A TREATISE

ON THE

LAW OF EVIDENCE.

BY

SIMON GREENLEAF, LL.D.,

EMERITUS PROFESSOR OF LAW IN HARVARD UNIVERSITY.

Quorsum enim sacræ leges inventæ et sancitæ fuere, nisi ut ex ipsarum justitia unicuique jus suum tribuatur? — MUSCARDUS EX ULPIAN.

VOLUME I.

TWELFTH EDITION, CAREFULLY REVISED, WITH LARGE ADDITIONS,

BY

ISAAC F. REDFIELD, LL.D.

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TO THE HONORABLE

JOSEPH STORY, LL.D.,

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,
AND DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

Sir,

In dedicating this work to you, I perform an office both justly due to yourself and delightful to me, — that of adding the evidence of a private and confidential witness to the abundant public testimonials of your worth. For more than thirty years the jurisprudence of our country has been illustrated by your professional and juridical labors; with what success, it is now superfluous to speak. Other Jurists have attained distinction in separate departments of the law; it has been reserved for yourself, with singular felicity, to cultivate and administer them all. Looking back to the unsettled state of the law of our national institutions, at the period of your accession to the bench of the Supreme Court of the United States, and considering the unlimited variety of subjects within the cognizance of the Federal tribunals, I do but express the consenting opinions of your contemporaries, in congratulating our country that your life

and vigor have been spared until the fabric of her jurisprudence has been advanced to its present state of lofty eminence, attractive beauty, and enduring strength.

But many will regard the foundation of the present Law School in Harvard University as the crowning benefit, which, through your instrumentality, has been conferred on our profession and country. Of the multitude of young men, who will have drunk at this fountain of jurisprudence, many will administer the law, in every portion of this widespread Republic, in the true spirit of the doctrines here inculcated; and succeeding throngs of ingenuous youth will, I trust, be here imbued with the same spirit, as long as our government shall remain a government of law. Your anxiety to perpetuate the benefits of this Institution, and the variety, extent, and untiring constancy of your labors in this cause, as well as the cheerful patience with which they have been borne, are peculiarly known to myself; while, at the same time, I have witnessed and been instructed by the high moral character, the widely-expanded views, and the learned and just expositions of the law, which have alike distinguished your private Lectures and your published Commentaries. With unaffected sincerity I may be permitted to acknowledge, that while my path has been illumined for many years by your personal friendship and animating example, to have been selected as your associate in the arduous and responsible labors of this Institution, I shall ever regard as the peculiar honor and happiness of my professional life. *Beatè vixisse videar, quia cum Scipione vixerim.*

Long may you continue to reap the rich reward of labors so vast, so incessant, and of such surpassing value, in the heartfelt gratitude of our whole country, and in the prosperity of her institutions, which you have done so much to establish and adorn.

I am, with the highest respect,
Your obliged friend,
SIMON GREENLEAF.

CAMBRIDGE, Massachusetts,
February 23, 1842.

ADVERTISEMENT TO THE FIRST EDITION.

The profession being already furnished with the excellent treatises of Mr. Starkie and Mr. Phillips on Evidence, with large bodies of notes, referring to American decisions, perhaps some apology may be deemed necessary for obtruding on their notice another work, on the same subject. But the want of a proper text-book, for the use of the students under my instruction, urged me to prepare something to supply this deficiency; and, having embarked in the undertaking, I was naturally led to the endeavor to render the work acceptable to the profession, as well as useful to the student. I would not herein be thought to disparage the invaluable works just mentioned; which, for their accuracy of learning, elegance, and sound philosophy, are so highly and universally esteemed by the American Bar. But many of the topics they contain were never applicable to this country; some others are now obsolete; and the body of notes has become so large, as almost to overwhelm the text, thus greatly embarrassing the student, increasing the labors of the instructor, and rendering it indispensable that the work should be rewritten, with exclusive reference to our own jurisprudence. I have endeavored to state those

doctrines and rules of the Law of Evidence which are common to all the United States; omitting what is purely local law, and citing only such cases as seemed necessary to illustrate and support the text. Doubtless a happier selection of these might be made, and the work might have been much better executed by another hand; for now it is finished, I find it but an approximation towards what was originally desired. But in the hope, that it still may be found not useless, as the germ of a better treatise, it is submitted to the candor of a liberal profession.

Cambridge, Massachusetts,
February 23, 1842.

ADVERTISEMENT TO THE TWELFTH EDITION.

In preparing the present edition, the entire volume has been carefully revised, and the decisions, both English and American, thoroughly examined, for the entire period since the decease of the author; and such additions made, both in the text and notes, as seemed requisite to bring the book up to the present date, as nearly in the form in which the author kept it during his life as was practicable. Careful abstracts of every section have been prefixed to the several chapters, and nearly a hundred pages of new matter added in all, with many hundreds of new cases. The new matter, which is thus indicated [*], has all been carefully prepared by my own hand; but, in the multiplicity of other labors, I have been obliged to trust mainly to the faithful and discriminating investigations of my excellent friend and assistant, William A. Herrick, Esq., of the Boston bar, for the collection of the materials which I have used. I feel great confidence that this volume will be found so far reliable, as to the present state of the law upon the numerous topics discussed, as to be valuable and acceptable to the profession.

I. F. R.

Boston, April 10, 1866.

NOTE.

Some of the citations from Starkie's Reports, in the earlier part of this work, are made from the Exeter edition of 1823, and the residue from the London edition of 1817–20. The editions of the principal elementary writers cited, where they are not otherwise expressed, are the following: —

Alciati, Opera Omnia. Basileæ. 1582. 4 tom. fol.
Best on Presumptions. Lond. 1844.
Best Principles of Evidence. Lond. 1849.
Canciani, Leges Barbarorum Antiquæ. Venetiis. 1781–1785. 5 vol. fol.
Carpzovii, Practicæ Rer. Crim. Francof. ad Mænum. 1758. 3 vol. fol.
Corpus Juris Glossatum. Lugduni. 1627. 6 tom. fol.
Danty, Traité de la Preuve. Paris. 1697. 4to.
Everhardi Concilia. Ant. 1643. fol.
Farinacii Opera. Francof. ad Mænum. 1618–1686. 9 vol. fol.
Glassford on Evidence. Edinb. 1820.
Gresley on Evidence. Philad. 1837.
Joy on Confessions. Dublin. 1842.
Mascardus de Probationibus. Francof. ad Mænum. 1684. 4 vol. fol.
Mathews on Presumptive Evidence. New York. 1830.
Menochius de Presumptionibus. Genevæ. 1670. 2 tom. fol.
Mittermaier, Traité de la Preuve en Matière Criminelle. Paris. 1848.
Peake's Evidence, by Norris. Philad. 1824.
Phillips and Amos on Evidence. Lond. 1838. 8th ed.
Phillips on Evidence. Lond. 1843. 8th ed.
Pothier on Obligations, by Evans. Philad. 1826.
Russell on Crimes. 3d Amer. ed.
Starkie on Evidence. 6th Amer. ed. 2 vols.
Stephen on Pleading. Philad. 1824.
Strykiorum, Opera. Francof. ad Mænum. 1743–1753. 15 vol. fol.
Tait on Evidence. Edinb. 1834.
Tidd's Practice. 9th Lond. ed.
Wigram on the Interpretation of Wills. 3d Lond. ed. 1840.
Wills on Circumstantial Evidence. Lond. 1838.

CONTENTS.

PART I.

Of the Nature and Principles of Evidence.

PART II.

Of the Rules which govern the Production of Testimony.

CHAPTER III.

CHAPTER IV.

CHAPTER V.

CHAPTER VI.

CHAPTER VII.

CHAPTER VIII.

CHAPTER IX.

CHAPTER X.

CHAPTER XI.

CHAPTER XII.

CHAPTER XIII.

CHAPTER XIV.

CHAPTER XV.

PART III.

OF THE INSTRUMENTS OF EVIDENCE.

CHAPTER I.

CHAPTER II.

CHAPTER III.

CHAPTER IV.

CHAPTER V.

CHAPTER VI.

INDEX TO CASES CITED.

B.

C.

E.

F.

N.

O.

U.

* This case is reported in 13 B. Mon. 252, and not as cited in note to section 506.

PART I.

OF THE

NATURE AND PRINCIPLES

OF

EVIDENCE.

A

TREATISE

ON

THE LAW OF EVIDENCE.

PART I.

OF THE NATURE AND PRINCIPLES OF EVIDENCE.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

[*§ 1. Definitions: evidence; proof; demonstration; moral evidence.
2. Competent evidence; satisfactory evidence; cumulative evidence.
3. Nature and object of evidence; means and instruments of proof.]

§ 1. The word Evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.[1] This term, and the word *proof*, are often used indifferently, as synonymous with each other; but the latter is applied by the most accurate logicians, to the *effect* of evidence, and not to the *medium* by which truth is established.[2] None but mathematical truth is susceptible of that high degree of evidence, called *demonstration*, which excludes all possibility of error, and which, therefore, may reasonably be required in support of every mathematical deduction. Matters of fact are proved by *moral evidence* alone; by which is meant, not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which

[1] See Wills on Circumstantial Evid. 2; 1 Stark. Evid. 10; 1 Phil. Evid. 1.

[2] Whately's Logic, b. iv. ch. iii. § 1.

is not obtained either from intuition, or from demonstration. In the ordinary affairs of life, we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is, that there is no reasonable doubt concerning them.[1] The *true question*, therefore, in trials of fact, is not whether it is possible that the testimony may be false, but whether there is *sufficient probability* of its truth; that is, whether the facts are shown by competent and satisfactory evidence. Things established by competent and satisfactory evidence are said to be *proved*.

§ 2. By *competent evidence* is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry. By *satisfactory evidence*, which is sometimes called *sufficient* evidence, is intended that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him, that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest.[2] Questions respecting the competency and admissibility of evidence, are entirely distinct from those which respect its sufficiency or effect; the former being exclusively within the province of the court; the latter belonging exclusively to the jury.[3] *Cumulative* evidence is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admission of the party, evidence of another verbal admission of the same fact is cumulative; but evidence of other circumstances, tending to establish the fact, is not.[4]

[1] See Gambier's Guide to the Study of Moral Evidence, p. 121. Even of mathematical truths, this writer justly remarks, that, though capable of demonstration, they are admitted by most men solely on the moral evidence of general notoriety. For most men are neither able themselves to understand mathematical demonstrations, nor have they, ordinarily, for their truth, the testimony of those who do understand them; but finding them generally believed in the world, they also believe them. Their belief is afterwards confirmed by experience; for whenever there is occasion to apply them, they are found to lead to just conclusions. Id. 196.

[2] 1 Stark. Evid. 514.

[3] Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25, 44; Bank United States *v.* Corcoran, Id. 121, 133; Van Ness *v.* Pacard, Id. 137, 149.

[4] Parker *v.* Hardy, 24 Pick. 246, 248.

§ 3. This branch of the law may be considered under three general heads, namely: *First*, The Nature and Principles of Evidence; — *Secondly*, The Object of Evidence, and the Rules which govern in the production of testimony; — And *Thirdly*, The Means of Proof, or the Instruments, by which facts are established. This order will be followed in farther treating this subject. But before we proceed, it will be proper first to consider what things courts will, of themselves, take notice of, without proof.

CHAPTER II.

OF THINGS JUDICIALLY TAKEN NOTICE OF, WITHOUT PROOF.

[* § 4. Courts take judicial notice of the national seal of other nations.
5. So also of the law of nations, courts of admiralty, notarial seals, the course of nature, the calendar, &c. &c.
6. Of the territorial divisions of the country, its courts, general laws, officers, and all things universally known, &c.
6a. The subject further illustrated with reference to more recent cases.]

§ 4. All civilized nations, being alike members of the great family of sovereignties, may well be supposed to recognize each other's existence, and general public and external relations. The usual and appropriate symbols of nationality and sovereignty are the national flag and seal. Every sovereign, therefore, recognizes, and, of course, the public tribunals and functionaries of every nation take notice of the existence and titles of all the other sovereign powers in the civilized world, their respective flags, and their seals of state. Public acts, decrees, and judgments, exemplified under this seal, are received as true and genuine, it being the highest evidence of their character.[1] If, however, upon a civil war in any country, one part of the nation shall separate itself from the other, and establish for itself an independent government, the newly-formed nation cannot without proof be recognized as such, by the judicial tribunals of other nations, until it has been acknowledged by the sovereign power under which those tribunals are constituted;[2] the first act of recognition belonging to the executive function, [* and courts will take judicial notice, whether or no, such governments have been so acknowledged].[3] But though the seal of the new power, prior to such acknowledgment, is not permitted

[1] Church *v.* Hubbart, 2 Cranch, 187, 238; Griswold *v.* Pitcairn, 2 Conn. 85, 90: United States *v.* Johns, 4 Dall. 416; The Santissima Trinidad, 7 Wheat. 273, 335; Anon. 9 Mod. 66; Lincoln *v.* Battelle, 6 Wend. 475. It is held in New York that such seal, to be recognized in the courts, must be a common-law seal, that is, an impression upon wax. Coit *v.* Milliken, 1 Denio, R. 376.

[2] City of Berne *v.* Bank of England, 9 Ves. 347; United States *v.* Palmer, 3 Wheat. 610, 634.

[3] [* Taylor *v.* Barclay, 2 Sim. 213.]

to prove itself, yet it may be proved as a fact by other competent testimony.[1] And the existence of such unacknowledged government or State may, in like manner, be proved; the rule being, that if a body of persons assemble together to protect themselves, and support their own independence, make laws, and have courts of justice, this is evidence of their being a state.[2]

§ 5. In like manner, the Law of Nations, and the general customs and usages of merchants, as well as the public statutes and general laws and customs of their own country, as well ecclesiastical as civil, are recognized, without proof, by the courts of all civilized nations.[3] The seal of a notary-public is also judicially taken notice of by the courts, he being an officer recognized by the whole commercial world.[4] Foreign Admiralty and Maritime Courts, too, being the courts of the civilized world, and of coördinate jurisdiction, are judicially recognized everywhere; and their seals need not be proved.[5] Neither is it necessary to prove things which must have happened according to the ordinary course of nature;[6] nor to prove the course of time, or of the heavenly bodies; nor the ordinary public fasts and festivals; nor the coincidence of days of the week with days of the month;[7] nor the meaning of words

[1] United States *v.* Palmer, 3 Wheat. 610, 634; The Estrella, 4 Wheat. 298. What is sufficient evidence to authenticate, in the courts of this country, the sentence or decree of the court of a foreign government, after the destruction of such government, and while the country is possessed by the conqueror, remains undecided. Hatfield *v.* Jameson, 2 Munf. 53, 70, 71.

[2] Yrissarri *v.* Clement, 2 C. & P. 223, per Best, C. J. And see 1 Kent, Comm. 189; Grotius, De Jur. Bel. b. 3, c. 3, § 1.

