met. 353; Reed *v.* Wood, 9 Vt. 285. And see, Anderson *v.* Merchants' Grocery Co., 99 S. C. 383, 84 S. E. Rep. 109.

[67] Rice *v.* Forsyth, 41 Md. 389; King *v.* Edward Thompson Co., 56 Ind. App. 274, 282, 104 N. E. Rep. 106.

[68] Pickering *v.* Dowson, 4 Taunt. 779, Benj. on S., § 621. But compare paragraph 9. So held of a bill of sale, Mumford *v.* McPherson, 1 Johns. 414; Pender *v.* Forbes, 1 Dev. & B. 250; Sparks *v.* Messick, 65 N. Car. 440; of an assignment of a patent right, Van Ostrand *v.* Reed, 1 Wend. 424; Rose *v.* Hurley, 39 Ind. 77, of a letter, Whitmore *v.* South Boston Iron Co., 2 Allen, 52, s. c., 1 Am. L. Reg. N. S. 403; and of the printed conditions of sale subscribed by the auctioneer, Powell *v.* Edmunds, 12 East, 6. Otherwise of unsigned conditions. Eden *v.* Blake, 13 Mees. & W. 614. Where the sale was not in writing, a warranty may be proved, though made during negotiations, some days before the sale. Wilmot *v.* Hurd, 11 Wend. 584.

No implied warranty can be read into a written contract or

unless fraud be shown,[69] nor can the warranty be established by extrinsic written evidence of a prior representation, such as the letters of negotiation,[70] or the advertisement of sale.[71] The writing may be deemed to contain the whole contract.[72] But this rule is greatly limited, where the statute of frauds does not require a writing,[73] and the instrument is one which does not purport to embody all the terms of the contract.[74] A bill of parcels, or sold note, given apparently as a receipt for the price,[75] or an invoice made out by the seller after an oral warranty,[76] is not a contract within the rule, and does

taken in connection with it, if its effect would be to contradict or vary the expressed terms and conditions of the contract. Where, however, the warranty has no such effect upon the terms of the contract, it may be implied from evidence of the surrounding circumstances. Lidgerwood Mfg. Co. *v.* Robinson, etc., Co., 183 Ill. App. 431. See Williston on Sales, p. 322, and Tranter Manuf. Co. *v.* Blaney, 61 Pa. Super. 379.

[69] As to what amounts to a sufficient plea of fraud, see Anderson *v.* Merchants' Grocery Co., 99 S. C. 383, 84 S. E. Rep. 109.

[70] Randall *v.* Rhodes, 1 Curt. C. Ct. 90.

[71] Mumford *v.* McPherson (above).

[72] Van Ostrand *v.* Reed, 1 Wend. 427. "If it be true that the failure of a vendee to exact a warranty when he takes a written contract precludes him from showing a warranty by parol, *a multi fortiori* when his written contract contains a warranty on the identical question, and one in its terms inconsistent with the one claimed." De Witt *v.* Berry, 134 U. S. 306, 312.

A written warranty cannot be enlarged by proof of oral warranties antedating the written one. Houghton Implement Co. *v.* Doughty, 14 N. D. 331, 104 N. W. Rep. 516.

[73] See 1 Pars. on Contr. 547.

[74] Thus where the writing consists of a written undertaking to ship, with an acknowledgment of previous receipt of payment, parol evidence is admissible to show what the terms of contract of sale were, and that the goods were those actually ordered. Hogins *v.* Plympton, 11 Pick. 97, Shaw, Ch. J.

In an action for the price of coal sold and delivered on a written order which does not in express terms embody any warranty, parol evidence is admissible to show a warranty as to quality, on the theory that the writing does not contain all the terms of the contract. Lovell *v.* Alton, 82 Misc. 431, 143 N. Y. Supp. 995.

[75] Filkins *v.* Whyland, 24 N. Y. 338; 24 Barb. 379; Allen *v.* Pink, 4 Mees. & W. 140. *Contra*, where the statute of frauds required the bill. Lamb *v.* Crafts, 12 Metc. 353.

[76] Foot *v.* Bentley, 44 N. Y. 166.

not preclude evidence of oral warranty. And if there be a written contract, the fact does not preclude evidence of a warranty made by parol, subsequent to the execution of the written contract.[77]

An express warranty does not preclude an implied warranty to the same effect unless inconsistent therewith.[78] And an express warranty may be helped out or enlarged by a warranty implied from knowledge of the purpose for which the thing was ordered.[79]

79. Parol Evidence to Explain Warranty.

Upon principles already stated, ambiguous expressions in the warranty may be explained by parol.[80]

80. Variances in the Contract, and Breach.

Variances between the allegation and proof, in respect to other parts of the contract,—the title to the goods,[81] the consideration of the sale,[82] and the like,—are of secondary

[77] Brewster *v.* Countryman, 12 Wend. 446.

[78] Pers. Prop. L. (N. Y. Cons. Laws), § 96, sub. 6; Ross *v.* Terry, 63 N. Y. 615. *Contra*, Whitmore *v.* South Boston Iron Co., 2 Allen, 52, 60, s. c., 1 Am. L. Reg. N. S. 403. Compare Boothby *v.* Scales, 27 Wis. 626.

[79] See Parks *v.* Morris Tool Co., 54 N. Y. 586, affi'g 4 Lans. 103, s. c., 60 Barb. 140.

An express warranty does not exclude an implied warranty unless the two would be inconsistent. Lidgerwood Manuf. Co. *v.* Robinson, etc., Co., 183 Ill. App. 431.

[80] Paragraphs 9, 10. Thus on a warranty that a machine could do certain work "with a good team," parol evidence of the declarations of the party is admissible, to show whether a two-horse or four-horse team was meant. Sanson *v.* Madigan, 15 Vt. 144. And see Pike *v.* Fay, 101 Mass. 134. Otherwise of evidence contradicting the language. Yates *v.* Pym, 6 Taunt. 446.

Thus where the contract called for a chassis of a certain horse power, the purchaser could not, in the absence of fraud or deceit, recover for the breach of an alleged oral warranty by the seller that the motor would develop a greater horse power. Colt *v.* Demarest & Co., 159 N. Y. App. Div. 394, 144 N. Y. Supp. 557.

[81] Starr *v.* Anderson, 19 Conn. 338.

[82] Smith *v.* Battams, L. J. 26 Exch. 232; Turner *v.* Huggins, 14 Ark. 21. The fact that the money

importance in proving the warranty, and are indulgently treated.