[3] Ereskine *v.* Murray, 2 Ld. Raym. 1542; Heineccius ad Pand. l. 22, tit. 3, sec. 119; 1 Bl. Comm. 75, 76, 85; Edie *v.* East India Co. 2 Burr. 1226, 1228; Chandler *v.* Grieves, 2 H. Bl. 606, n.; Rex *v.* Sutton, 4 M. & S. 542; 6 Vin. Abr. tit. Court, D; 1 Rol. Abr. 526, D. Judges will also take notice of the usual practice and course of conveyancing. 3 Sugd. Vend. & Pur. 28; Willoughby *v.* Willoughby, 1 T. R. 772, per Ld. Hardwicke; Doe *v.* Hilder, 2 B. & Ald. 793; Rowe *v.* Grenfel, Ry. & Mo. 398, per Abbott, C. J. So, of the general lien of bankers on securities of their customers, deposited with them. Brandao *v.* Barnett, 3 M. G. & Sc. 519 [See also *infra*, § 489, 490. A special act for the survey of a particular tract of land is not, as a general rule, such a public statute as the courts are bound to take notice of and expound, without requiring its production. Allegheny *v.* Nelson, 25 Penn. State R. 332.]

[4] Anon. 12 Mod. 345; Wright *v.* Barnard, 2 Esp. 700; Yeaton *v.* Fry, 5 Cranch, 535; Brown *v.* Philadelphia Bank, 6 S. & R. 484; Chanoine *v.* Fowler, 3 Wend. 173, 178; Bayley on Bills, 515 (2d Am. ed. by Phillips & Sewall); Hutcheon *v.* Mannington, 6 Ves. 823; Porter *v.* Judson, 1 Gray, 175.

[5] Croudson *v.* Leonard, 4 Cranch, 435; Rose *v.* Himely, Id. 292; Church *v.* Hubbart, 2 Cranch, 187; Thompson *v.* Stewart, 3 Conn. 171, 181; Green *v.* Waller, 2 Ld. Raym. 891, 893; Anon. 9 Mod. 66; Story on the Conflict of Laws, § 643; Hughes *v.* Cornelius, as stated by Lord Holt, in 2 Ld. Raym. 893. And see T. Raym. 473; 2 Show. 232, s. c.

[6] Rex *v.* Luffe, 8 East, 202; Fay *v.* Prentice, 9 Jur. 876.

[7] 6 Vin. Abr. 491, pl. 6, 7, 8; Hoyle *v.* Cornwallis, 1 Stra. 387; Page *v.* Faucet, Cro. El. 227; Harvey *v.* Broad, 2 Salk. 626; Hanson *v.* Shackelton, 4 Dowl. 48; Dawkins *v.* Smithwick, 4 Flor. R. 158; [Sasscer *v.* Farmers' Bank, 4 Md. 409;] [* Sprowl *v.* Lawrence, 33 Ala. 674.]

in the vernacular language;[1] nor the legal weights and measures;[2] nor any matters of public history, affecting the whole people;[3] nor public matters, affecting the government of the country.[4] [* Nor will it be required to give evidence of the course of the seasons, and the date of the ordinary maturity of particular crops.[5] But the courts cannot take judicial notice of the meaning of catchwords, such as "the cost book principle;"[6] "Black Republicans" or "supporters of the Helper book;"[7] nor of the import of abbreviations, as "St. Louis, Mo.;" and others more difficult of interpretation.[8] And it was held, in a recent case before the New York Court of Appeals,[9] that in a trial by jury, it was proper to give evidence of historical facts.]

§ 6. Courts also take notice of the territorial extent of the jurisdiction and sovereignty, exercised *de facto* by their own government; and of the local divisions of their country, as into states, provinces, counties, cities, towns, local parishes, or the like, so far as political government is concerned or affected; and of the relative positions of such local divisions; but not of their precise boundaries, farther than they may be described in public statutes.[10] [* But not whether the jurisdiction *de facto* be rightfully exercised.[11]]

[1] Clementi *v.* Golding, 2 Campb. 25; Commonwealth *v.* Kneeland, 20 Pick. 239. [Courts will take judicial notice of the customary abbreviations of Christian names. Stephen *v.* State, 11 Geo. 225; Weaver *v.* McElhenon, 13 Miss. 89.]

[2] Hockin *v.* Cooke, 4 T. R. 314. The current coins of the country, whether established by statute or existing immemorially, will be judicially recognized. [* Daily *v.* State, 10 Ind. 536.] The courts will also take notice of the character of the existing circulating medium, and of the popular language in reference to it; Lampton *v.* Haggard, 3 Monr. 149; Jones *v.* Overstreet, 4 Monr. 547; [United States *v.* Burns, 5 McLean, 23; United States *v.* King, Ib. 208;] but not of the current value of the notes of a bank at any particular time. Feemster *v.* Ringo, 5 Monr. 336.

[3] Bank of Augusta *v.* Earle, 13 Pet. 519, 590; 1 Stark. Ev. 211 (6th Am. ed.). [See also Douglass *v.* Branch Bank, 19 Ala. 659.]

[4] Taylor *v.* Barclay, 2 Sim. 221. Where a libel was charged, in stating that the plaintiff's friends, in the advocacy of her claims, "had realized the fable of the Frozen Snake," it was held that the court might judicially take notice that the knowledge of that fable of Phædrus generally prevailed in society. Hoare *v.* Silverlock, 12 Jur. 695; 12 Ad. & El. 624, N. S.

[5] [* Floyd *v.* Ricks, 14 Ark. 286.

[6] Bodmin Mines Co. *in re*, 23 Beav. 370.

[7] Baltimore *v.* The State, 15 Md. Rep. 376.

[8] Ellis *v.* Park, 8 Texas, 205.

[9] McKinnon *v.* Bliss, 21 N. Y. App. 206.]

[10] Deybel's case, 4 B. & Ald. 242; 2 Inst. 557; Fazakerley *v.* Wiltshire, 1 Stra. 469; Humphreys *v.* Budd, 9 Dowl. 1000; Ross *v.* Reddick, 1 Scam. 73; Goodwin *v.* Appleton, 9 Shepl. 453; Vanderwerker *v.* The People, 5 Wend. 530; [* State *v.* Powers, 25 Conn. 48;] [Ham *v.* Ham, 39 Maine, 263; Ib. 291; Wright *v.* Phillips, 2 Greene (Iowa), 191; Robertson *v.* Teal, 9 Texas, 344; Wheeler *v.* Moody, Ib. 372; Ross *v.* Austill, 2 Cal. 183; Kidder *v.* Blaisdell, 45 Maine, 461; Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420.] But courts do not take notice that particular places are or not in particular counties. Bruce *v.* Thompson, 2 Ad. & El. 789, N. S. [* But see Cooke *v* Wilson, 1 C. B. N. S., 153.]

[11] [* State *v.* Dunwell, 3 R. I. 127.]

They will also judicially recognize the political constitution or frame of their own government; its essential political agents or public officers, sharing in its regular administration; and its essential and regular political operations, powers, and action. Thus, notice is taken, by all tribunals, of the accession of the Chief Executive of the nation or state, under whose authority they act; his powers and privileges;[1] the genuineness of his signature,[2] the heads of departments, and principal officers of state, and the public seals;[3] the election or resignation of a senator of the United States; the appointment of a cabinet or foreign minister;[4] marshals and sheriffs,[5] and the genuineness of their signatures,[6] but not their deputies; courts of general jurisdiction, their judges,[7] their seals, their rules and maxims in the administration of justice, and course of proceeding;[8] also, of public proclamations of war and peace,[9] and of days of special public fasts and thanksgivings; stated days of general political elections; the sittings of the legislature, and its established and usual course

[1] Elderton's case, 2 Ld. Raym. 980, per Holt, C. J.; [* Hizer *v.* State, 12 Ind. 330; Lindsey *v.* Attorney-general, 33 Miss. 508; State *v.* Williams, 5 Wis. 308.]

[2] Jones *v.* Gale's Ex'r, 4 Martin, 635. And see Rex *v.* Miller, 2 W. Bl. 797; 1 Leach, Cr. Cas. 74; Rex *v.* Gully, 1 Leach, Cr. Cas. 98.

[3] Rex *v.* Jones, 2 Campb. 121; Bennett *v.* The State of Tennessee, Mart. & Yerg. 133; Ld. Melville's case, 29 How. St. Tr. 707. And see as to seals, *infra*, § 503, and cases there cited. [The courts of the United States will take notice of the persons who from time to time preside over the patent-office, whether permanently or transiently. York, &c., Railroad Co. *v.* Winans, 17 How. U. S. 30.]

[4] Walden *v.* Canfield, 2 Rob. Louis. R. 466.

[5] Holman *v.* Burrow, 2 Ld. Raym. 794; [Ingraham *v.* State, 27 Ala. 17; Major *v.* State, 2 Sneed (Tenn.), 11. The Court of Common Pleas will take judicial notice that the Queen's prison is in England. Wickens *v.* Goatley, 8 Eng. Law & Eq. 420, 422.]

[6] Alcock *v.* Whatmore, 8 Dowl. P. C. 615.

[7] Watson *v.* Hay, 3 Kerr, 559. [The Supreme Court (of Ohio) will take judicial notice of the time fixed for the commencement of its sessions, but not of the duration of any particular session. Gilliland *v.* Sellers, 2 Ohio (N. S.), 223. See also Lindsay *v.* Williams, 17 Ala. 229.]

[8] Tregany *v.* Fletcher, 1 Ld. Raym. 154; Lane's case, 2 Co. 16; 3 Com. Dig. 336, Courts, Q.; Newell *v.* Newton, 10 Pick. 470; Elliott *v.* Evans, 3 B. & P. 183, 184, per Ld. Alvanley, C. J.; Maberley *v.* Robins, 5 Taunt. 625; Tooker *v.* Duke of Beaufort, Sayer, 296; [* Tucker *v.* State, 11 Md. 322.] Whether Superior Courts are bound to take notice who are Justices of the inferior tribunals, is not clearly settled. In Skipp *v.* Hook, 2 Stra. 1080, it was objected that they were not; but whether the case was decided on that, or on the other exception taken, does not appear. Andrews, 74, reports the same case, "*ex relatione alterius*," and equally doubtful. And see Van Sandau *v.* Turner, 6 Ad. & El. 773, 786, per Ld. Denman. The weight of American authorities seems rather on the affirmative side of the question. Hawks *v.* Kennebec, 7 Mass. 461; Ripley *v.* Warren, 2 Pick. 592; Despau *v.* Swindler, 3 Martin, N. S. 705; Follain *v.* Lefevre, 3 Rob. Louis. R. 13. In *Louisiana* the courts take notice of the signatures of executive and judicial officers to all official acts. Jones *v.* Gale's Ex'r, 4 Martin, 635; Wood *v.* Fitz, 10 Martin, 196. [Courts will also take notice of the times and places of holding their sessions. Kidder *v.* Blaisdell, 45 Maine, 461.]

[9] Dolder *v.* Ld. Huntingfield, 11 Ves. 292; Rex *v.* De Berenger, 3 M. & S. 67; Taylor *v.* Barclay, 2 Sim. 213.

of proceeding; the privileges of its members, but not the transactions on its journals.[1] The courts of the United States, moreover, take judicial notice of the ports and waters of the United States in which the tide ebbs and flows; of the boundaries of the several states and judicial districts;[2] and, in an especial manner, of all the laws and jurisprudence of the several states in which they exercise an original or an appellate jurisdiction. The judges of the Supreme Court of the United States are, on this account, bound to take judicial notice of the laws and jurisprudence of all the states and territories.[3] A Court of Errors will also take notice of the nature and extent of the jurisdiction of the inferior court whose judgment it revises.[4] In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction. In all these, and the like cases, where the memory of the judge is at fault, he resorts to such documents of reference as may be at hand, and he may deem worthy of confidence.[5]

[* § 6*a*. There is not an entire consistency, in principle, in the decisions in the several states, upon this question. Thus it has been held courts will take notice of the usual route and course of travel between different points within the state, in order to determine the reasonableness of notice to take depositions;[6] but that they will not take notice of the quantity of land contained within given courses and distances.[7] But in fact the latter is a matter of mere computation, and no more requires proof than any other

[1] Lake *v.* King, 1 Saund. 131; Birt *v.* Rothwell, 1 Ld. Raym. 210, 343; Rex *v.* Wilde, 1 Lev. 296; 1 Doug. 97, n. 41; Rex *v.* Arundel, Hob. 109, 110, 111; Rex *v.* Knollys, 1 Ld. Raym. 10, 15; Stockdale *v.* Hansard, 7 C. & P. 731; 9 Ad. & El. 1; 11 Ad. & El. 253; Sheriff of Middlesex's case, Id. 273; Cassidy *v.* Stewart, 2 M. & G. 437.

[2] Story on Eq. Plead., § 24, cites United States *v.* La Vengeance, 3 Dall. 297; The Apollon, 9 Wheat. 374; The Thomas Jefferson, 10 Wheat. 428; Peyroux *v.* Howard, 7 Pet. 342. They will also recognize the usual course of the great inland commerce, by which the products of agriculture in the valley of the Mississippi find their way to market. Gibson *v.* Stevens, 8 How. S. C. R. 384; [Lathrop *v.* Stewart, 5 McLean, 167. They will take notice without proof of the legal coins of the United States. United States *v.* Burns, 5 McLean, 23; United States *v.* King, Ib. 208. They also take judicial notice of treaties between the United States and foreign governments; and of the public acts and proclamations of those governments and their publicly authorized agents in carrying those treaties into effect. United States *v.* Reynes, 9 How. U. S. 127; and of the Spanish Laws which prevailed in Louisiana, before its cession to the United States. United States *v.* Turner, 11 Ib. 663.]

[3] Ibid.; Owings *v.* Hull, 9 Pet. 607, 624, 625; Jasper *v.* Porter, 2 McLean, 579; [Miller *v.* McQuerry, 5 McLean, 469.]

[4] Chitty *v.* Dendy, 3 Ad. & El. 319. [See March *v.* Commonwealth, 12 B. Mon. 25.]

[5] Gresley on Evid. 295.

[6] [* Hipes *v.* Cochran, 13 Ind. 175.

[7] Tison *v.* Smith, 8 Texas, 147.]

proposition based upon the fundamental rules of arithmetic; and the former is a thing liable to vary with every change of the time-tables, upon a railway. It is most unquestionable, that courts will take notice of what is within the common experience or knowledge of all men; as the length of time ordinarily required to cross the Atlantic by steam,[1] or the nature of lotteries and the manner in which they are conducted.[2] And it is no objection that the court may require instruction upon the point, themselves. They will make inquiries, at the proper place for acquiring information. For this purpose in one case[3] the Vice-Chancellor made inquiries at the Foreign Office, whether the Federal Republic of Central America had been recognized by the British Government. And Lord Hardwicke inquired of an eminent conveyancer as to the existence of a rule of practice in that department of the profession.[4] And the United States Supreme Court resorted to the archives and public record-books of the United States to inform themselves of particular facts material to be known to the proper understanding of a cause before it.][5]

[1] [* Openheim *v.* Leo Wolf, 3 Sandf. Ch. 571.

[2] Boullemet *v.* State, 28 Ala. 83.

[3] Taylor *v.* Barclay, 2 Sim. 221.

[4] Willoughby *v.* Willoughby, 1 T. R. 772.

[5] Romero *v.* The United States, 1 Wallace, U. S. 721; Nelson, J., in United States *v.* Teschmaker, 22 How. U. S. 405.]

CHAPTER III.

OF THE GROUNDS OF BELIEF.

[* § 7. Our experience forms the basis of our belief in human testimony.
8. But we also derive great aid from the experience of others.
9. The belief in human testimony, a fundamental principle of our moral nature.
10. This belief is strengthened by many corroborative circumstances.
11. The probability of an hypothesis is determined by experience and reasoning combined.
12. Extensive induction tests the probability of a narrative of events, with surprising certainty.
13. Distinction between direct and circumstantial evidence.
13*a*. Consideration of the degrees of certainty produced by circumstantial evidence.]

§ 7. We proceed now to a brief consideration of the *General Nature and Principles of Evidence.* No inquiry is here proposed into the origin of human knowledge; it being assumed, on the authority of approved writers, that all that men know is referable, in a philosophical view, to perception and reflection. But, in fact, the knowledge acquired by an individual, through his own perception and reflection, is but a small part of what he possesses; much of what we are content to regard and act upon as knowledge having been acquired through the perception of others.[1] It is not easy to conceive that the Supreme Being, whose wisdom is so conspicuous in all his works, constituted man to believe only upon his own personal experience; since in that case the world could neither be governed nor improved; and society must remain in the state in which it was left by the first generation of men. On the contrary, during the period of childhood, we believe implicitly almost all that is told us; and thus are furnished with information which we could not otherwise obtain, but which is necessary, at the time, for our present protection, or as the means of future improvement. This disposition to believe may be termed instinctive. At an early period, however, we begin to find that, of the things told to us, some are not true, and thus our implicit reliance on the

[1] Abercrombie on the Intellectual Powers, Part II. sec. 1, pp. 45, 46.

testimony of others is weakened; first, in regard to particular things in which we have been deceived; then in regard to persons whose falsehood we have detected; and, as these instances multiply upon us, we gradually become more and more distrustful of such statements, and learn by experience the necessity of testing them by certain rules. Thus, as our ability to obtain knowledge by other means increases, our instinctive reliance on testimony diminishes, by yielding to a more rational belief.[1]

§ 8. It is true, that in receiving the knowledge of facts from the testimony of others, we are much influenced by their accordance

[1] Gambier's Guide, p. 87; McKinnon's Philosophy of Evidence, p. 40. This subject is treated more largely by Dr. Reid in his profound "Inquiry into the Human Mind," ch. 6, sec. 24, p. 428–434, in these words: — "The wise and beneficent Author of Nature, who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge by the information of others, hath, for these purposes, implanted in our natures two principles that tally with each other. The first of these principles is a propensity to speak truth and to use the signs of language, so as to convey our real sentiments. This principle has a powerful operation, even in the greatest liars; for where they lie once they speak truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art or training, no inducement or temptation, but only, that we yield to a natural impulse. Lying, on the contrary, is doing violence to our nature; and is never practised, even by the worst men, without some temptation. Speaking truth is like using our natural food, which we would do from appetite, although it answered no end; but lying is like taking physic, which is nauseous to the taste, and which no man takes but for some end which he cannot otherwise attain. If it should be objected, that men may be influenced by moral or political considerations to speak truth, and, therefore, that their doing so is no proof of such an original principle as we have mentioned; I answer, first, that moral or political considerations can have no influence until we arrive at years of understanding and reflection; and it is certain, from experience, that children keep to truth invariably, before they are capable of being influenced by such considerations. Secondly, when we are influenced by moral or political considerations, we must be conscious of that influence, and capable of perceiving it upon reflection. Now, when I reflect upon my actions most attentively, I am not conscious that, in speaking truth, I am influenced on ordinary occasions by any motive, moral or political. I find that truth is always at the door of my lips, and goes forth spontaneously, if not held back. It requires neither good nor bad intention to bring it forth, but only that I be artless and undesigning. There may, indeed, be temptations to falsehood, which would be too strong for the natural principle of veracity, unaided by principles of honor or virtue; but where there is no such temptation, we speak truth by instinct; and this instinct is the principle I have been explaining. By this instinct, a real connection is formed between our words and our thoughts, and thereby the former become fit to be signs of the latter, which they could not otherwise be. And although this connection is broken in every instance of lying and equivocation, yet these instances being comparatively few, the authority of human testimony is only weakened by them, but not destroyed. Another original principle, implanted in us by the Supreme Being, is a disposition to confide in the veracity of others, and to believe what they tell us. This is the counterpart to the former; and as that may be called the principle of veracity, we shall, for want of a more proper name, call this the principle of credulity. It is unlimited in children, until they meet with instances of deceit and falsehood; and it retains a very considerable degree of strength through life. If nature had left the mind of the speaker in æquilibrio, without any inclination to the side of truth more than to that of falsehood, children would lie as often as they speak truth, until reason was so far ripened, as to suggest the imprudence of lying, or conscience, as to suggest its immorality. And if nature had left the mind of the hearer in æquilibrio, without any inclination to the side of belief more than to that of disbelief, we should take no man's word, until we had

with facts previously known or believed; and this constitutes what is termed their probability. Statements, thus probable, are received upon evidence much less cogent than we require for the belief of those which do not accord with our previous knowledge. But while these statements are more readily received, and justly relied upon, we should beware of unduly distrusting all others. While unbounded credulity is the attribute of weak minds, which seldom think or reason at all, — *quo magis nesciunt eò magis admirantur*, — unlimited scepticism belongs only to those who make their own knowledge and observation the exclusive standard of probability. Thus the king of Siam rejected the testimony of the Dutch ambassador, that in his country, water was sometimes congealed into a solid mass; for it was utterly contrary to his own experience.

positive evidence that he spoke truth. His testimony would, in this case, have no more authority than his dreams, which may be true or false; but no man is disposed to believe them, on this account, that they were dreamed. It is evident, that in the matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself, when there is nothing put into the opposite scale. If it was not so, no proposition that is uttered in discourse would be believed, until it was examined and tried by reason; and most men would be unable to find reasons for believing the thousandth part of what is told them. Such distrust and incredulity would deprive us of the greatest benefits of society, and place us in a worse condition than that of savages. Children, on this supposition, would be absolutely incredulous, and therefore absolutely incapable of instruction; those who had little knowledge of human life, and of the manners and characters of men, would be in the next degree incredulous; and the most credulous men would be those of greatest experience, and of the deepest penetration; because in many cases, they would be able to find good reasons for believing testimony, which the weak and the ignorant could not discover. In a word, if credulity were the effect of reasoning and experience, it must grow up and gather strength in the same proportion as reason and experience do. But if it is the gift of nature, it will be strongest in childhood, and limited and restrained by experience; and the most superficial view of human life shows, that the last is really the case, and not the first. It is the intention of nature, that we should be carried in arms before we are able to walk upon our legs; and it is likewise the intention of nature, that our belief should be guided by the authority and reason of others, before it can be guided by our own reason. The weakness of the infant, and the natural affection of the mother, plainly indicate the former; and the natural credulity of youth and authority of age as plainly indicate the latter. The infant, by proper nursing and care, acquires strength to walk without support. Reason hath likewise her infancy, when she must be carried in arms; then she leans entirely upon authority, by natural instinct, as if she was conscious of her own weakness; and without this support she becomes vertiginous. When brought to maturity by proper culture, she begins to feel her own strength, and leans less upon the reason of others; she learns to suspect testimony in some cases, and to disbelieve it in others; and sets bounds to that authority, to which she was at first entirely subject. But still, to the end of life, she finds a necessity of borrowing light from testimony, where she has none within herself, and of leaning in some degree upon the reason of others, where she is conscious of her own imbecility. And as, in many instances, Reason, even in her maturity, borrows aid from testimony, so in others she mutually gives aid to it and strengthens its authority. For, as we find good reason to reject testimony in some cases, so in others we find good reason to rely upon it with perfect security, in our most important concerns. The character, the number, and the disinterestedness of witnesses, the impossibility of collusion, and the incredibility of their concurring in their testimony without collusion, may give an irresistible strength to testimony, compared to which its native and intrinsic authority is very inconsiderable."

Sceptical philosophers, inconsistently enough with their own principles, yet true to the nature of man, continue to receive a large portion of their knowledge upon testimony derived, not from their own experience, but from that of other men; and this, even when it is at variance with much of their own personal observation. Thus, the testimony of the historian is received with confidence, in regard to the occurrences of ancient times; that of the naturalist and the traveller, in regard to the natural history and civil condition of other countries; and that of the astronomer, respecting the heavenly bodies; facts, which, upon the narrow basis of his own "firm and unalterable experience," upon which Mr. Hume so much relies, he would be bound to reject, as wholly unworthy of belief.

§ 9. The uniform habits, therefore, as well as the necessities of mankind, lead us to consider the disposition to believe, upon the evidence of extraneous testimony, as a fundamental principle of our moral nature, constituting the general basis upon which all evidence may be said to rest.[1]

§ 10. Subordinate to this paramount and original principle, it may, in the *second* place, be observed, that evidence rests upon our faith in human testimony, as sanctioned by experience; that is, upon the general experienced truth of the statements of men of integrity, having capacity and opportunity for observation, and without apparent influence from passion or interest to pervert the truth. This belief is strengthened by our previous knowledge of the narrator's reputation for veracity; by the absence of conflicting testimony; and by the presence of that which is corroborating and cumulative.

§ 11. A *third* basis of evidence is the known and experienced connection subsisting between collateral facts or circumstances, satisfactorily proved, and the fact in controversy. This is merely the legal application, in other terms, of a process, familiar in natural philosophy, showing the truth of an hypothesis by its coincidence with existing phenomena. The connections and coincidences, to which we refer, may be either physical or moral; and the knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual, and moral constitution and habits of man. Their

[1] Abercrombie on the Intellectual Powers, Part II. sec. 3, pp. 70–75.

force depends on their sufficiency to exclude every other hypothesis but the one under consideration. Thus, the possession of goods recently stolen, accompanied with personal proximity in point of time and place, and inability in the party charged, to show how he came by them, would seem naturally, though not necessarily, to exclude every other hypothesis but that of his guilt. But the possession of the same goods, at a remoter time and place, would warrant no such conclusion, as it would leave room for the hypothesis of their having been lawfully purchased in the course of trade. Similar to this in principle is the rule of *noscitur a sociis*, according to which the meaning of certain words, in a written instrument, is ascertained by the context.

§ 12. Some writers have mentioned yet another ground of the credibility of evidence, namely, the exercise of our reason upon the effect of coincidences in testimony, which, if collusion be excluded, cannot be accounted for upon any other hypothesis than that it is true.[1] It has been justly remarked, that progress in knowledge is not confined, in its results, to the mere facts which we acquire, but it has also an extensive influence in enlarging the mind for the further reception of truth, and setting it free from many of those prejudices which influence men whose minds are limited by a narrow field of observation.[2] It is also true, that, in the actual occurrences of human life, nothing is inconsistent. Every event which actually transpires has its appropriate relation and place in the vast complication of circumstances, of which the affairs of men consist; it owes its origin to those which have preceded it; it is intimately connected with all others which occur at the same time and place, and often with those of remote regions; and, in its turn, it gives birth to a thousand others which succeed.[3] In all this, there is perfect harmony; so that it is hardly possible to invent a story which, if closely compared with all the actual contemporaneous occurrences, may not be shown to be false. From these causes, minds, deeply imbued with science, or enlarged by long and matured experience, and close observation of the conduct and affairs of men, may, with a rapidity and certainty approaching to intuition, perceive the elements of truth or falsehood in the face itself of the narrative, without any regard to the narrator. Thus, Archimedes might have believed an account

[1] 1 Stark. Evid. 471, note.
[2] Abercrombie on the Intellectual Powers, Part II. sec. 3, p. 71.
[3] 1 Stark. Evid. 496.

of the invention and wonderful powers of the steam-engine, which his unlearned countrymen would have rejected as incredible; and an experienced judge may instantly discover the falsehood of a witness, whose story an inexperienced jury might be inclined to believe. But, though the mind, in these cases, seems to have acquired a new power, it is properly to be referred only to experience and observation.

§ 13. In trials of fact, it will generally be found that the *factum probandum* is either directly attested by those who speak from their own actual and personal knowledge of its existence, or it is to be inferred from other facts, satisfactorily proved. In the former case, the truth rests upon the *second* ground before mentioned, namely, our faith in human veracity, sanctioned by experience. In the latter case, it rests on the same ground, with the addition of the experienced connection between the collateral facts thus proved and the fact which is in controversy; constituting the *third* basis of evidence before stated. The facts proved are, in both cases, directly attested. In the former case, the proof applies immediately to the *factum probandum*, without any intervening process, and it is therefore called *direct* or *positive* testimony. In the latter case, as the proof applies immediately to collateral facts, supposed to have a connection, near or remote, with the fact in controversy, it is termed *circumstantial;* and sometimes but not with entire accuracy, *presumptive*. Thus, if a witness testifies that he saw A inflict a mortal wound on B, of which he instantly died; this is a case of direct evidence; and, giving to the witness the credit to which men are generally entitled, the crime is satisfactorily proved. If a witness testifies that a deceased person was shot with a pistol, and the wadding is found to be part of a letter, addressed to the prisoner, the residue of which is discovered in his pocket; here the facts themselves are directly attested; but the evidence they afford is termed *circumstantial;* and from these facts, if unexplained by the prisoner, the jury may, or may not, *deduce*, or *infer*, or *presume* his guilt, according as they are satisfied, or not, of the natural connection between similar facts, and the guilt of the person thus connected with them. In both cases, the veracity of the witness is presumed, in the absence of proof to the contrary; but in the latter case there is an additional presumption or inference, founded on the known usual connection between the facts proved, and the guilt of the party implicated.

This operation of the mind, which is more complex and difficult in the latter case, has caused the evidence afforded by circumstances to be termed *presumptive evidence;* though in truth, the operation is similar in both cases.

§ 13*a*. Circumstantial evidence is of two kinds, namely, *certain*, or that from which the conclusion in question *necessarily* follows; and *uncertain*, or that from which the conclusion does not necessarily follow, but is *probable* only, and is obtained by process of reasoning. Thus, if the body of a person of mature age is found dead, with a recent mortal wound, and the mark of a bloody *left* hand is upon the *left* arm, it may well be concluded that the person once lived, and that another person was present at or since the time when the wound was inflicted. So far the conclusion is certain; and the jury would be bound by their oaths to find accordingly. But whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was that of the assassin, or of a friend who attempted, though too late, to afford relief, or to prevent the crime, is a conclusion which does not necessarily follow from the facts proved, but is obtained from these and other circumstances, by probable deduction. The conclusion, in the latter case, may be more or less satisfactory or stringent, according to the circumstances. In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. But in criminal cases, because of the more serious and irreparable nature of the consequences of a wrong decision, the jurors are required to be satisfied, beyond any reasonable doubt, of the guilt of the accused, or it is their duty to acquit him; the charge not being proved by that higher degree of evidence which the law demands. In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the party. In both cases, a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce.[1]

[1] See Bodine's case, in the New York Legal Observer, vol. 4, pp. 89, 95, where the nature and value of this kind of evidence are fully discussed. See *infra*, § 44

to 48. And see Commonwealth *v.* Webster, 5 Cush. 296, 310–319; [People *v.* Videto, 1 Parker, C. R. 603. The court cannot be required to instruct the jury that if the proof rests upon circumstantial evidence, then the jury must be satisfied that the government has proved such a coincidence of circumstances as excludes every hypothesis except the guilt of the prisoner; and unless they are satisfied that the proof does exclude every other hypothesis, then they ought not to convict the prisoner. "The true rule is, that the circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis." Commonwealth *v.* Goodwin, 14 Gray, 55.]