Under the allegation of warranty and breach, evidence of defendant's subsequent promise to cure the defect is admissible, and he may be held liable on that promise;[83] but mere proof of a subsequent agreement to rescind the original contract and return the money,[84] is not sufficient, at least without amendment.

81. Breach.

To sustain an action upon a warranty, it is not necessary to prove that all the representations made by defendant were false, or actionable. It is enough to prove that any were so.[85] And it is not necessary to prove that the seller knew of the defect.[86] The question whether the article corresponds with the warranty, is usually one for the jury.[87] If the qualities of the article be proved by the testimony of a witness to whom it has been submitted for inspection, there must be direct evidence that the thing of which the witness speaks was the same as that delivered or offered.[88] If fraud is alleged, evidence that other goods were fraudulently sold by the seller to other persons, is relevant to the question of scienter within the limits marked by the rules

was paid by plaintiff's agent who had not been reimbursed, is not material. Indianapolis, Peru & Chicago Ry. Co. *v.* Tyng, 63 N. Y. 653, affi'g 2 Hun, 311, s. c., 4 Supm. Ct. (T. & C.) 524.

[83] Dennis *v.* Coman, 61 N. Y. 642.

[84] Dickinson *v.* Lane, 107 Mass. 548.

[85] Sweet *v.* Bradley, 24 Barb. 549.

[86] Loper *v.* Lingo, 97 Atl. Rep. (Del.) 585; Carley *v.* Wilkins, 6 Barb. 557; Wears *v.* Johnson, 151 N. Y. App. Div. 770, 136 N. Y. Supp. 316. Otherwise as to a mere representation, as distinguished from a warranty. Id. Compare Edick *v.* Crim, 10 Id. 445.

[87] McKinley *v.* Small, 160 N. W. Rep. (Mich.) 652; Bayer *v.* Winton Motor Car Co., 160 N. W. Rep. (Mich.) 642; Crerar, Adams & Co. *v.* Brittain, 195 Ill. App. 38; Warren *v.* Renault Freres Selling Branch, 195 Ill. App. 117. Even if the thing be produced in court. Morton *v.* Fairbanks, 11 Pick. 368. See Crossman *v.* Lurman, 33 N. Y. App. Div. 422, 54 N. Y. Supp. 72.

[88] Perry *v.* Smith, 22 Vt. 301.

applicable in actions for deceit. So if the seller has adduced evidence that he never made or sold inferior goods to anyone, evidence of sales, etc., to third persons is competent in rebuttal.[89] And in other cases, on a conflict of evidence as to quality, evidence of the bad quality of other things of the same production and condition of keeping, may be relevant as raising a presumption that the thing in question, parcel of the same batch or crop, had the like alleged defect.[90] Where the article is contracted for, to serve a specified use, evidence is admissible of the difference in the results produced in such use, by the sample or model ordered, and the imitation, as corroborative of their inherent difference.[91] If the parties agreed on submitting the question of conformity to the warranty to the arbitrament of a third person,[92] or to a specific test,[93] the decision so had, is conclusive,[94] unless fraud or bad faith is shown.[95] Where the thing sold consists of a large quantity of merchandise, it is

[89] Durst *v.* Burton, 2 Lans. 137, affi'd in 47 N. Y. 167.

As to whether, in order to make available a plea of fraud, it is necessary for the vendee to tender back the goods, see Anderson *v.* Merchants' Grocery Co., 99 S. C. 383, 84 S. E. Rep. 109.

[90] Buchanan *v.* Collins, 42 Ala. 419.

[91] Tilton *v.* Miller & Co., 66 Penn. St. 388, s. c., 5 Am. Rep. 373.

In an action to recover the price of a design for a label, it was held error to refuse to allow the defendant to exhibit another design of the same subject subsequently made by another firm, "for the purpose of showing the difference between the design offered by the plaintiff and the one furnished by the other company." The court intimated that such evidence might not be at all conclusive but it nevertheless was some evidence tending to show whether the plaintiff had complied with his contract. The soundness of this decision, however, is perhaps doubtful. Louisville Lithographic Co. *v.* Schedler, 23 Ky. Law Rep. 465, 63 S. W. Rep. 8.

[92] McParlin *v.* Boynton, 8 Hun, 449.

[93] Sharpe *v.* Great Western Ry., 9 Mees. & W. 6, s. c., 2 Am. Ry. Cas. 722.

[94] See for the cases on the general question Schencke *v.* Rowell, 3 Abb. New Cas. 42. But see Crossman *v.* Lurman, 33 N. Y. App. Div. 422, 54 N. Y. Supp. 72.

[95] See Bowery Nat. Bank *v.* Mayor, &c., 63 N. Y. 363, rev'g 3 Hun, 639.

not necessary in the first instance to prove that every lot or package was examined. It is enough that, of a quantity of similar parcels, a reasonable number were opened and all found alike defective.[96] The general character or quality of the thing beyond the limits of that called for by the warranty, is not relevant.[97]

In an action on a warranty of title to a chattel, breach is usually proved by an eviction by recovery;[98] but the buyer may recover on proof of a demand made on him by virtue of a paramount claim to which he voluntarily surrendered; in such case, however, the burden of proving the claim is on him.[99] If eviction by recovery is relied on, the judgment against the buyer is competent.[1] It has been held incumbent on the defendant to plead and prove fraud or collusion in the judgment of eviction, if he would avoid its effect, even where the plaintiff did not attempt to prove notice of the suit to the warrantor;[2] and if the warrantor had adequate notice of the action, and an opportunity to litigate it, the judgment recovered on the merits is conclusive against him.[3] But mere knowledge of the action and a notice to attend the trial are not enough.[4]

82. Opinions of Witnesses.

Where a qualified expert is examined as to the quality of the article, it is competent to ask the general question—as for instance, whether the machine in question was made in a workmanlike manner. The facts may be called for in

[96] Renaud *v.* Peck, 2 Hilt. 137.

[97] Thus under a warranty that a furnace should heat the building to 70 degrees, the requisite degree of heat for ordinary dwellings is irrelevant. Bristol *v.* Tracy, 21 Barb. 236.

[98] And it was formerly held that this was the only evidence, unless there was affirmative proof of guilty knowledge. Case *v.* Hall, 24 Wend. 103.

[99] Bordwell *v.* Collie, 45 N. Y. 494, affi'g 1 Lans. 141.

[1] Atkins *v.* Hosley, 3 Supm. Ct. (T. & C.) 322.

[2] Blasdale *v.* Babcock, 1 Johns. 517; Barney *v.* Dewey, 13 Id. 224.

[3] Fake *v.* Smith, 2 Abb. Ct. App. Dec. 76.

[4] Somers *v.* Schmidt, 24 Wis. 417, s. c., 1 Am. Rep. 191.

detail, and in the case of any other than a skilled witness, they should be called for;[5] but in examining a skilled witness, the party may, if he choose, rest upon the general statement alone and leave it to his adversary to call for more specific objections to the work by cross-examination, and he has a right to do so.[6]

A liberal rule is applied in regard to opinions as evidence as to diseases of animals, as it is rare that persons are found who make the treatment of diseases of domestic animals a distinct profession, or attain to great skill or science therein. The best skill and science that can be expected will be the evidence of persons who have had much experience, and have been for years made acquainted with such diseases and their treatment.[7] The qualification of the witness is a question of law for the court; but in proportion as his character as an expert is contested, it is important that his testimony should be confined to facts rather than opinion. In a case of breach of warranty, by disease, a medical witness, who has stated that he has read various standard authors on the subject of disease, and has given his own opinion in respect to the character of the disease of which the animal died, may be asked: "What is the best opinion, according to the best medical authority?"[8]

83. Admissions and Declarations.

Evidence that the seller on being complained to that he had given a warranty, and that it was broken, only denied the breach, is sufficient evidence to sustain a finding that he gave the warranty.[9] Whether declarations of an agent are competent depends on the test applicable in other cases.

[5] Strevel *v.* Hempstead, 44 Barb. 518.

[6] Curtis *v.* Gano, 26 N. Y. 426; Beekman *v.* Johnson, 35 Ala. 252.

[7] Slater *v.* Wilcox, 57 Barb. 604. Compare McDonald *v.* Christie, 42 Barb. 36; Joy *v.* Hopkins, 5 Den. 84; Willis *v.* Quimby, 11 Fost. (N. H.) 485. *Contra*, Graves *v.* Moses, 13 Minn. 335; and see Spear *v.* Richardson, 34 N. H. 428.

[8] Pierson *v.* Hoag, 47 Barb. 243.

[9] Miller *v.* Lawton, 15 C. B. N. S. 834; Salmon *v.* Ward, 2 Carr. & P. 211.

An authority to receive payment for goods sold, does not make the agent's declarations in regard to the condition of the goods, evidence against his principal.[10] But where one is employed by the seller to remedy the alleged defect after delivery, his declarations, made as part of the *res gestæ*, while engaged in the work, are competent.[11]

84. Omission to Return the Article.

If a warranty has been proved, keeping the goods, delaying to give notice of the defect, etc., may furnish a strong presumption against an alleged breach of warranty; but cannot bar the buyer from suing for, or recouping his damages for such breach, if proved.[12]

[10] Hyland *v.* Sherman, 2 E. D. Smith, 234.

A purchaser of a horse under a warranty that if it is not as warranted, he may return it and either obtain his money back or exchange it for another horse, cannot recover the cost of keeping the horse for breeding purposes after he learns that the animal is not as warranted. Ellwood *v.* McDill, 105 Iowa, 437, 75 N. W. Rep. 340.

[11] Kimball Manuf. Co. *v.* Vroman, 35 Mich. 310.

The buyer may explain his written statement to the seller that the subject of the sale was in good condition, by showing that he meant apparently in good condition. See Elwood *v.* McDill, 105 Iowa, 437, 75 N. W. Rep. 340.

[12] Muller *v.* Eno, 14 N. Y. (4 Kern.) 597; J. B. Madsen & Co. *v.* Hogans, 189 Ill. App. 589; Peterson *v.* Denny-Renton Clay & Coal Co., 89 Wash. 141, 154 Pac. Rep. 123; Feilder *v.* Starkin, 1 H. Blackst. 17; Coner *v.* Dempsey, 49 N. Y. 665; Smeltzer *v.* White, 92 U. S. (2 Otto) 390, 395. But under executory contract, acceptance after opportunity to examine, waives objections to patent defects. Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515. Compare Grimoldby *v.* Wells, L. R. 10 C. P. 391, s. c., 12 Moak's Eng. R. 451, and cases cited.

Where a jack was purchased under circumstances giving rise to an implied warranty of its fitness for breeding purposes, and the jack proved worthless for that purpose but was valuable for other purposes, its retention by the buyer rendered him liable for the animal's actual value, the sale price furnishing a basis for calculation. Monroe *v.* Arthaud, 186 S. W. Rep. (Mo.) 554.

The Sales Act (N. Y. Pers. Prop. Law, § 130, provides that "if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or a warranty within a reasonable

85. Damages.

A breach having been proved there must be some evidence of difference in value between the article as furnished and the article as agreed to be furnished.[13] A mere offer to prove the value of the thing furnished, unconnected with evidence of that of the thing agreed for, may be excluded.[14] The witness cannot speak directly to the amount of damages recoverable; but, if the thing have a market value, a qualified witness may give an opinion of its value, and of the difference between its actual value, and what would have been its value had it corresponded to defendant's representations.[15] If the thing or its condition be such that it has no known or market value, the damages are necessarily special, and the items of actual loss should be proved, and the whole left to the jury.[16] To charge with consequential damages there should be evidence either that the object of the buyer was specially brought to the notice of the seller,[17] or that circumstances were known to the seller, from which the intention ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties.[18]

In an action for breach of the warranty implied or expressed in the assignment of a judgment, the *prima facie* value of the judgment is the amount of money which the

time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

[13] Fales *v.* McKeon, 2 Hilt. 53; Williams *v.* J. F. Rowley Co., 195 Ill. App. 638; Rittenhouse, Winterson Auto Co. *v.* Kissner, 129 Md. 102, 98 Atl. Rep. 361.

[14] Leonard *v.* Fowler, 44 N. Y. 296. See, Dravo Doyle Co. *v.* Sulzberger & Sons Co., 197 Ill. App. 547.

[15] Rogers *v.* Ackerman, 22 Barb. 134; Nickley *v.* Thomas, Id. 652; Miller *v.* Smith, 112 Mass. 470.

[16] Whitney *v.* Taylor, 54 Barb. 536; Levison *v.* Oes, 98 Misc. 260, 162 N. Y. Supp. 1043.

[17] As in Messmore *v.* N. Y. Shot and Lead Co., 40 N. Y. 422; M. Hommel Wine Co. *v.* Netter, 197 Ill. App. 382.