CHAPTER IV.

OF PRESUMPTIVE EVIDENCE.

[* § 14. Presumptions of law, and of fact; conclusive, or disputable.
15. Conclusive presumptions require no support, and admit no contradiction.
16. These are defined by statutes, as those of limitation.
17. Presumptions founded on prescription; same term as statutes of limitation in analogous cases.
18. Men presumed to intend the natural consequences of their conduct.
19. Records presumed correct: specialties upon consideration.
20. The presumption, *omnia rite acta*, either from lapse of time, or from the fact of being done.
20*a*. In the latter case, the force of the presumption will vary with the circumstances.
21. So ancient deeds and wills are presumed genuine after the lapse of thirty years.
22. Estoppels are of the class of conclusive presumptions.
23. The recitals in deeds conclusive against parties and privies.
24. The grantor in a deed estopped to deny that he had good title, and from claiming title adverse to his covenants.
25. The tenant cannot deny the title of his landlord
26. Recitals in deed not conclusive except of facts directly stated.
27. Admissions, solemn and unsolemn, conclusive.
28. Conclusive presumptions apply to infants and married women, as to capacity and consent.
29. In some countries conclusive presumptions exist, as to survivorship, but not common law.
30. It is there regarded as a question of fact for the jury.
31. Conclusive presumptions applied by the law of nations.
32. These presumptions founded more upon policy than probability.
33. Disputable presumptions good until disproved.
34. These depend upon common experience, and are referable to the jury, where any evidence is given.
35. Presumption of innocence allowed to overcome other presumptions.
36. But in the publication of libel the presumption of innocence yields to that of malice.
37. The destruction of documentary evidence raises a presumption of guilt. The fabrication of evidence has a tendency in the same direction.
38. Presumptions founded on the course of trade and business.
38*a*. Presumptions of the due execution of wills and deeds.
39. Presumptions of payment of bonds and other instruments from the lapse of twenty years.
40. Presumptions from the due course of business in public and private administration of duty.
41. Presumptions in regard to the continuance of life.

§ 42. Presumptions that condition and character continue unless the contrary be shown.
43. Presumptions of the adoption of foreign laws, from the comity of nations.
44. Presumptions of fact defined.
45. Presumptions from experience against the testimony of accomplices, the verbal admissions of a party, &c. &c.
46. Presumptions of grants and conveyances.
47. Claims long acquiesced in presumed to be founded in right.
48. The subject embraces all grounds of inferring one fact from the existence of others, whether founded upon a mechanical and physical connection, or upon mere probability, depending upon moral evidence.]

§ 14. The general head of Presumptive Evidence is usually divided into two branches, namely, *presumptions of law* and *presumptions of fact*. Presumptions of Law consist of those rules, which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded, either upon the first principles of justice; or the laws of nature; or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. The general doctrines of presumptive evidence are not therefore peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connection, which leads to its recognition by the law without other proof; the presumption, however, having more or less force, in proportion to the universality of the experience. And this has led to the distribution of presumptions of law into two classes, namely, *conclusive* and *disputable*.

§ 15. *Conclusive*, or, as they are elsewhere termed, imperative, or absolute presumptions of law, are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long-experienced connection, before alluded to, has been found so general and uniform as to render it expedient for the common good, that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the

promotion of peace and quiet in the community; and therefore it is, that all corroborating evidence is dispensed with, and all opposing evidence is forbidden.[1]

§ 16. Sometimes this common consent is expressly declared, through the medium of the legislature, in *statutes*. Thus, by the statutes of limitation, where a debt has been created by simple contract, and has not been distinctly recognized, within six years, as a subsisting obligation, no action can be maintained to recover it; that is, it is conclusively presumed to have been paid. A trespass, after the lapse of the same period, is, in like manner, conclusively presumed to have been satisfied. So the possession of land, for the length of time mentioned in the statutes of limitation, under a claim of absolute title and ownership, constitutes against all persons but the sovereign, a conclusive presumption of a valid grant.[2]

§ 17. In other cases, the common consent, by which this class of legal presumptions is established, is declared through the medium of the judicial tribunals, it being the *common law* of the land; both being alike respected, as authoritative declarations of an imperative rule of law, against the operation of which no averment or evidence is received. Thus, the uninterrupted enjoyment of an incorporeal hereditament for a period beyond the memory of man, is held to furnish a conclusive presumption of a prior grant of that which has been so enjoyed. This is termed a title by prescription.[3] If

[1] The presumption of the Roman Law is defined to be, — "Conjectura, ducta ab eo, quod ut plurimum fit. Ea conjectura vel a *lege* inducitur, vel a *judice*. Quæ ab ipsa lege inducitur, vel ita comparata, ut probationem contrarii haud admittat; vel ut eadem possit elidi. *Priorem* doctores *præsumptionem* JURIS ET DE JURE, *posteriorem præsumptionem* JURIS, adpellant. Quæ a *Judice* indicitur conjectura, *præsumptio* HOMINIS vocari solet; et semper admittit probationem contrarii, quamvis, si alicujus momenti sit, probandi onere relevet." Hein. ad Pand. Pars iv. § 124. Of the former, answering to our conclusive presumption, Mascardus observes, — "Super hac præsumptione lex firmum sancit jus, et eam *pro veritate, habet*." De Probationibus, vol. 1, Quæst. x. 48. An exception to the general conclusiveness of this class of presumptions is allowed in the case of admissions *in judicio*, which will be hereafter mentioned. See *infra*, §§ 169, 186, 205, 206.

[2] This period has been limited differently, at different times; but, for the last fifty years, it has been shortened at succeeding revisions of the law, both in England and the United States. By Stat. 3 & 4 Wm. IV. c. 27, all real actions are barred, after twenty years from the time when the right of action accrued. And this period is adopted in most of the United States, though in some of the states it is reduced to seven years, while in others it is prolonged to fifty. See 3 Cruise's Dig. tit. 31, ch. 2, the synopsis of Limitions at the end of the chapter (Greenleaf's ed.). See also, 4 Kent, Comm. 188, note (a). The same period in regard to the title to real property, or, as some construe it, only to the profits of the land, is adopted in the Hindu Law. See Macnaghten's Elements of Hindu Law, vol. 1, p. 201.

[3] 3 Cruise's Dig. 430, 431 (Greenleaf's ed.). "Præscriptio est titilus, ex usu et tempore substantiam capiens, ab authoritate legis." Co. Litt. 113, a. What length

this enjoyment has been not only uninterrupted, but exclusive and adverse in its character, for the period of twenty years, this also has been held, at common law, as a conclusive presumption of title.[1] There is no difference, in principle, whether the subject be a corporeal or an incorporeal hereditament; a grant of land may as well be presumed as a grant of a fishery, or a common, or a way.[2] But, in regard to the effect of possession alone for a period of time, unaccompanied by other evidence, as affording a presumption of title, a difference is introduced, by reason of the statute of limitations, between corporeal subjects, such as lands and tenements, and things incorporeal; and it has been held, that a grant of lands, conferring an entire title, cannot be presumed from mere possession alone, for any length of time short of that prescribed by the statute of limitations. The reason is, that, with respect to corporeal hereditaments, the statute has made all the provisions which the law deems necessary for quieting possessions; and has thereby taken these cases out of the operation of the common law. The possession of lands, however, for a shorter period, when coupled with other circumstances, indicative of ownership, may justify a jury in finding a grant; but such cases do not fall within this class of presumptions.[3]

of time constitutes this period of legal memory has been much discussed among lawyers. In this country, the courts are inclined to adopt the periods mentioned in the statutes of limitation, in all cases analogous in principle. Coolidge *v.* Learned, 8 Pick. 504; Melvin *v.* Whiting, 10 Pick. 295; Ricard *v.* Williams, 7 Wheat. 110. In England, it is settled by Stat. 2 & 3 Wm. IV. c. 71, by which the period of legal memory has been limited as follows: in cases of rights of common or other benefits arising out of lands, except tithes, rents, and services, *primâ facie* to thirty years; and conclusively to sixty years, unless proved to have been held by consent, expressed by deed or other writing; in cases of aquatic rights, ways, and other easements, *primâ facie* to twenty years; and conclusively to forty years, unless proved in like manner, by written evidence, to have been enjoyed by consent of the owner; and in cases of lights, conclusively to twenty years, unless proved in like manner, to have been enjoyed by consent. In the Roman Law, prescriptions were of two kinds: *extinctive* and *acquisitive*. The former referred to rights of action, which, for the most part, were barred by the lapse of thirty years. The latter had regard to the mode of acquiring property by long and uninterrupted possession; and this, in the case of immovable or real property, was limited, *inter præsentes*, to ten years, and *inter absentes*, to twenty years. The student will find this doctrine fully discussed in Mackeldey's Compendium of Modern Civil Law, vol. 1, p. 200–205, 290, *et seq.* (Amer. ed.), with the learned notes of Dr. Kaufman. See also, Novel. 119, c. 7, 8. [See also, 2 Greenl. Ev. (7th ed.), § 537–546, tit. PRESCRIPTION.]

[1] Tyler *v.* Wilkinson, 4 Mason, 397, 402; Ingraham *v.* Hutchinson, 2 Conn. 584; Bealey *v.* Shaw, 6 East, 208, 215; Wright *v.* Howard, 1 Sim. & Stu. 190, 203; Strickler *v.* Todd, 10 Serg. & Rawle, 63, 69; Balston *v.* Bensted, 1 Campb. 463, 465; Daniel *v.* North, 11 East, 371; Sherwood *v.* Burr, 4 Day, 244; Tinkham *v.* Arnold, 3 Greenl. 120; Hill *v.* Crosby, 2 Pick. 466. See Best on Presumptions, p. 103, n. (m); Bolivar Manuf. Co. *v.* Neponset Manuf. Co. 16 Pick. 241. See also *post*, vol. 2, § 537–546, tit. PRESCRIPTION.

[2] Ricard *v.* Williams, 7 Wheat. 109; Prop'rs of Brattle Street Church *v.* Bullard, 2 Met. 363.

[3] Sumner *v.* Child, 2 Conn. 607, 628–632, per Gould, J.; Clark *v.* Faunce, 4 Pick. 245.

§ 18. Thus, also, a sane man is conclusively presumed to contemplate the natural and probable *consequences* of his own acts; and, therefore, the intent to murder is conclusively inferred from the deliberate use of a deadly weapon.[1] So, the deliberate publication of calumny, which the publisher knows to be false, or has no reason to believe to be true, raises a conclusive presumption of malice.[2] So the neglect of a party to appear and answer to process, legally commenced in a court of competent jurisdiction, he having been duly served therewith and summoned, is taken conclusively against him as a confession of the matter charged.[3]

§ 19. Conclusive presumptions are also made in favor of judicial proceedings. Thus the *records* of a court of justice are presumed to have been correctly made;[4] a party to the record is presumed to

[1] 1 Russ. on Crimes, 658–660; Rex *v.* Dixon, 3 M. & S. 15; 1 Hale, P. C. 440, 411; Britton, 50, § 6. But if death does not ensue till a year and a day (that is, a full year) after the stroke, it is conclusively presumed that the stroke was not the sole cause of the death, and it is not murder. 4 Bl. Comm. 197; Glassford on Evid. 592. The doctrine of presumptive evidence was familiar to the Mosaic Code; even to the letter of the principle stated in the text. Thus, it is laid down, in regard to the manslayer, that "if he smite him with an *instrument of iron*, so that he die," — or, "if he smite him with throwing a *stone wherewith* he may die, and he die," — or, "if he smite him with a *hand-weapon of wood wherewith* he may die, and he die, he is a murderer." See Numb. xxxv. 16, 17, 18. Here, every instrument of *iron* is conclusively taken to be a deadly weapon; and the use of any such weapon raises a conclusive presumption of malice. The same presumption arose from *lying in ambush*, and thence destroying another. Id. v. 20. But, in other cases, the existence of malice was to be proved, as one of the facts in the case; and, in the absence of malice, the offence was reduced to the degree of manslaughter, as at the common law. Id. v. 22, 23. This very reasonable distinction seems to have been unknown to the Gentoo Code, which demands life for life in all cases, except where the culprit is a Bramin. "If a man deprives another of life, the magistrate shall deprive that person of life." Halhed's Gentoo Laws, Book 16, sec. 1, p. 233. Formerly, if the mother of an illegitimate child, recently born and found dead, concealed the fact of its birth and death, it was conclusively presumed that she murdered it. Stat. 21 Jac. 1, c. 37; probably copied from a similar edict of Hen. II. of France, cited by Domat. But this unreasonable and barbarous rule is now rescinded, both in England and America.

The subject of implied malice, from the unexplained fact of killing with a lethal weapon, was fully discussed in Commonwealth *v.* York, 9 Met. 103, upon a difference of opinion among the learned judges; and the rule, there laid down, in favor of the inference, was re-affirmed in Commonwealth *v.* Webster, 5 Cush. 305. [See also *infra*, § 34.

[2] Bodwell *v.* Osgood, 3 Pick. 379; Haire *v.* Wilson, 9 B. & C. 643; Rex *v.* Shipley, 4 Doug. 73, 177, per Ashhurst, J. [See also *post*, vol. 2 (7th ed.), § 418.]

[3] 2 Erskine, Inst. 780. Cases of this sort are generally regulated by statutes, or by the rules of practice established by the courts; but the principle evidently belongs to a general jurisprudence. So is the Roman Law. "Contumacia, eorum, qui, jus dicenti non obtemperant, litis damno coercetur." Dig. lib. 42, tit. 1, l. 53. "Si citatus aliquis non compareat, habetur pro consentiente." Mascard, De Prob. vol. 3, p. 253, concl. 1159, n. 26. See further on this subject, *infra*, § 201–211. The right of the party to have notice of the proceedings against him, before his non-appearance, is taken as a confession of the matter alleged, has been distinctly recognized in the courts both of England and America, as a rule, founded in the first principles of natural justice, and of universal obligation. Fisher *v.* Lane, 3 Wils. 302, 303, per Lee, C. J.; The Mary, 9 Cranch, 144, per Marshall, C. J.; Bradstreet *v.* The Neptune Ins. Co. 3 Sumn. 607, per Story, J.