[18] Smith *v.* Green, L. R. 1 C. P. Div. 94, s. c., 16 Moak's Eng. 443; Gorham *v.* Dallas, etc., Ry. Co., 106 S. W. Rep. (Tex. Civ. App.) 930.

debtor in the judgment appears liable to pay thereon.[19] The amount of the consideration of the assignment is immaterial.[20] But evidence of the less value of property which could have been taken on execution at the time of the assignment, may be competent in mitigation.[21] The expenses of attempting to enforce the judgment against one who had been released, if pleaded, are recoverable.[22]

86. Disproof of Implied Warranty.

Proof of express and unqualified[23] refusal to warrant, negatives the implied warranty that otherwise might arise.[24] The implied warranty of title, and the implied warranty of amount unpaid upon a security assigned, rest upon the presumption of law that the vendor knows the facts which he impliedly warrants; and this is a conclusive presumption, and cannot be contradicted.[25]

87. Buyer's Knowledge of Defect.

In an action on a written warranty of soundness of a chattel, parol evidence is admissible, to show that the defects complained of were made known to the plaintiff at the time of the sale. A warranty does not extend to defects which are visible.[26] And when it is proved affirmatively,

[19] Furniss *v.* Ferguson, 34 N. Y. 485, affi'g 3 Robt. 269.

[20] Sweet *v.* Bradley, 24 Barb. 549.

[21] Jansen *v.* Ball, 6 Cow. 628.

[22] Weston *v.* Chamberlain, 56 Barb. 415.

[23] Wood *v.* Smith, 5 M. & Ry. 124; Detroit Trust Co. *v.* Engel, 158 N. W. Rep. (Mich.) 123; Carter *v.* McGill, 171 N. C. 775, 89 S. E. Rep. 28.

[24] So held as to genuineness of note. Bell *v.* Dagg, 60 N. Y. 528.

In like manner an express warranty precludes the presumption of an implied warranty that might otherwise arise. Glover Mach. Works *v.* Cooke-Jellico Coal Co., 173 Ky. 675, 191 S. W. Rep. 516; Holt Lumber Co. *v.* Givens, 72 So. Rep. (Ala.) 257; Slinger *v.* Totten, 160 N. W. Rep. (S. D.) 1008.

[25] Furniss *v.* Ferguson, 34 N. Y. 485, affi'g 3 Robt. 269.

[26] Schuyler *v.* Russ, 2 Cai. 202.

Blindness of a horse from cataracts is not a patent defect. Wears *v.* Johnson, 151 N. Y. App. Div. 770, 136 N. Y. Supp. 316.

that the purchaser knew of the defect at the time of the sale, he cannot recover damages.[27] But an offer to show that he had means of knowledge is not enough.[28]

88. Seller's Good Faith.

A breach of warranty, as distinguished from a mere false representation having been proved, evidence of facts showing that defendant made it under misinformation[29] and in good faith, is irrelevant.

89. Former Adjudication.

Judgment in an action of deceit, for a false statement as to quality, is a bar to an action on contract on a false warranty of the same quality, and so of the converse.[30] Judgment in an action for the price is also, if the buyer, by his answer in that action or his course on the trial of it, admitted the validity of the seller's claim; otherwise not.[31]

[27] H. Hommel Wine Co. *v.* Netter, 197 Ill. App. 382, and cases cited; Studer *v.* Bleinstein, 115 N. Y. 316, 324, 22 N. E. Rep. 243, 5 L. R. A. 702; Chandler *v.* Lopus, 1 Smith's L. Cas. 299, 320, and cases cited.

[28] Furniss *v.* Ferguson, 34 N. Y. 485, affi'g 3 Robt. 269; Grace *v.* Levy, 30 Cal. App. 231, 156 Pac. Rep. 626.

Evidence of an opportunity to examine the goods, though not availed of, has been held to rebut the presumption of an implied warranty. Alexander *v.* Stone, 29 Cal. App. 488, 156 Pac. Rep. 998.

[29] Brisbane *v.* Parsons, 33 N. Y. 332.

[30] 2 Whart. Ev., § 779, citing Ware *v.* Percival, 61 Me. 391; Norton *v.* Doherty, 3 Gray, 372. See N. Y. Code Civ. Pro., § 549.

[31] Whart. Ev., § 790, citing Davis *v.* Talcott, 12 N. Y. 184; Mondel *v.* Steel, 8 Mees. & W. 858; Davis *v.* Hedges, L. R., 6 Q. B. 687; Bascom *v.* Manning, 52 N. H. 132; Burnett *v.* Smith, 4 Gray, 50; Ihmsen *v.* Ormsby, 32 Penn. St. 198.

CHAPTER XVII

ACTIONS FOR USE AND OCCUPATION OF REAL PROPERTY

1. Grounds of the Action.

The gist of the action is that defendant has had the use and occupation of plaintiff's real property, by virtue of an agreement therefor, express or implied, made between them, under which plaintiff is entitled to a reasonable compensation.

2. The Relation of Landlord and Tenant.

There must be proof that the conventional relation of landlord and tenant existed.[32] It is not enough to show privity of estate; there must be privity of contract.[33] The contract, however, need not be expressed, but may be implied from circumstances, such as defendant's entering, or holding over,

[32] 6 Abb. N. Y. Dig. New ed. 54; Carpenter *v.* U. S., 17 Wall. 489, 493; City of Boston *v.* Binney, 11 Pick. 1; Thompson *v.* Bower, 60 Barb. 463; Dennett *v.* Penobscot Fair Co., 57 Me. 425, s. c., 2 Am. Rep. 58; Burdin *v.* Ordway, 88 Me. 375, 34 Atl. Rep. 175; Blake *v.* Preston, 67 Vt. 613, 615, 32 Atl. Rep. 491. A void lease, under which the defendant entered into possession, is admissible to show the nature of the holding. McIntosh *v.* Hodges, 110 Mich. 319, 68 N. W. Rep. 158, 70 N. W. Rep. 550.

[33] Glover *v.* Wilson, 2 Barb. 264.