[4] Reed *v.* Easton, 1 East, 355. Res judicata pro veritate accipitur. Dig. lib. 50, tit. 17, l. 207.

have been interested in the suit;[1] and, after verdict, it will be presumed that those facts, without proof of which the verdict could not have been found, were proved, though they are not expressly and distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in fair and reasonable intendment.[2] The presumption will also be made, after twenty years, in favor of every judicial tribunal acting within its jurisdiction, that all persons concerned had due notice of its proceedings.[3] A like presumption is also sometimes drawn from the solemnity of the act done, though not done in court. Thus a bond or other specialty is presumed to have been made upon good *consideration*, as long as the instrument remains unimpeached.[4]

§ 20. To this class of legal presumptions may be referred one of the applications of the rule, *Ex diuturnitate temporis omnia præsumuntur ritè et solemniter esse acta;* namely, that which relates to transactions, which are not of record, the proper evidence of which, after the lapse of a little time, it is often impossible, or extremely difficult to produce. The rule itself is nothing more than the principle of the statutes of limitation, expressed in a different form, and applied to other subjects. Thus, where an authority is given by law to executors, administrators, guardians, or other officers, to make sales of lands, upon being duly licensed by the courts, and they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings; the lapse of sufficient time (which in most cases is fixed at thirty years),[5]

[1] Stein *v.* Bowman, 13 Pet. 209.

[2] Jackson *v.* Pesked, 1 M. & S. 234, 237, per Ld. Ellenborough; Stephen on Pl. 166, 167; Spiers *v.* Parker, 1 T. R. 141; [Lathrop *v.* Stewart, 5 McLean, 167; Sprague *v.* Litherberry, 4 McLean, 442; Beale *v.* Commonwealth, 25 Penn. State R. 11; Hordiman *v.* Herbert, 11 Texas, 656. In pleading a discharge in bankruptcy, if the plea shows the District Court to have had jurisdiction, and to have proceeded, on the petition to decree the discharge, all the intermediate steps will be presumed to have been regularly taken. Morrison *v.* Woolson, 9 Foster, N. H. 510].

[3] Brown *v.* Wood, 17 Mass. 68. A former judgment, still in force, by a court of competent jurisdiction, in a suit between the same parties, is conclusive evidence, upon the matter directly in question in such suit, in any subsequent action or proceeding. Duchess of Kingston's case, 11 Howell, St. R. 261; Ferrer's case, 6 Co. 7. The effect of judgments will be farther considered hereafter. See *infra*, § 528–543.

[4] Lowe *v.* Peers, 4 Burr. 2225.

[5] See Pejepscot Prop'rs *v.* Ransom, 14 Mass. 145; Blossom *v.* Cannon, Id. 177; Colman *v.* Anderson, 10 Mass. 105. In some cases, twenty years has been held sufficient. As, in favor of the acts of sheriffs. Dronet *v.* Rice, 2 Rob. Louis. R. 374. So, after partition of lands by an incorporated land company, and a several possession, accordingly, for twenty years, it was presumed that its meetings were duly notified. Society, &c., *v.* Wheeler, 1 New Hamp. R. 310. [See also King *v.* Little, 1 Cush. 436; Freeman *v.* Thayer, 33 Maine, 76; Cobleigh *v.* Young, 15 N. H. 493; Freeholders of Hudson Co. *v.* State, 4 Zabr. 718; State *v.* Lewis, 2 New Jersey, 564; Allegheny *v.* Nelson, 25 Penn. St. R. 332; Plank-road Co. *v.* Bruce, 6

raises a conclusive presumption that all the legal formalities of the sale were observed. The license to sell, as well as the official character of the party, being provable by record or judicial registration, must in general be so proved; and the deed is also to be proved in the usual manner: it is only the intermediate proceedings that are presumed. *Probatis extremis, præsumuntur media.*[1] The reason of this rule is found in the great probability, that the necessary intermediate proceedings were all regularly had, resulting from the lapse of so long a period of time, and the acquiescence of the parties adversely interested; and in the great uncertainty of titles, as well as the other public mischiefs, which would result, if strict proof were required of facts so transitory in their nature, and the evidence of which is so seldom preserved with care. Hence it does not extend to records and public documents, which are supposed always to remain in the custody of the officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for, and supplied by secondary evidence.[2] Neither does the rule apply to cases of prescription.[3]

[* § 20*a*. The presumption, *omnia rite acta*, may arise from lapse of time, as before stated; or from the fact of being done by one bound to know, and to act conformably to, the law. As where an oath is administered to a deponent, in a foreign state, by one signing himself, "Justice of the Supreme Court."[4] But it was said, in a recent English case,[5] that the force of such presumptions must vary with the circumstances of each case.]

§ 21. The same principle applies to the proof of the execution of *ancient deeds and wills*. Where these instruments are more than thirty years old, and are unblemished by any alterations, they are said to prove themselves; the bare production thereof is sufficient;

Md. 457; Emmons *v.* Oldham, 12 Texas, 18. Where nine years before the commencement of the suit, a meeting of a proprietary had been called, on the application of certain persons representing themselves to be proprietors, it was held that there was no legal presumption that the petitioners for the meeting were proprietors, however the rule might be as to ancient transactions, but that proof of some kind, to show the fact that they were proprietors, must be adduced to sustain the issue. Stevens *v.* Taft, 3 Gray, 487;] [* Williams *v.* Eyton, 4 H. & N. 357; s. c. 5 Jur. N. S. 770.]

[1] Erskine, Inst. 782; Earle *v.* Baxter, 2 W. Bl. 1228. Proof that one's ancestor sat in the House of Lords, and that no patent can be discovered, affords a presumption that he sat by summons. The Braye Peerage, 6 Cl. & Fin. 657. See also, as to presuming the authority of an executor, Piatt *v.* McCullough, 1 McLean, 73.

[2] Brunswick *v.* McKeen, 4 Greenl. 508; Hathaway *v.* Clark, 5 Pick. 490.

[3] Eldridge *v.* Knott, Cowp. 215; Mayor of Kingston *v.* Horner, Id. 102.

[4] [* Saltar *v.* Applegate, 3 Zabr. 115.

[5] Vinnicombe *v.* Butler, 34 L. J. Prob. 18.]

the subscribing witnesses being presumed to be dead. This presumption, so far as this rule of evidence is concerned, is not affected by proof that the witnesses are living.[1] But it must appear that the instrument comes from such custody, as to afford a reasonable presumption in favor of its genuineness; and that it is otherwise free from just grounds of suspicion;[2] and in the case of a bond for the payment of money, there must be some endorsement of interest, or other mark of genuineness, within the thirty years, to entitle it to be read.[3] Whether, if the deed be a conveyance of real estate, the party is bound first to show some acts of possession under it, is a point not perfectly clear upon the authorities; but the weight of opinion seems in the negative, as will hereafter be more fully explained.[4] But after an undisturbed possession for thirty years, of any property, real or personal, it is too late to question the authority of the agent, who has undertaken to convey it,[5] unless his authority was by matter of record.

§ 23. *Estoppels* may be ranked in this class of presumptions. A man is said to be estopped, when he has done some act, which the policy of the law will not permit him to gainsay or deny. "The law of estoppel is not so unjust or absurd as it has been too much the custom to represent."[6] Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law, to prevent the great mischiefs resulting from uncertainty, confusion, and want of confidence, in the intercourse of men, if they were permitted to deny that which they have deliberately and solemnly asserted and received

[1] Rex *v.* Farringdon, 2 T. R. 471, per Buller, J.; Doe *v.* Wolley, 8 B. & C. 22; Bull. N. P. 255; 12 Vin. Abr. 84; Gov. &c. of Chelsea Waterworks *v.* Cowper, 1 Esp. 275; Rex *v.* Ryton, 5 T. R. 259; Rex v. Long, Buckby, 7 East, 45; McKenire *v.* Frazer, 9 Ves. 5; Oldnall *v.* Deakin, 3 C. & P. 462; Jackson *v.* Blanshan, 3 Johns. 292; Winn *v.* Patterson, 9 Peters, 674, 675; Bank United States *v.* Dandridge, 12 Wheat. 70, 71; Henthorne *v.* Doe, 1 Blackf. 157; Bennet *v.* Runyon, 4 Dana, R. 422, 424; Cook *v.* Totten, 6 Dana, 110; Thurston *v.* Masterson, 9 Dana, 233; Hynde *v.* Vattiere, 1 McLean, 115; Walton *v.* Coulson, Id. 124; Northrope *v.* Wright, 24 Wend. 221; [King *v.* Little, 1 Cush. 436; Settle *v.* Allison, 8 Geo. 201].

[2] Roe *v.* Rawlings, 7 East, 279, 291; 12 Vin. Abr. 84, Evid. A. b. 5; *infra*, §§ 142, 570; Swinnerton *v.* Marquis of Stafford, 3 Taunt. 91; Jackson *v.* Davis, 5 Cowen, 123; Jackson *v.* Luquere, Id. 221; Doe *v.* Beynon, 4 P. & D. 193; Doe *v.* Samples, 3 Nev. & P. 254.

[3] Forbes *v.* Wale, 1 W. Bl. 532; 1 Esp. 278, s. c.; *infra*, §§ 121, 122.

[4] *Infra*, § 144, note (1).

[5] Stockbridge *v.* West Stockbridge, 14 Mass. 257. Where there had been a possession of thirty-five years, under a legislative grant, it was held conclusive evidence of a good title, though the grant was unconstitutional. Trustees of the Episcopal Church in Newbern *v.* Trustees of Newbern Academy, 2 Hawks, 233.

[6] Per Taunton, J., 2 Ad. & El. 291. [See Cruise's Dig. (Greenl. 2d ed.) tit. 32, ch. 20, § 64, note. (Greenl. 2d ed. vol. 2, p. 611.)]

as true. If it be a recital of facts in a deed, there is implied a solemn engagement, that the facts are so, as they are recited. The doctrine of estoppels has, however, been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth; for it is rather to be supposed, that that is true, which the opposite party has already solemnly recited; but because the estoppel *may* exclude the truth. Hence, estoppels must be certain to every intent; for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former allegations and acts.[1]

§ 23. In regard to *recitals in deeds*, the general rule is, that all parties to a deed are bound by the recitals therein,[2] which operates as an estoppel, working on the interest in the land, if it be a deed of conveyance and binding both parties and privies; privies in blood, privies in estate, and privies in law. Between such parties and privies, the deed or other matter recited needs not at any time be otherwise proved, the recital of it in the subsequent deed being conclusive. It is not offered as secondary, but as primary evidence, which cannot be averred against, and which forms a muniment of title. Thus, the recital of a lease, in a deed of release, is conclusive evidence of the existence of the lease against the parties, and all others claiming under them in privity of estate.[3]

[1] Bowman *v.* Taylor, 2 Ad. & El. 278, 289, per Ld. C. J. Denman; Id. 291, per Taunton, J.; Lainson *v.* Tremere, 2 Ad. & El. 792; Pelletran *v.* Jackson, 11 Wend. 117; 4 Kent, Comm. 261, note; Carver *v.* Jackson, 4 Peters, 83.

[2] But it is not true, as a general proposition, that one claiming land under a deed to which he was not a party, adopts the recitals of facts in an anterior deed, which go to make up his title. Therefore, where, by a deed made in January, 1796, it was recited that S. became bankrupt in 1781, and that, by virtue of the proceedings under the commission, certain lands had been conveyed to W. and thereupon W. conveyed the same lands to B. for the purpose of enabling him to make a tenant to the præcipe; to which deed B. was not a party; and afterwards, in February, 1796, B. by a deed, not referring to the deed last mentioned, nor to the bankruptcy, conveyed the premises to a tenant to the præcipe, and declared the uses of the recovery to be to his mother for life, remainder to himself in fee; it was held that B. in a suit respecting other land, was not estopped from disputing S.'s bankruptcy. Doe *v.* Shelton, 3 Ad. & El. 265, 283. If the deed recite that the consideration was paid by a husband and wife, parol evidence is admissible to show that the money consisted of a legacy given to the wife. Doe *v.* Statham, 7 D. & Ry. 141.

[3] Shelly *v.* Wright, Willes, 9; Crane *v.* Morris, 6 Peters, 611; Carver *v.* Jackson, 4 Peters, 1, 83; Cossens *v.* Cossens, Willes, 25. But such recital does not bind strangers, or those who claim by title paramount to the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by a title anterior to the date of the reciting deed. See Carver *v.* Jackson, *ub. sup.* In this case, the doctrine of estoppel is very fully expounded by Mr. Justice Story, where, after stating the general principle, as in the text, with the qualification just mentioned, he proceeds (p. 83) as follows. "Such is the general rule. But there are cases, in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease

§ 24. Thus, also, a grantor is, in general, estopped by his deed from denying that he had any title in the thing granted. But

in such a release is not *per se* evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible, as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption, from lapse of time and length of possession, of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession, which cannot otherwise be explained; and, under such circumstances, a recital of the fact of such a lease in an old deed is certainly far stronger presumptive proof in favor of such possession under title, than the naked presumption arising from a mere unexplained possession. Such is the general result of the doctrine to be found in the best elementary writers on the subject of evidence. It may not, however, be unimportant to examine a few of the authorities in support of the doctrine on which we rely. The cases of Marchioness of Anandale *v.* Harris, 2 P. Wms. 432, and Shelly *v.* Wright, Willes, 9, are sufficiently direct, as to the operation of recitals by way of estoppel between the parties. In Ford *v.* Gray, 1 Salk. 285, one of the points ruled was 'that a recital of a lease in a deed of a release is good evidence of such lease against the releasor, and those who claim under him; but, as to others, it is not, without proving that there was such a deed, and it was lost or destroyed.' The same case is reported in 6 Mod. 44, where it is said that it was ruled, 'that the recital of a lease in a deed of release is good evidence against the releasor, and those that claim under him.' It is then stated, that 'a fine was produced, but no deed declaring the uses; but a deed was offered in evidence, which did recite a deed of limitation of the uses, and the question was, whether that (recital) was evidence; and the court said, that the bare recital was not evidence; but that, if it could be proved that such a deed had been [executed], and [is] lost, it would do if it were recited in another.' This was, doubtless, the same point asserted in the latter clause of the report in Salkeld; and, thus explained, it is perfectly consistent with the statement in Salkeld; and must be referred to a case where the recital was offered as evidence against a stranger. In any other point of view, it would be inconsistent with the preceding propositions, as well as with the cases in 2 P. Williams and Willes. In Trevivan *v.* Lawrence, 1 Salk. 276, the court held, that the parties and all claiming under them were estopped from asserting that a judgment, sued against the party as of Trinity term, was not of that term, but of another term; that very point having arisen and been decided against the party upon a *scire facias* on the judgment. But the court there held (what is very material to the present purpose), that 'if a man make a lease by indenture of D in which he hath nothing, and afterwards purchases D in fee, and afterwards bargains and sells it to A and his heirs, A shall be bound by this estoppel; and, that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel.' This decision is important in several respects. In the first place, it shows that an estoppel may arise by implication from a grant, that the party hath an estate in the land, which he may convey, and he shall be estopped to deny it. In the next place, it shows that such estoppel binds all persons claiming the same land, not only under the same deed, but under any subsequent conveyance from the same party; that is to say, it binds not merely privies in blood, but privies in estate, as subsequent grantees and alienees. In the next place, it shows that an estoppel, which (as the phrase is) works on the interest of the land, runs with it, into whosesoever hands the land comes. The same doctrine is recognized by Lord Chief Baron Comyns, in his Digest, Estoppel, B. & E. 10. In the latter place (E. 10) he puts the case more strongly; for he asserts, that the estoppel binds, even though all the facts are found in a special verdict. 'But,' says he, and he relies on his own authority, 'where an estoppel binds the estate and converts it to an interest, the court will adjudge accordingly. As if A leases land to B for six years, in which he has nothing, and then purchases a lease of the same land for twenty-one years, and afterwards leases to C for ten years, and all this is found by a verdict; the court will adjudge the lease to B good, though it be so only by conclusion.' A doctrine similar in principle was asserted in this court, in Terrett *v.* Taylor, 9 Cranch,

this rule does not apply to a grantor acting officially, as a public agent or trustee.[1] A covenant of warranty also estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant;[2] but he is not thus estopped by a covenant, that he is seised in fee and has good right to convey;[3] for any seisin in fact, though by wrong, is sufficient to satisfy this covenant, its import being merely this, that he has the seisin in fact, at the time of conveyance, and thereby is qualified to transfer

52. The distinction, then, which was urged at the bar, that an estoppel of this sort binds those claiming under the same deed, but not those claiming by a subsequent deed under the same party, is not well founded. All privies in estate by a subsequent deed are bound in the same manner as privies in blood; and so, indeed, is the doctrine of Comyns's Digest, Estoppel B., and in Co. Lit. 352*a*. We may now pass to a short review of some of the American cases on this subject. Denn *v.* Cornell, 3 Johns. Cas. 174, is strongly in point. There, Lieutenant-governor Colden, in 1775, made his will, and in it recited that he had conveyed to his son David his lands in the township of Flushing, and he then devised his other estate to his sons and daughters, &c., &c. Afterwards, David's estate was confiscated under the act of attainder, and the defendant in ejectment claimed under that confiscation, and deduced his title from the state. No deed of the Flushing estate (the land in controversy) was proved from the father; and the heir at law sought to recover on that ground. But the court held that the recital in the will, that the testator had conveyed the estate to David, was an estoppel of the heir to deny that fact, and bound the estate. In this case, the estoppel was set up by the tenant claiming under the state, as an estoppel running with the land. If the state or its grantee might set up the estoppel in favor of their title, then, as estoppels are reciprocal, and bind both parties, it might have been set up against the state or its grantee. It has been said at the bar, that the estate is not bound by estoppel by any recital in a deed. That may be so where the recital is in his own grants or patents, for they are deemed to be made upon suggestion of the grantee. (But see Commonwealth *v.* Pejepscot Proprietors, 10 Mass. 155.) But where the state claims title under the deed, or other solemn acts of third persons, it takes it *cum onere*, and subject to all the estoppels running with the title and estate, in the same way as other privies in estate. In Penrose *v.* Griffith, 4 Binn. 231, it was held that recitals in a patent of the Commonwealth were evidence against it, but not against persons claiming by a title paramount from the Commonwealth. The court there said, that the rule of law is, that a deed containing a recital of another deed is evidence of the recited deed against the grantor, and all persons claiming by title derived from him subsequently. The reason of the rule is, that the recital amounts to the confession of the party; and that confession is evidence against himself, and those who stand in his place. But such confession can be no evidence against strangers. The same doctrine was acted upon and confirmed by the same court, in Garwood v. Dennis, 4 Binn. 314. In that case, the court further held, that a recital in another deed was evidence against strangers, where the deed was ancient and the possession was consistent with the deed. That case also had the peculiarity belonging to the present, that the possession was of a middle nature, that is, it might not have been held solely in consequence of the deed, for the party had another title; but there never was any possession against it. There was a double title, and the question was, to which the possession might be attributable. The court thought, that a suitable foundation of the original existence and loss of the recited deed being laid in the evidence, the recital in the deed was good corroborative evidence, even against strangers. And other authorities certainly warrant this decision."

[1] Fairtitle *v.* Gilbert, 2 T. R. 171; Co. Lit. 363, *b*.

[2] Terrett *v.* Taylor, 9 Cranch, 43; Jackson *v.* Matsdorf, 11 Johns. 97; Jackson *v.* Wright, 14 Johns. 183; McWilliams *v.* Nisby, 2 Serg. & Rawl. 515; Somes *v.* Skinner, 3 Pick. 52. [See Blanchard *v.* Ellis, 1 Gray, 195. But such a covenant does not estop the grantor from claiming a way of necessity over the land granted. Brigham *v.* Smith, 4 Gray, 297.]

[3] Allen *v.* Sayward, 5 Greenl. 227.

the estate to the grantee.[1] Nor is a feme covert estopped, by her deed of conveyance, from claiming the land by a title subsequently acquired; for she cannot bind herself personally by any covenant.[2] Neither is one who has purchased land in his own name, for the benefit of another, which he has afterwards conveyed by deed to his employer, estopped by such deed, from claiming the land by an elder and after-acquired title.[3] Nor is the heir estopped from questioning the validity of his ancestor's deed, as a fraud against an express statute.[4] The grantee, or lessee, in a deed poll, is not, in general, estopped from gainsaying any thing mentioned in the deed; for it is the deed of the grantor or lessor only; yet if such grantee or lessee claims title under the deed, he is thereby estopped to deny the title of the grantor.[5]

§ 25. It was an early rule of feudal policy, that the tenant should not be permitted to deny the title of the lord, from whom he had received investiture, and whose liegeman he had become; but as long as that relation existed, the title of the lord was conclusively presumed against the tenant, to be perfect and valid. And though the feudal reasons of the rule have long since ceased, yet other reasons of public policy have arisen in their place, thereby preserving the rule in its original vigor. A tenant, therefore, by indenture, is not permitted, at this day, to deny the title of his lessor, while the relation thus created subsists. It is of the essence of the contract under which he claims, that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He could not controvert this title without breaking the faith which he had pledged.[6] But this doctrine does not apply with the same force, and to the same extent between other parties, such as releasor and releasee, where the latter has not received possession

[1] Marston *v.* Hobbs, 2 Mass. 433; Bearce *v.* Jackson, 4 Mass. 408; Twombly *v.* Henly, Id. 441; Chapell *v.* Bull, 17 Mass. 213. [* These cases have not been followed in some of the other states, where it is held that covenants of seisin bind the party to show that he had good title at the date of the covenant. See Richardson *v.* Dorr, 5 Vert. R. 9; Hosmer, Ch. J., in Lockwood *v.* Sturdevant, 6 Conn. 373.]

[2] Jackson *v.* Vanderhayden, 17 Johns. 167; [Lowell *v.* Daniels, 2 Gray, 161.]

[3] Jackson *v.* Mills, 13 Johns. 463; 4 Kent, Comm. 260, 261, note.

[4] Doe *v.* Lloyd, 8 Scott, 93.

[5] Co. Lit. 363, b; Goddard's case, 4 Co. 4. But he is not always concluded by recitals in anterior title deeds. See *supra*, § 23, note.

[6] Com. Dig. Estoppel, A. 2; Craig. Jus. Feud. lib. 3, tit. 5, §§ 1, 2; Blight's Lessee *v.* Rochester, 7 Wheat. 535, 547. [The assignee of a lease, who enters upon and occupies the premises, is estopped in an action for the rent, brought against him by the original lessor, to deny the validity of the assignment by the original lessee to him. Blake *v.* Sanderson, 1 Gray, 332.]

from the former. In such cases, where the party already in possession of land, under a claim of title by deed, purchases peace and quietness of enjoyment, by the mere extinction of a hostile claim by a release, without covenants of title, he is not estopped from denying the validity of the title, which he has thus far extinguished.[1] Neither is this rule applied in the case of a lease already expired; provided the tenant has either quitted the possession, or has submitted to the title of a new landlord;[2] nor is it applied to the case of a tenant, who has been ousted or evicted by a title paramount; or who has been drawn into the contract by the fraud or misrepresentation of the lessor, and has, in fact, derived no benefit from the possession of the land.[3] Nor is a defendant in ejectment estopped from showing that the party, under whom the lessor claims, had no title when he conveyed to the lessor, although the defendant himself claims from the same party, if it be by a subsequent conveyance.[4]

§ 26. This rule in regard to the conclusive effect of recitals in deeds is *restricted* to the recital of things in particular, as being in existence at the time of the execution of the deed; and does not extend to the mention of things in general terms. Therefore, if one be bound in a bond, conditioned to perform the covenants in a certain indenture, or to pay the money mentioned in a certain recognizance, he shall not be permitted to say that there was no such indenture or recognizance. But if the bond be conditioned, that the obligor shall perform all the agreements set down by A., or carry away all the marl in a certain close, he is not estopped by this general condition from saying, that no agreement was set down by A., or that there was no marl in the close. Neither does this doctrine apply to that which is mere description in the deed, and not an essential averment; such as the quantity of land; its nature, whether arable or meadow; the number of tons in a vessel chartered by the ton; or the like; for these are but incidental and

[1] Fox *v.* Widgery, 4 Greenl. 214; Blight's Lessee *v.* Rochester, 7 Wheat. 535, 547; Ham *v.* Ham, 2 Shepl. 351. Thus, where a stranger set up a title to the premises, to which the lessor submitted, directing his lessee in future to pay the rent to the stranger; it was held, that the lessor was estopped from afterwards treating the lessee as his tenant; and that the tenant, upon the lessor afterwards distraining for rent, was not stopped to allege, that the right of the latter had expired. Downs *v.* Cooper, 2 Ad. & El. 252, N. S.

[2] England *v.* Slade, 4 T. R. 681; Balls *v.* Westwood, 2 Camph. 11.

[3] Hayne *v.* Maltby, 3 T. R. 438; Hearn *v.* Tomlin, Peake's Cas. 191.

[4] Doe *v.* Payne, 1 Ad. & El. 538.

collateral to the principal thing, and may be supposed not to have received the deliberate attention of the parties.[1]

§ 27. In addition to estoppels by deed, there are two classes of *admissions* which fall under this head of conclusive presumptions of law; namely, *solemn admissions*, or admissions *in judicio*, which have been solemnly made in the course of judicial proceedings, either expressly, and as a substitute for proof of the fact, or tacitly, by pleading; and *unsolemn admissions*, *extra judicium*, which have been *acted upon*, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith. Of the former class are all agreements of counsel, dispensing with legal proof of facts.[2] So if a material averment, well pleaded, is passed

[1] 4 Com. Dig. Estoppel, A. 2; Yelv. 227 (by Metcalf), note (1); Doddington's case, 2 Co. 33; Skipworth *v.* Green, 8 Mod. 311; 1 Stra. 610, s. c. Whether the recital of the payment of the consideration-money, in a deed of conveyance, falls within the rule, by which the party is estopped to deny it, or belongs to the exceptions, and therefore is open to opposing proof, is a point not clearly agreed. In England, the recital is regarded as conclusive evidence of payment, binding the parties by estoppel. Shelly *v.* Wright, Willes, 9; Cossens *v.* Cossens, Id. 25; Rowntree *v.* Jacob, 2 Taunt. 141; Lampon *v.* Corke, 5 B. & Ald. 606; Baker *v.* Dewey, 1 B. & C. 704; Hill *v.* Manchester, and Salford Water Works, 2 B. & Ald. 544. See also Powell *v.* Monson, 3 Mason, 347, 351, 356. But the American courts have been disposed to treat the recital of the *amount* of the money paid, like the mention of the date of the deed, the quantity of land, the amount of tonnage of a vessel, and other recitals of quantity and value, to which the attention of the parties is supposed to have been but slightly directed, and to which, therefore, the principle of estoppels does not apply. Hence, though the party is estopped from denying the conveyance, and that it was for a valuable consideration, yet the weight of American authority is in favor of treating the recital as only *primâ facie* evidence of the amount paid, in an action of covenant by the grantee to recover back the consideration, or, in an action of *assumpsit* by the grantor, to recover the price which is yet unpaid. The principal cases are, — in *Massachusetts*, Wilkinson *v.* Scott, 17 Mass. 249; Clapp *v.* Tirrell, 20 Pick. 247; Livermore *v.* Aldrich, 5 Cush. 431; — in *Maine*, Schilenger *v.* McCann, 6 Greenl. 364; Tyler *v.* Carlton, 7 Greenl. 175; Emmons *v.* Littlefield, 1 Shepl. 233; Burbank *v.* Gould, 3 Shepl. 118; — in *Vermont*, Beach *v.* Packard, 10 Verm. 96; — in *New Hampshire*, Morse *v.* Shattuck, 4 New Hamp. 229; Pritchard *v.* Brown, Id. 397; — in *Connecticut*, Belden *v.* Seymour, 8 Conn. 304; — in *New York*, Shepherd *v.* Little, 14 Johns. 210; Bowen *v.* Bell, 20 Johns. 388; Whitbeck *v.* Whitbeck, 9 Cowen, 266; McCrea *v.* Purmort, 16 Wend. 460; — in *Pennsylvania*, Weigly *v.* Weir, 7 Serg. & Rawl. 311; Watson *v.* Blaine, 12 Serg. & Rawl. 131; Jack *v.* Dougherty, 3 Watts, 151; — in *Maryland*, Higdon *v.* Thomas, 1 Har. & Gill, 139; Lingan *v.* Henderson, 1 Bland, Ch. 236, 249; — in *Virginia*, Duval *v.* Bibb, 4 Hen. & Munf. 113; Harvey *v.* Alexander, 1 Randolph, 219; — in *South Carolina*, Curry *v.* Lyles, 2 Hill, 404; Garret *v.* Stuart, 1 McCord, 514; — in *Alabama*, Mead *v.* Steger, 5 Porter, 498, 507; — in *Tennessee*, Jones *v.* Ward, 10 Yerger, 160, 166; — in *Kentucky*, Hutchinson *v.* Sinclair, 7 Monroe, 291, 293; Gully *v.* Grubbs, 1 J. J. Marsh. 389. The courts in *North Carolina* seem still to hold the recital of payment as conclusive. Brocket *v.* Fosecue, 1 Hawks, 64; Spiers *v.* Clay, 4 Hawks, 22; Jones *v.* Sasser, 1 Dev. & Batt. 452. And in *Louisiana*, it is made so by legislative enactment. Civil Code of Louisiana, Art. 2234; Forest *v.* Shores, 11 Louis. 416. See also Steele *v.* Worthington, 2 Ohio R. 350; [and see Cruise's Dig. (Greenl. 2d ed.) tit. 32, ch. 2, § 38, note; ch. 20, § 52, note (Greenl. 2d ed. vol. 2, pp. 322, 607)].