A lease has been said to possess a dual character. The rights and obligations arising from the relation of landlord and tenant are founded on the privity of estate, while those arising from the express stipulations of the lease are founded on privity of contract. Samuels *v.* Ottinger, 169 Cal. 209, 146 Pac. Rep. 638, Ann. Cas. 1916, E. 830. Where the liability of the defendant is founded on his privity of estate and not on contract a plea of *non est factum* is bad. Cross *v.* Button, 5 Wis. 600.

after notice from plaintiff that he should expect a rent; [34] or from the defendant's recognition of the plaintiff as landlord, as, for example, by repeatedly paying rent to the agent of the plaintiff, and taking receipts from him as landlord.[35] An implied obligation to pay is not, however, raised from mere possession; there must be an implied agreement for the use. The evidence must imply that the relation of landlord and tenant was created by agreement or understanding

[34] Coit *v.* Planer, 4 Abb. Pr. N. S. 140, s. c., 7 Robt. 413; Despard *v.* Walbridge, 15 N. Y. 374.

Where the owner of premises leases them to the defendant for a certain term, and subsequently leases the same premises to the plaintiff for a term to commence at the expiration of the defendant's term, no relation of landlord and tenant is created between the plaintiff and defendant, and the plaintiff cannot hold the defendant as a hold-over tenant if the defendant remains in possession after the expiration of his term. But if before the expiration of the defendant's term, the defendant requests the plaintiff to allow him to remain in possession after the expiration of his term, and the plaintiff refuses the request and notifies the defendant that if he remains in possession the plaintiff will hold him liable for an additional year as a hold-over tenant, the relation of landlord and tenant will be implied, and if the defendant remains in possession at the expiration of his term he will be answerable to the plaintiff for a year's rent on the same terms as in the defendant's original lease. United Merchants' Realty, etc., Co. *v.* Roth, 122 App. Div. 628, 107 N. Y. Supp. 511.

[35] McFarlan *v.* Watson, 3 N. Y. 286.

Where, after the death of the landlord, the tenants hold over and occupy the premises, and attorn to the executrix of the estate of the decedent, and continue to pay rent without objection to her for five years, the relation of landlord and tenant is clearly established between the executrix and the tenants, and the payment of rent estops them from disputing the title of the executrix. Howe *v.* Gregory, 2 Ind. App. 477, 28 N. E. Rep. 776.

The receipt of rent from one in possession of real estate is sufficient to imply the existence of the relation of landlord and tenant, and summary proceedings to dispossess will lie. Weinhaner *v.* Eastern Brewing Co., 85 N. Y. Supp. 354.

When a tenant testifies that he has lived in a place for thirteen years, and that he paid $25 when he first went there and $25 between the 1st and the 11th days of each month thereafter, a monthly tenancy is proved. Drake *v.* Cunningham, 127 App. Div. 79, 111 N. Y. Supp. 199.

of the parties.[36] Where defendant has entered and occupied by permission of plaintiff, without any express agreement, the law implies a promise on his part to pay a reasonable compensation, but such presumption does not arise when an arrangement is proven showing that the parties did not intend to constitute the relation of landlord and tenant.[37] Evidence that after the determination of a lease, the tenant held over and paid rent, is conclusive evidence of a tenancy,[38]

[36] Id., and cases cited.

One who goes into possession simply of the real estate of another is presumed to be a tenant, in the absence of any proof to rebut such presumption. Heddleston *v.* Stoner, 128 Ia. 525, 105 N. W. Rep. 56.

Where a corporation takes a mortgage upon a term as collateral security, and receives the key to the premises from the landlord, but never enters into possession of them, the mere receipt of the key will not raise a presumption of tenancy, and the mortgagee will not become liable as assignee upon the covenants contained in the lease. Levy *v.* Long Island Brewing Co., 26 Misc. 410, 56 N. Y. Supp. 242.

Where one person occupies the land of another in subordination of the latter's title, and with the latter's express or implied consent, the relation of landlord and tenant exists. Hawkins *v.* Tanner, 129 Ga. 497, 59 S. E. Rep. 225.

[37] Carpenter *v.* U. S., 17 Wall. 489, 493; Hirschman *v.* Knechle, 95 Misc. 243, 158 N. Y. Supp. 734. It has been held that proof of use and occupation alone is *prima facie* evidence of the relation of landlord and tenant; and, therefore, the very fact of occupancy, unexplained, creates a liability or obligation for the rent to any person entitled thereto. Anoatubby *v.* Pennington, 46 Okl. 221, 148 Pac. Rep. 828. In an action to recover the rental value of plaintiff's land alleged to have been wrongfully taken possession of and occupied by defendant for grazing purposes, a former judgment in plaintiff's favor against the defendant for a like possession and occupation of those lands, terminating before the commencement of this action, is admissible in evidence against defendant. Lazarus *v.* Phelps, 156 U. S. 202.

[38] Rosc. N. P. 340, citing Bishop *v.* Howard, 2 B. & C. 100; and see Bayley *v.* Bradley, 5 C. B. 326. But where a tenant from year to year, after the expiration of his landlord's title, continued in possession for one quarter, and paid rent for that quarter to the reversioner, but quitted at the end of it, the payment is not evidence of a tenancy for more than the quarter. Id., citing Freeman *v.* Jury, M. & M. 19; Jenner *v.* Clegg, 1 M. & Rob. 213. See also Matter of Steele, 154 App. Div. 860, 139 N. Y. Supp. 550.

and the action lies for rent subsequent to the term, although the lease was sealed.[39] Any evidence of indebtedness for rent in an immediately preceding period is competent, in connection with evidence of continued occupation.[40]

3. Express Agreement.[40½]

If the occupation was under an express agreement which is void under the statute of frauds, the agreement may be proved for the purpose of showing the intended relation of landlord and tenant.[41] If, however, it was under a valid

[39] Abeel *v.* Radcliff, 13 Johns. 297, and see Bishop *v.* Howard, 2 B. & C. 100.

[40] See Withington *v.* Warren, 12 Metc. 114; Morris *v.* Niles, 12 Abb. Pr. 103.

[40½] The existence or nonexistence of an express agreement on the part of a lessee to pay rent becomes of controlling importance in suits between the lessor and lessee for rent accruing after an assignment of the lease by the latter with the consent of the former. It seems that where the lessee has expressly agreed to pay the rent his liability under the contract is not terminated by an assignment of his lease, though made with the consent of the lessor. If, on the other hand, the lessee has not expressly bound himself to pay the rent, his assignment, with the lessor's consent, relieves him of further obligation to pay rent. By "express agreement," in this connection, is meant not merely a promise, in exact words, to pay a given sum as rental; any language necessarily importing an undertaking on the part of the lessee to pay the rent will satisfy the requirement of the rule. Samuels *v.* Ottinger, 169 Cal. 209, 146 Pac. Rep. 638.