[2] See *infra*, §§ 169, 170, 186, 204, 205; Kohn *v.* Marsh, 3 Rob. (Louis.) R. 48.

over by the adverse party, without denial, whether it be by confession, or by pleading some other matter, or by demurring in law, it is thereby conclusively admitted.[1] So also the payment of money into court, under a rule for that purpose, in satisfaction of so much of the claim as the party admits to be due, is a conclusive admission of the character in which the plaintiff sues, and of his claim to the amount paid.[2] The latter class comprehends, not only all those declarations, but also that line of conduct by which the party has induced others to act, or has acquired any advantage to himself.[3] Thus, a woman cohabited with, and openly recognized by a man, as his wife, is conclusively presumed to be such, when he is sued as her husband, for goods furnished to her, or for other civil liabilities growing out of that relation.[4] So where the sheriff returns any thing as fact, done in the course of his duty in the service of a precept, it is conclusively presumed to be true against him.[5] And if one party refers the other to a third person for information concerning a matter of mutual interest in controversy between them, the answer given is conclusively taken as true, against the party referring.[6] This subject will hereafter be more fully considered, under its appropriate title.[7]

§ 28. Conclusive presumptions of law are also made in respect to *infants* and *married women*. Thus, an infant under the age of seven years is conclusively presumed to be incapable of committing any felony, for want of discretion;[8] and under fourteen, a male infant is presumed incapable of committing a rape.[9] A female under the age of ten years is presumed incapable of consenting to sexual intercourse.[10] Where the husband and wife cohabited together, as such, and no impotency is proved, the issue is conclusively presumed to be *legitimate*, though the wife is proved to have been at the same time guilty of infidelity.[11] And

[1] Young *v.* Wright, 1 Campb. 139; Wilson *v.* Turner, 1 Taunt. 398. But if a deed is admitted in pleading, there must still be proof of its identity. Johnson *v.* Cottingham, 1 Armst. Macartn. & Ogle, R. 11.

[2] Cox *v.* Parry, 1 T. R. 464; Watkins *v.* Towers, 2 T. R. 275; Griffiths *v.* Williams, 1 T. R. 710. [See *infra*, § 205.]

[3] See *infra*, §§ 184, 195, 196, 207, 208.

[4] Watson *v.* Threlkeld, 2 Esp. 637; Monro *v.* De Chemant, 4 Campb. 215; Robinson *v.* Nahon, 1 Campb. 245; *post*, § 207.

[5] Simmons *v.* Bradford, 15 Mass. 82.

[6] Lloyd *v.* Willan, 1 Esp. 178; Delesline *v.* Greenland, 1 Bay, 458; Williams *v.* Innes, 1 Campb. 364; Burt *v.* Palmer, 5 Esp. 145.

[7] See *infra*, § 169 to 212.

[8] 4 Bl. Comm. 23. [See 3 Greenl. Ev. (4th ed.) p. 4.]

[9] 1 Hal. P. C. 630; 1 Russell on Crimes, 801; Rex *v.* Phillips, 8 C. & P. 736; Rex *v.* Jordan, 9 C. & P. 118; [3 Greenl. Ev. (4th ed.) §§ 4, 215.]

[10] 1 Russell on Crimes, 810.

[11] Cope *v.* Cope, 1 Mood. & Rob. 269,

if a wife act in company with her husband in the commission of a felony, other than treason or homicide, it is conclusively presumed, that she acted under his coercion, and consequently without any guilty intent.[1]

§ 29. Where the succession to estates is concerned, the question, which of two persons is to be presumed the survivor, where both *perished in the same calamity*, but the circumstances of their deaths are unknown, has been considered in the Roman law, and in several other codes; but in the common law, no rule on the subject has been laid down. By the Roman law, if it were the case of a father and son, perishing together in the same shipwreck or battle, and the son was under the age of puberty, it was presumed that he died first, but if above that age, that he was the survivor; upon the principle, that in the former case the elder is generally the more robust, and in the latter, the younger.[2] The French code has regard to the ages of fifteen and sixty; presuming that of those under the former age the eldest survived; and that of those above the latter age the youngest survived. If the parties were between those ages, but of different sexes, the male is presumed to have survived; if they were of the same sex, the presumption is in favor of the survivorship of the younger, as opening the succession in the order of nature.[3] The same rules were in force in the territory of Orleans at the time of its cession to the United States, and have since been incorporated into the code of Louisiana.[4]

276; Morris *v.* Davies, 3 C. & P. 215; St. George *v.* St. Margaret, 1 Salk. 123; Banbury Peerage case, 2 Selw. N. P. (by Wheaton), 558; 1 Sim. and Stu. 153, s. c.; Rex *v.* Luffe, 8 East, 193. But if they lived apart, though within such distance as afforded an opportunity for intercourse, the presumption of legitimacy of the issue may be rebutted. Morris *v.* Davis, 5 C. & Fin. 163. Non-access is not presumed from the fact, that the wife lived in adultery with another; it must be proved *aliunde*. Regina *v.* Mansfield, 1 G. & Dav. 7; [Hemmenway *v.* Towner, 1 Allen, 209; Phillips *v.* Allen, 2 Allen, 453; Doherty *v.* Clark, 3 Allen, 151.]

[1] 4 Bl. Comm. 28, 29; Anon. 2 East, P. C. 559; *post*, vol. 3, §§ 3, 4, 7.

[2] Dig. lib. 34, tit. 5; De rebus dubiis, l. 9, §§ 1, 3; Ibid. l. 16, 22, 23; Menochius de Præsumpt. lib. 1, Quæst. x. n. 8, 9. This rule, however, was subject to some exceptions for the benefit of mothers, patrons, and beneficiaries.

[3] Code Civil, §§ 720, 721, 722; Duranton, Cours de Droit Français, tom. 6, pp. 39, 42, 43, 48, 67, 69; Rogron, Code Civil Expli. 411, 412; Toullier, Droit Civil Français, tom. 4, pp. 70, 72, 73. By the Mahometan Law of India, when relatives thus perish together, "it is to be presumed, that they all died at the same moment; and the property of each shall pass to his living heirs, without any portion of it vesting in his companions in misfortune." See Baillie's Moohummudan Law of Inheritance, 172. Such also was the rule of the ancient Danish Law. "Filius in communione cum patre et matre denatus, pro non nato habetur." Ancher, Lex Cimbrica, lib. 1, c. 9, p. 21.

[4] Civil Code of Louisiana, art. 930–933; Digest of the Civil Laws of the Territory of Orleans, art. 60–63.

§ 30. This question first arose, in common-law courts, upon a motion for a *mandamus*, in the case of General Stanwix, who perished, together with his second wife, and his daughter by a former marriage, on the passage from Dublin to England; the vessel in which they sailed having never been heard from. Hereupon his nephew applied for letters of administration, as next of kin; which was resisted by the maternal uncle of the daughter, who claimed the effects upon the presumption of the Roman law, that she was the survivor. But this point was not decided, the court decreeing for the nephew upon another ground; namely, that the question could properly be raised only upon the statute of distributions, and not upon an application for administration by one clearly entitled to administer by consanguinity.[1] The point was afterwards raised in chancery, where the case was, that the father had bequeathed legacies to such of his children as should be living at the time of his death; and he having perished, together with one of the legatees, by the foundering of a vessel on a voyage from India to England, the question was, whether the legacy was lapsed by the death of the son in the lifetime of the father. The Master of the Rolls refused to decide the question by presumption, and directed an issue, to try the fact by a jury.[2] But the Prerogative Court adopt the presumption, that both perished together, and that therefore neither could transmit rights to the other.[3] In the absence of all evidence of the particular circumstances of the calamity, probably this rule will be found

[1] Rex *v.* Dr. Hay, 1 W. Bl. 640. The matter was afterwards compromised, upon the recommendation of Lord Mansfield, who said he knew of no legal principle on which he could decide it. See 2 Phillim. 268, in note; Fearne's Posth. Works, 38.

[2] Mason *v.* Mason, 1 Meriv. 308.

[3] Wright *v.* Netherwood, 2 Salk. 593, note (a) by Evans; more fully reported under the name of Wright *v.* Sarmuda, 2 Phillim. 266–277, note (c); Taylor *v.* Diplock, 2 Phillim. 261, 278, 280; Selwyn's case, 3 Hagg. Eccl. R. 748. In the goods of Murray, 1 Curt. 596; Satterthwaite *v.* Powell, 1 Curt. 705. See also 2 Kent's Comm. 435, 436 (4th ed.), note (b). In the brief note of Colvin *v.* H. M. Procurator-Gen., 1 Hagg. Eccl. R. 92, where the husband, wife, and infant child (if any) perished together, the court seem to have held, that the *primâ facie* presumption of law was that the husband survived. But the point was not much moved. It was also raised, but not disposed of, in Mœhring *v.* Mitchell, 1 Barb. Ch. R. 264. The subject of presumed survivorship is fully treated by Mr. Burge, in his Commentaries on Colonial and Foreign Laws, vol. 4, p. 11–29. In Chancery it has recently been held, that a presumption of priority of death might be raised from the comparative age, health, and strength of the parties; and, therefore, where two brothers perished by shipwreck, the circumstances being wholly unknown, the elder being the master, and the younger the second mate of the ship, it was presumed that the latter died first. Sillick *v.* Booth, 1 Y. & C. New Cas. 117. [In Underwood *v.* Wing, 31 Eng. Law & Eq. 293, where a husband, wife, and children were swept from the deck of a vessel by the same wave, and went down together, it was held, that, in the absence of evidence, the court would not presume that the husband survived the wife.]

the safest and most convenient;[1] but if any circumstances of the death of either party can be proved, there can be no inconvenience in submitting the question to a jury, to whose province it peculiarly belongs.

§ 31. Conclusive presumptions of law are not unknown to the *law of nations*. Thus, if a neutral vessel be found carrying despatches of the enemy between different parts of the enemy's dominions, their effect is presumed to be hostile.[2] The *spoliation of papers*, by the captured party, has been regarded, in all the States of Continental Europe, as conclusive proof of guilt; but in England and America, it is open to explanation, unless the cause labors under heavy suspicions, or there is a vehement presumption of bad faith or gross prevarication.[3]

§ 32. In these cases of conclusive presumption, the rule of law merely attaches itself to the circumstances, when proved; it is not deduced from them. It is not a rule of inference from testimony; but a rule of protection, as expedient, and for the general good. It does not, for example, assume that all landlords have good titles; but that it will be a public and general inconvenience to suffer tenants to dispute them. Neither does it assume, that all averments and recitals in deeds and records are true; but, that it will be mischievous, if parties are permitted to deny them. It does not assume that all simple contract debts, of six years' standing, are paid, nor that every man, quietly occupying land twenty years as his own, has a valid title by grant; but it deems it expedient that claims, opposed by such evidence as the lapse of those periods affords, should not be countenanced, and that society is more benefited by a refusal to entertain such claims, than by suffering them to be made good by proof. In fine, it does not assume the impossibility of things which are possible; on the contrary, it is founded, not only on the possibility of their existence, but on their occasional occurrence; and it is against

[1] It was so held in Coye *v.* Leach, 8 Met. 371. And see Mœhring *v.* Mitchell, 1 Barb. Ch. R. 264. [*See Redfield on Wills, Part II. § 1, n. 1. In Wing *v.* Angrave, 8 H. L. Cas. 183, it is held that there is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause; nor any presumption of law that all died at the same time: but the question is one of fact depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The burden of proof is on the person asserting the affirmative.]

[2] The Atalanta, 6 Rob. Adm. 440.

[3] The Pizarro, 2 Wheat. 227, 241, 242, note (e); The Hunter, 1 Dods. Adm. 480, 486.

the mischiefs of their occurrence, that it interposes its protecting prohibition.[1]

§ 33. The SECOND CLASS of presumptions of law, answering to the *præsumptiones juris* of the Roman law, which may always be overcome by opposing proof,[2] consists of those termed *disputable presumptions*. These, as well as the former, are the result of the general experience of a connection between certain facts, or things, the one being usually found to be the companion, or the effect of the other. The connection, however, in this class, is not so intimate, nor so nearly universal, as to render it expedient, that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode, *the law* defines the nature and amount of the evidence, which it deems sufficient to establish a *primâ facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favor of the presumption. A contrary verdict would be liable to be set aside, as being against evidence.

§ 34. The rules in this class of presumptions, as in the former, have been adopted by common consent, from motives of public policy, and for the promotion of the general good; yet not, as in the former class, forbidding all further evidence; but only excusing or dispensing with it, till some proof is given on the other side to rebut the presumption thus raised. Thus, as men do not generally violate the penal code, the law presumes every man *innocent;* but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled. And where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.[3] On the other hand, as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been criminally intended, until the contrary

[1] See 6 Law Mag. 348, 355, 356.
[2] Heinnec. ad. Pand. Pars iv. § 124.
[3] Hodge's case, 2 Lewin, Cr. Cas. 227, per Alderson, B.

appears. Thus, on a charge of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation; and the burden of disproving the malice is thrown upon the accused.[1] The same presumption arises in civil actions, where the act complained of was unlawful.[2] So, also, as men generally own the personal property they possess, proof of pos-

[1] Foster's Crown Law, 255; Rex *v.* Farrington, Russ. & Ry. 207. This point was re-examined and discussed, with great ability and research, in York's case, 9 Met. 93, in which a majority of the learned judges affirmed the rule as stated in the text. Wilde, J., however, strongly dissented; maintaining, with great force of reason, that the rule was founded in a state of society no longer existing; that it was inconsistent with settled principles of criminal law; and that it was not supported by the weight of authority. He was of opinion that the following conclusions were maintained on sound principles of law and manifest justice: 1. That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter is to be decided upon the evidence, and not upon any presumption from the mere act of killing. 2. That if there be any such presumption, it is a presumption of fact; and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner. 3. That the burden of proof, in every criminal case, is on the government, to prove all the material allegations in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him. [In Commonwealth *v.* Hawkins, 3 Gray, 465, Chief Justice Shaw said, that the doctrine of York's case is, that where the killing is proved to have been committed by the defendant, and *nothing further is shown*, the presumption of law is that it was malicious and an act of murder; and that it was inapplicable to a case where the circumstances attending the homicide were fully shown by the evidence; that in such a case, the homicide being conceded and no excuse or justification being shown, it was either murder or manslaughter; and that the jury upon all the circumstances must be satisfied beyond a reasonable doubt that it was done with malice before they could find the defendant guilty of murder. This would appear to qualify materially the rule in York's case as it has heretofore been understood. [*This question is incidentally discussed by us in State *v.* McDonnell, 32 Vt. Rep. 491, in a case of homicide by mutual combat; and, although not called to decide the very point involved in York's case, *supra*, we certainly formed a very decided opinion in favor of the views embraced in the very able dissenting opinion of Mr. Justice Wilde.] See *infra*, § 81 *b*.]