[41] The agreement, though by parol, and void by the statute of frauds as to the term and the interest in lands sought to be created, regulates the relations of the parties to it in other respects upon which the tenancy exists, and may be resorted to to determine their rights and duties, in all things consistent with, and not inapplicable to, a yearly tenancy, such as the amount of the rent to be paid, the time of year when the tenant could be compelled by the landlord to quit, and any covenants adapted to a letting for a year. Reeder *v.* Sayre, 70 N. Y. 180, 26 Am. Rep. 567.

If the agreement be regarded as void or insufficient, it may nevertheless be resorted to, in order to ascertain the terms of the letting. Eagle Tube Co. *v.* Holsten, 110 N. Y. Supp. 242.

Where evidence is introduced to show that the possession of the tenant is not under the lease sued on but under a lease which is void by acts of Congress, the evidence

sealed agreement the action must be upon the deed itself.[42] The statute,[43] which permits an action of assumpsit for use and occupation where the agreement was express, but not by deed, allows the agreement, if it reserves a certain rent, to be used as evidence of the amount recoverable.[44] Under the new procedure, the distinction between this action and an action on the sealed contract is formal; and if the proper parties are joined, an amendment may be allowed at the trial, if there has been no surprise on defendant, in not counting on his contract.[45] Either an oral or unsealed written agreement for hiring, or, in case there was no express agreement, such facts as will raise an implied contract, may be proved under a general allegation of indebtedness for use

and the void lease are competent and admissible. Lemmon *v.* United States, 45 C. C. A. 518, 106 Fed. Rep. 650. See Eccles. Comrs. *v.* Merral, L. R. 4 Exch. 162; and see Greton *v.* Smith, 33 N. Y. 245, affi'g 1 Daly, 380.

[42] Kiersted *v.* Orange, &c. R. R. Co., 69 N. Y. 343, 346, rev'g 1 Hun, 151; Abeel *v.* Radcliff, 13 Johns. 297; Pierce *v.* Pierce, 25 Barb. 243. For the rule that debt will lie for use and occupation under a deed, compare 6 Am. Law. Rev. 17, 18.

If the plaintiff bases his action on an agreement, the cannot read it in evidence or use it for any purpose at the trial, until he has proved its execution. Barry *v.* Ryan, 4 Gray (Mass.), 523.

[43] 11 Geo. II., c. 19, § 14, 1 N. Y. Real Property Law, § 220.

[44] See Abeel *v.* Radcliff, and Pierce *v.* Pierce (above); Williams *v.* Sherman, 7 Wend. 109.

Where the landlord covenants to make certain repairs before the commencement of the term but fails to do so, and the tenant enters into possession and stays in possession until the termination of the lease, he cannot refuse to pay rent on the ground that the landlord did not make the repairs. The covenants to repair and to pay rent are independent under the circumstance. Rubens *v.* Hill, 213 Ill. 523, 72 N. E. Rep. 1127.

Where, after a tenant enters into possession under a written lease, the city takes the fee of a portion of the premises for a street, such action by the city is a variation of the lease by act of law. The effect is the same as though the parties had agreed to discharge a part of the lease and apportion the rent, and therefore the remedy is in assumpsit for use and occupation and not upon the lease. McCardell *v.* Miller, 22 R. I. 96, 46 Atl. Rep. 184.

[45] Bedford *v.* Terhune, 30 N. Y. 453, s. c., 27 How. Pr. 422, affi'g 1 Daly, 471.

and occupation.[46] If the agreement was not made in writing a witness may be asked to "state the terms." It is not necessary to ask him to state what was said.[47] If it appears from the plaintiff's evidence that defendant held under a written agreement not produced or accounted for, plaintiff will not be allowed to give parol evidence of the holding.[48] But if the plaintiff has made out a *prima facie* case, without proof of the existence of a writing, and defendant seeks to show that he held under a written agreement, he must produce the instrument, or his objection is untenable.[49] To what extent a written agreement of lease excludes oral evidence of the terms is considered in connection with Actions on Leases.

4. Parties.

Tenants in common may join as plaintiffs, upon evidence that the tenant has always paid the rent to their joint agent; for this is evidence of a joint letting.[50] But a lessee of one

[46] Waters *v.* Clark, 22 How. Pr. 104; Morris *v.* Niles, 12 Abb. Pr. 103.

[47] Frost *v.* Benedict, 21 Barb. 247. Thus a witness may testify that he leased the property to defendant at a certain rent, reserving the right to sell it at any time, and that defendant accepted it on such terms. Id.

[48] Brewer *v.* Palmer, 3 Esp. 213; Ramsbottom *v.* Mortley, 2 M. & S. 445, cited in Rosc. N. P. 334.

[49] Id., citing Fielder *v.* Ray, 6 Bing. 332; R. *v.* Padstow, 4 B. & Ad. 208; 1 Greenl. Ev., 13th ed. 111, § 87.

Where the defendant, for the purpose of disproving a parol renting agreement which has been set up by the plaintiff, offers in evidence a written lease which was executed by one of two attorneys in fact who signed his own name as well as the name of the other attorney, the burden is on the defendant to prove that the one had power to sign for both before the lease can be admitted in evidence. Freschi *v.* Molony, 65 App. Div. 516, 72 N. Y. Supp. 819.

[50] Last *v.* Dinn, L. J. 28 Ex. 94.

It is proper to join as parties plaintiff one of two owners in common and the assignee of the other owner. Bly *v.* Bliss, 123 Mich. 195, 81 N. W. Rep. 1080, 6 Det. Leg. N. 1031.

Where two tenants in common arrange with the lessee of the premises to have him divide the rent into two equal parts and to pay one part to one of the owners and the other to the other owner, a sever-

tenant in common is not liable to the other without proof of a joint letting or an attornment.[51]

The mere fact that one of two joint lessees holds over does not charge both.[52] But where two persons sign an agreement to become tenants, and one enters under it, it may be presumed that he entered for both; and use and occupation against both will lie.[53] The fact that one tenant in common has had the entire occupancy of the common estate, and his co-tenants have not occupied it, with proof of value, is not enough to sustain their action against him for the value of the use of their interests.[54] Each is entitled to occupy; and the presumption of law is that either is in possession under his own title, until evidence is adduced that he holds as tenant of the others.[55] For this purpose the fact that he is holding over after the expiration of a lease from his co-tenants is not enough. The fact of his not leaving the possession does not authorize the inference that he still intends to hold under the lease; the presumption is that he holds under his own title; but this presumption may be rebutted.[56]

5. Defendant's Occupation.

Evidence of an agreement to take the premises and pay rent, is not alone enough.[57] There must be evidence of beneficial enjoyment, or of constructive possession or dominion. It is not necessary to prove defendant to have been in manual occupation during the time for which recovery is sought. It is enough to show that the power to occupy and

ance of the rights of the two tenants in common results, and it will not be necessary for one of them in suing the lessee for his share of the rent to join the other as a party plaintiff. Woolsey *v.* Lasher, 35 App. Div. 108, 54 N. Y. Supp. 737.

[51] Austin *v.* Ahearne, 61 N. Y. 14.

[52] Draper *v.* Crofts, 15 M. & W. 166.

[53] Rosc. N. P., 340, citing Glen *v.* Dungey, 4 Exch. 61.

[54] Everts *v.* Beach, 31 Mich. 136, s. c., 18 Am. Rep. 169.

[55] Dresser *v.* Dresser, 40 Barb. 300.

[56] McKay *v.* Mumford, 10 Wend. 351, Nelson J.

[57] Wood *v.* Wilcox, 1 Den. 37, and cases cited. Otherwise in an action on the contract. Gilhooly *v.* Washington, 4 N. Y. 217, affi'g 3 Sandf. 330.

enjoy was given by the landlord to the tenant.[58] Hence (agreement having been proved) evidence of delivery and acceptance of the key, though without proof of continued actual possession, is enough to sustain a finding; [59] and the occupation so shown will be presumed to have continued until the contrary appears.[60] Payment of rent by defendant to plaintiff is presumptive evidence of occupation.[61] Such payment during the occupancy of a third person is presumptive evidence that the occupant held under defendant, which is the same as actual occupancy by defendant.[62] If defendant was an under-tenant, still an agreement to pay rent to the original lessor may be inferred from continuous payments of the previous rents to him.[63] The receipt by the defendant of the rents and profits, or an attornment from an under-tenant, is evidence of use and occupation by the defendant.[64] Occupancy by a third person who was put into possession by the defendant, is evidence from which the jury may infer occupancy by defendant.[65] And subleases and similar writ-

[58] Hall *v.* Western Trans. Co., 34 N. Y. 284, and cases cited.

[59] Id.; Little *v.* Martin, 3 Wend. 220.

[60] Seaman *v.* Ward, 1 Hilt. 52, 55.

[61] Bishop *v.* Howard, 2 B. & C. 100; Harden *v.* Hesketh, 4 H. & N. 175.

The receipt of rent from the parties in possession raises an implication as to the existence of the relation of landlord and tenant sufficiently to support a summary proceeding for dispossession. Weinhaner *v.* Eastern Brewing Co., 85 N. Y. Supp. 354.

[62] Moffatt *v.* Smith, 4 N. Y. 126.

[63] McFarlan *v.* Watson, 3 N. Y. 286.

Where the assignees of a lease file the assignment for record and for years thereafter pay rent to the original landlord it is ample proof of their entry under the lease. Landt *v.* McCullough, 218 Ill. 607, 75 N. E. Rep. 1069.

Where an under-tenant gets his possession not directly from the tenant but through an intermediate party, but never discloses this fact to the landlord during all his dealings with the landlord, he cannot take advantage of the discrepancies between the pleadings and the proofs where the landlord has alleged that the under-tenant got his possession from the tenant. Weide *v.* St. Paul Boom Co., 92 Minn. 76, 99 N. W. Rep. 421.

[64] Rosc. N. P. 338, citing Neal *v.* Swind, 2 C. & J. 377.

[65] Dimock *v.* Van Bergen, 12 Allen, 551.

The possession of the sub-tenants

ings, made by defendant to third persons, are competent evidence.[66] But there does not appear to be any authority for the proposition that use and occupation can, in the absence of an actual demise, be maintained on a constructive occupation after the tenant has in fact ceased to occupy, and has offered to surrender the premises to the landlord.[67] If defendant denies privity with the occupant, and alleges possession by the occupant under a stranger, evidence of employment of the occupant by the stranger, is competent, although the transaction was not had in plaintiff's possession. Defendant may show that the occupation attributed to him was *res inter alios acta*.[68]

6. Measure of Recovery.

Where there has been a lease at an annual rent and the tenant held over after its expiration, without any new agreement as to the rent, the law implies that he held from year to year and at the original rent.[69] The landlord is not necessarily entitled to an increased rent, because the lease contemplated a renewal at an appraisement.[70] But if the former rent was not upon the basis of an annual value, as, for instance, where it was for a fraction of a year only,[71] or where it is only a ground rent, the value of buildings being otherwise stipulated for,[72] evidence of actual value can be re-

is the possession of the tenant, and if the sub-tenants remain in possession after the expiration of the tenant's term, the tenant is liable for holding over. Ventura Hotel Co. *v.* Pabst Brewing Co., 33 Ky. Law Rep. 149, 109 S. W. Rep. 354.

[66] Cornwall *v.* Hoyt, 7 Conn. 420, 428.

[67] Rosc. N. P. 337.

[68] Lewis *v.* Havens, 40 Conn. 361.

[69] Abeel *v.* Radcliff, 15 Johns. 505.

[70] Holsman *v.* Abrams, 2 Duer, 435.

[71] Evertson *v.* Sawyer, 2 Wend. 507.

Where the rent of certain premises is in dispute, it is error to admit testimony as to the amount of rent received by the plaintiff for the adjoining premises, as it can have no bearing whatever on the question of the amount of rent to be paid by the defendant. Stevens *v.* Beardsley, 122 Mich. 671, 81 N. W. Rep. 921.

[72] Abeel *v.* Radcliff (above).

ceived. If during occupancy after expiration of a lease, the title is in dispute, and there is no recognized landlord, the rate of rent fixed by the lease is not conclusive on either party.[73] Where the agreement of tenancy (even though proved merely by the tenant's tacit assent to terms stated by the lessor), fixed the rent for the period in question, evidence of actual value is irrelevant.[74] If defendant occupied under a lease fixing the rent, the fact that the lease was not valid as against him, for example, by reason of want of sealed authority in the agent who executed it, does not prevent its use against him as furnishing an admission establishing the measure of recovery.[75] If one holding over under a prior lease retains only a part of the premises, or if part of the premises have been recovered from the tenant by title paramount, plaintiff may recover a reasonable compensation for the part defendant enjoyed.[76]

7. Admissions and Declarations.

Evidence that a bill for the rent was presented to defendant, and that he promised to pay it, is, in connection with very slight evidence of occupation, sufficient to sustain a

[73] Van Brunt *v.* Pope, 6 Abb. Pr. N. S. 217.

Where a tenant holds over while negotiations with his landlord for a new lease are pending, and a proposed lease is drawn up but not executed, such proposed lease is admissible in evidence to aid the jury in determining whether it was acted upon and accepted and became a contract. Pusheck *v.* Frances E. Willard, etc., Assoc., 94 Ill. App. 192.

[74] Despard *v.* Walbridge, 15 N. Y. 374.

When the amount of the rent has been agreed upon, evidence as to what the premises rented for in prior years is immaterial and irrelevent. Simpson *v.* East, 124 Ala. 293, 27 So. Rep. 436.

Where the parties assert and rely upon an express contract the question of reasonable rental value is not an issue and testimony as to it should be excluded. Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. Rep. 124.

[75] Morrell *v.* Cawley, 17 Abb. Pr. 76.

[76] Christopher *v.* Austin, 11 N. Y. 216, affi'g 2 E. D. Smith, 203. As to a mere trespass by the landlord, see Lounsbery *v.* Snyder, 31 N. Y. 514.

verdict.[77] If a valid agreement of hiring be proven, defendant's general admissions of occupation may be referred to that agreement; but if it be shown to be void, the burden is on the tenant of proving that the occupation referred to was under that agreement, if he relies on it to defeat the action.[78] Acts and declarations characterizing possession may be proven;[79] but the meaning of the terms of a written lease

[77] Treadwell *v.* Bruder, 3 E. D. Smith, 596.

[78] Buell *v.* Cook, 5 Conn. 206. Otherwise if valid.

[79] Corbett *v.* Costello, 8 La. Ann. 427.

Claim of ownership of one in possession of lands is an ingredient of adverse possession and it may be shown by the declarations of the party while in possession. Henry *v.* Brown, 143 Ala. 446, 39 So. Rep. 325.

Declarations of one in possession, explanatory of his possession and making claim, are admissible evidence while he is in possession, to show that it is under claim of ownership, but not to show title. Parkersbury Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. Rep. 255.

Particular acts of dominion over the property and declarations of the possessor while in possession as to his claim to the property, though not accompanying an act of possession, are admissible, being of the *res gestæ* of the fact involved. Knight *v.* Knight, 178 Ill. 553, 53 N. E. Rep. 306.

Since a person who is in possession of premises would ordinarily be presumed to be the owner, his statements, while he is in possession, that he is acting as agent for another, are in disparagement of his own title, and therefore admissible. Murphy *v.* Dafoe, 18 S. D. 42, 99 N. W. Rep. 86.

But declaration of a deceased owner characterizing the possession cannot be received in evidence to prove merely the fact of the possession. That cannot be proven merely by the declaration. High *v.* Pancake, 42 W. Va. 602, 26 S. E. Rep. 536.

The declarations of one in possession of property explanatory of his possession are admissible in evidence, because they explain the character of his possession; but his declarations in regard to the contract by which he came into possession cannot be received in his favor.

Letters written by a tenant of a farm who did not reside on the farm, to his managing agent on the farm directing him as to the disposition of the personal property there and as to the farming operations to be carried on there, are more than mere declarations. They are acts of the tenant tending to show possession and control of the farm and the personal property there and are admissible in his favor. Bagnell *v.* Sweet Springs

cannot be varied by the declarations of the parties as to their understanding of them.[80]

Chemical Bk., 76 Mo. App. 121.

Sayings of a person in possession of real estate or interest therein ought not to be admitted in evidence against another, unless the latter claims through or under him or stands in privity with him, the declarations not being offered to show adverse possession on the part of the declarant. Whelchel *v.* Gainesville, etc., Ry. Co., 116 Ga. 431, 42 S. E. Rep. 776.

[80] Bigelow *v.* Collamore, 5 Cush. 226.

Evidence tending to vary the terms of a written lease is inadmissible. Smith *v.* McEvoy, 98 Ill. App. 330.

It is improper to admit parol evidence to vary the terms of a lease under seal. Friedman *v.* Schwabacher, 64 Ill. App. 422.

Parol evidence tending to show the original intention of the parties to a written lease is not admissible. The court must construe the instrument as it finds it. Soule *v.* Palmer, 49 N. Y. Supp. 475.

Parol testimony that it was the intention of both parties to a written lease to include the word "cellar" in the description of the premises is inadmissible in a court which has no equity jurisdiction. Kraus *v.* Smolen, 46 Misc. Rep. 463, 92 N. Y. Supp. 329.

A tenant, after having executed a written lease, cannot testify that the tenancy was not a tenancy for one year, but from month to month, as it would be varying a written instrument by parol. Equitable Life Assur. Soc. *v.* Schum, 40 Misc. Rep. 657, 83 N. Y. Supp. 161.

The terms of a written lease as to the amount of rent to be paid cannot be varied by showing that the tenant bought furniture for the premises as a part of the consideration for the lease. McMullen *v.* Moffitt, 68 Ill. App. 160.

Where the lease does not specify the amount of rent to be paid, parol evidence of the intention and purpose for which the tenant rented the grounds is inadmissible. Cox *v.* O'Neal, 142 Ala. 314, 37 So. Rep. 674.

Where the terms of a lease are not ambiguous and uncertain in the sense which permits the explanation thereof by parol, one of the parties will not be permitted to testify that it was agreed and understood, when the contract was entered into, that the option to buy should be unconditional. De Vitt *v.* Kaufman County, 27 Tex. Civ. App. 332, 66 S. W. Rep. 224.

One of the parties to a written lease will not be permitted to testify to a previous parol understanding between the parties as to retaining a portion of the premises. Greenhill *v.* Hunton (Tex.), 69 S. W. Rep. 440.

When a party voluntarily and knowingly executes a lease under seal, even though it be by the fraudulent contrivance of others, it

can only be impeached and set aside, and parol evidence be received for that purpose, in a court of equity. Resser *v.* Corwin, 72 Ill. App. 625.

Where a lease, uncertain in its terms, has been acted on and partly performed, the court, in order to relieve the objection of uncertainty, will, for the construction of the instrument, have regard in some cases to the user and course of dealings of the parties, to the surrounding circumstances and to their conduct between the making of the lease and the commencement of the suit. Naughton *v.* Elliott, 68 N. J. Eq. 259, 59 Atl. Rep. 869.