[2] In Bromage *v.* Proser, 4 B. & C. 247, 255, 256, which was an action for words spoken of the plaintiffs, in their business and trade of bankers, the law of implied or legal malice, as distinguished from malice in fact, was clearly expounded by Mr. Justice Bayley, in the following terms: "Malice, in the common acceptation, means ill-will against a person, but in its legal sense, it means a wrongful act, done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. Russell on Crimes, 614, n. 1. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact, and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge, that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. This is so laid down in Styles, 392, and was adjudged upon error in Mercer *v.* Sparks, Owen, 51; Noy, 35. The objection there was, that the words were not charged to have been spoken maliciously, but the court

session is presumptive proof of *ownership*.[1] But possession of the fruits of crime recently after its commission, is *primâ facie* evidence of *guilty possession;* and if unexplained either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive.[2] This rule of presumption is not confined to the case of theft, but is applied to all cases of crime, even the highest and most penal. Thus, upon an indictment for arson, proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a probable presumption, that he was present, and concerned in the offence.[3] The like presumption is raised in the case of murder, accompanied by robbery;[4] and in the case of the possession of an unusual quantity of counterfeit money.[5]

§ 35. This presumption of *innocence* is so strong, that even where the guilt can be established only by proving a negative, that negative must, in most cases, be proved by the party alleging the guilt; though the general rule of law devolves the burden of proof on the party holding the affirmative. Thus, where the plaintiff complained that the defendants, who had chartered his ship, had put on board an article highly inflammable and dangerous, without giving notice of its nature to the master, or others in charge of the

answered that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. But in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communication to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff; and in Edmondson *v.* Stevenson, Bull. N. P. 8, Lord Mansfield takes the distinction between these and ordinary actions of slander."

[In Commonwealth *v.* Walden, 3 Cush. 559, 561, which was an indictment under a statute, for malicious mischief in wilfully and *maliciously* injuring a certain animal, by shooting, the court below ruled that "maliciously" meant "the wilfully doing of any act prohibited by law, and for which the defendant had no lawful excuse." The Supreme Court held the instructions erroneous, and decided that to make the act "maliciously" done, the jury must be satisfied that it was done either out of a spirit of wanton cruelty or wicked revenge. See 4 Bl. Comm. 244; Jacob's Law Dic. by Tomlin, tit. "Mischief, Malicious."]

[1] [Armory *v.* Delamirie, 1 Stra. 505; Magee *v.* Scott, 9 Cush. 150; Fish *v.* Skut, 21 Barb. 333; Millay *v.* Butts, 35 Maine, 139; Linscott *v.* Trask, Ib. 150.]

[2] Rex *v.* ——, 2 C. & P. 359; Regina *v.* Coote, 1 Armst. Macartn. & Ogle, R. 337; The State *v.* Adams, 1 Hayw. 463; Wills on Circumstantial Evidence, 67. Where the things stolen are such as do not pass from hand to hand (e. g. the ends of unfinished woollen clothes), their being found in the prisoner's possession, two months after they were stolen, is sufficient to call for an explanation from him how he came by them, and to be considered by the jury. Rex *v.* Partridge, 7 C. & P. 551. Furtum præsumitur commissum ab illo, penes quem res furata inventa fuerit, adeo ut si non docuerit a quo rem habuerit, justè, ex illa inventione, poterit subjici tormentis. Mascard. De Probat. vol. 2, Concl. 834; Menoch. De Præsumpt. Liv. 5, Præsumpt. 31. [See *post*, vol. 3, §§ 31, 32, 33.]

[3] Rickman's case, 2 East, P. C. 1035.

[4] Wills on Circumst. Evid. 72.

[5] Rex *v.* Fuller et al., Russ. & Ry. 308.

ship, whereby the vessel was burnt; he was held bound to prove this negative averment.[1] In some cases, the presumption of innocence has been deemed sufficiently strong to overthrow the presumption of life. Thus, where a woman, twelve months after her husband was last heard of, married a second husband, by whom she had children; it was held, that the Sessions, in a question upon their settlement, rightly presumed that the first husband was dead at the time of the second marriage.[2]

§ 36. An *exception* to this rule, respecting the presumption of innocence, is admitted in the case of a libel. For where a libel is sold in a bookseller's shop, by his servant, in the ordinary course of his employment, this is evidence of a guilty publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. This exception is founded upon public policy, lest irresponsible persons should be put forward, and the principal and real offender should escape. Whether such evidence is conclusive against the master, or not, the books are not perfectly agreed; but it seems conceded, that the want of privity in fact by the master is not sufficient to excuse him; and that the presumption of his guilt is so strong as to fall but little short of conclusive evidence.[3] Proof that the libel was sold in violation of express orders from the master would clearly take the case out of this exception, by showing that it was not sold in the ordinary course of the servant's duty. The same law is applied to the publishers of newspapers.[4] [* We apprehend, that, at the present day, the rule is pretty generally recognized, that the acts of the servant will always bind the master, if performed, in the language of the learned author, "in the ordinary course of the servant's duty." And that this rule applies, without regard to the motive of the servant, or the actual privity of the master; and that even where

[1] Williams *v.* E. Ind. Co. 3 East, 192; Bull. N. P. 298. So, of allegations that a party had not taken the sacrament; Rex *v.* Hawkins, 10 East, 211: had not complied with the act of uniformity, &c.; Powell *v.* Millburn, 3 Wills. 355, 366: that goods were not legally imported; Sissons *v.* Dixon, 5 B. & C. 758: that a theatre was not duly licensed; Rodwell *v.* Redge, 1 C. & P. 220.

[2] Rex *v.* Twyning, 2 B. & Ald. 385. But in another case, where, in a question upon the derivative settlement of the second wife, it was proved that a letter had been written from the first wife from Van Dieman's Land, bearing date only twenty-five days prior to the second marriage, it was held, that the Sessions did right in presuming that the first wife was living at the time of the second marriage. Rex *v.* Harborne, 2 Ad. & El. 540.

[3] Rex *v.* Gutch, 1 M. & M. 433: Harding *v.* Greening, 8 Taunt. 42; Rex *v.* Almon, 5 Burr. 2686; Rex *v.* Walter, 3 Esp. 21; 1 Russ. on Crimes, 341 (3d ed. p. 251); Ph. & Am. on Evid. 466; 1 Phil. Evid. 446.

[4] 1 Russ. on Crimes, 341; Rex *v.* Nutt, Bull. N. P. 6 (3d ed. p. 251); Southwick *v.* Stevens, 10 Johns. 443.

the servant acts maliciously and in express disregard of the master's instructions, if he act within the scope of his employment, and in the performance of his master's business, the maxim, *respondeat superior*, applies.[1]]

§ 37. The presumption of innocence may be overthrown, and a *presumption of guilt* be raised by the misconduct of the party, in suppressing or *destroying evidence* which he ought to produce, or to which the other party is entitled. Thus, the spoliation of papers, material to show the neutral character of a vessel, furnishes a strong presumption, *in odium spoliatoris*, against the ship's neutrality.[2] A similar presumption is raised against a party who has obtained possession of papers from a witness, after the service of *subpœna duces tecum* upon the latter for their production, which is withheld.[3] The general rule is, *omnia præsumuntur contra spoliatorem*.[4] His conduct is attributed to his supposed knowledge that the truth would have operated against him. Thus, if some of a series of documents of title are suppressed by the party admitting them to be in his possession, this is evidence that the documents withheld afford inferences unfavorable to the title of that party.[5] Thus, also, where the finder of a lost jewel would not produce it, it was presumed against him that it was of the highest value of its kind.[6] But if the defendant has been guilty of no fraud, or improper conduct, and the only evidence against him is of the delivery to him of the plaintiff's goods, of unknown quality, the presumption is, that they were goods of the cheapest quality.[7] The *fabrication of evidence*, however, does not of itself furnish any

[1] [* See Redfield on Railways, § 137, and the numerous cases cited and commented on.]

[2] The Hunter, 1 Dods. 480; The Pizarro, 2 Wheat. 227; 1 Kent, Comm. 157; *supra*, § 31.

[3] Leeds *v.* Cook, 4 Esp. 256; Rector *v.* Rector, 3 Gilm. 105. But a refusal to produce books and papers under a notice, though it lays a foundation for the introduction of secondary evidence of their contents, has been held to afford no evidence of the fact sought to be proved by them; such, for example, as the existence of a deed of conveyance from one mercantile partner to another. Hanson *v.* Enstace, 2 Howard, S. C. Rep. 653. [The omission of a party to call a witness, who might equally have been called by the other party, is no ground for a presumption that the testimony of the witness would have been unfavorable. Scovill *v.* Baldwin, 27 Conn. 316.]

[4] 2 Poth. Obl. (by Evans) 292; Dalston *v.* Coatsworth, 1 P. Wms. 731; Cowper *v.* Earl Cowper, 2 P. Wms. 720, 748–752; Rex *v.* Arundel, Hob. 109, explained in 2 P. Wms. 748, 749; D. of Newcastle *v.* Kinderly, 8 Ves. 363, 375; Annesley *v.* E. of Anglesea, 17 Howell's St. Tr. 1430. See also Sir Samuel Romilly's argument in Lord Melville's case, 29 Howell's St. Tr. 1194, 1195; Anon. 1 Ld. Raym. 731; Broom's Legal Maxims, p. 425. In Barker *v.* Ray, 2 Russ. 73, the Lord Chancellor thought that this rule had in some cases been pressed a little too far. See also Harwood *v.* Goodright, Cowp. 86. [See *post*, vol. 3, § 34.]

[5] James *v.* Bion, 2 Sim. & Stu. 600.

[6] Armory *v.* Delamirie, 1 Stra. 505.

[7] Clunnes *v.* Pezzey, 1 Campb. 8.

presumption of law against the innocence of the party, but is a matter to be dealt with by the jury. Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts; of which several instances are stated in the books.[1] Neither has the mere non-production of books, upon notice, any other *legal* effect, than to admit the other party to prove their contents by parol, unless under special circumstances.[2] [*It is generally considered that when a party withholds a document in his possession which would show the precise state of the facts, that the other testimony should be taken most strongly against him.[3]]

§ 38. Other presumptions of this class are founded upon the experience of human *conduct in the course of trade;* men being usually vigilant in guarding their property, and prompt in asserting their rights, and orderly in conducting their affairs, and diligent in claiming and collecting their dues. Thus, where a bill of exchange, or an order for the payment of money or delivery of goods, is found in the hands of the drawee, or a promissory note is in the possession of the maker, a legal presumption is raised that he has paid the money due upon it, and delivered the goods ordered:[4] A bank-note will be presumed to have been signed before it was issued, though the signature be torn off.[5] So, if a deed is found in the hands of the grantee, having on its face the evidence of its regular execution, it will be presumed to have been delivered by the grantor.[6] So a receipt for the last year's or quarter's rent is *primâ facie* evidence of the payment of all the

[1] See 3 Inst. 104; Wills on Circumst. Evid. 113.

[2] Cooper *v.* Gibbons, 3 Campb. 363.

[3] [*Attorney-General *v.* Windsor, 24 Beavan, 679.]

[4] Gibbon *v.* Featherstonhaugh, 1 Stark. R. 225; Egg *v.* Barnett, 3 Esp. 196; Garlock *v.* Geortner, 7 Wend. 198; Alvord *v.* Baker, 9 Wend. 323; Weidner *v.* Schweigart, 9 Serg. & R. 385; Shepherd *v.* Currie, 1 Stark. R. 454; Brembridge *v.* Osborne, Id. 374. The production, by the plaintiff, of an I O U, signed by the defendant, is *primâ facie* evidence that it was given by him to the plaintiff. Curtis *v.* Richards, 1 M. & G. 46. And where there are two persons, father and son, of the same name, it is presumed that the father is intended, until the contrary appears. See Stebbing *v.* Spicer, 8 M. G. & S. 827, where the cases to this point are collected. See also The State *v.* Vittum, 9 N. Hamp. 519; Kincaid *v.* Howe, 10 Mass. 205. [The possession of a bond by an obligor who is a surety therein, raises a legal presumption that the bond has been paid. Carroll *v.* Bowie, 7 Gill, 34.] [*And the party benefited by a deed or judgment will be presumed to assent to the same. Clawson *v.* Eichbaum, 2 Grant's Cases, 130.]

[5] Murdock *v.* Union Bank of Louis. 2 Rob. (Louis.) R. 112; Smith *v.* Smith, 15 N. R. 55.

[6] Ward *v.* Lewis, 4 Pick. 518. [There is a legal presumption, that the property in the goods is in the consignee named in the bill of lading, so that he may sue in his own name to recover damages for non-delivery thereof, &c. Lawrence *v.* Minturn, 17 How. U. S. 100.]

rent previously accrued.[1] But the mere delivery of money by one to another, or of a bank check, or the transfer of stock, unexplained, is presumptive evidence of the payment of an antecedent debt, and not of a loan.[2] The same presumption arises upon the payment of an order or draft for money, namely, that it was drawn upon funds of the drawer in the hands of the drawee. But in the case of an order for the delivery of goods it is otherwise, they being presumed to have been sold by the drawee to the drawer.[3] Thus, also, where the proprietors of adjoining parcels of land agree upon a line of division, it is presumed to be a recognition of the true original line between their lots.[4]

§ 38*a*. Of a similar character is the presumption in favor of the due execution of solemn instruments. Thus, if the subscribing witnesses to a will are dead, or if, being present, they are forgetful of all the facts, or of any fact material to its due execution, the law will in such cases supply the defect of proof, by presuming that the requisites of the statute were duly observed.[5] The same principle, in effect, seems to have been applied in the case of deeds.[6]

§ 39. On the same general principle, where a debt due by *specialty* has been unclaimed, and without recognition, for *twenty years*, in the absence of any explanatory evidence, it is presumed to have been paid. The *jury* may infer the fact of payment from the circumstances of the case, within that period; but the presumption of *law* does not attach, till the twenty years are expired.[7] This

[1] 1 Gilb. Evid. (by Lofft) 309; Brewer *v.* Knapp, 1 Pick. 337. [See also Hodgdon *v.* Wight, 36 Maine, 326.]

[2] Welch *v.* Seaborn, 1 Stark. R. 474; Patton *v.* Ash, 7 Serg. & R. 116, 125; Breton *v.* Cope, Peake's Cas. 30; Lloyd *v.* Sandilland, Gow, R. 13, 16; Cary *v.* Gerrish, 4 Esp. 9; Aubert *v.* Wash, 4 Taunt. 293; Boswell *v.* Smith, 6 C. & P. 60; [*Gerding *v.* Walter, 29 Mo. Rep. 426]. Where the plaintiff, in proving his charge of money lent, proved the delivery of a bank-note to the defendant, the amount or value of which did not appear, the jury were rightly directed to presume that it was a note of the smallest denomination in circulation; the burden of proving it greater being on the plaintiff. Lawton *v.* Sweeny, 8 Jur. 964.

[3] Alvord *v.* Baker, 9 Wend. 323, 324.

[4] Sparhawk *v.* Bullard, 1 Met. 95.

[5] Burgoyne *v.* Showler, 1 Roberts, Eccl. R. 10; *In re* Leach, 12 Jur. 381.

[6] Burling *v.* Paterson, 9 C. & P. 570; Dewey *v.* Dewey, 1 Met. 349; Quimby *v.* Buzzell, 4 Shepl. 470; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; *infra*, § 372. n. [*But there is no presumption in the case of a deed, that the witnesses being dead, would, if living, testify to the grantor's soundness of mind at the time of delivery. Flanders *v.* Davis, 19 N. H. R. 139. But one will be presumed to understand the contents of an instrument signed by him, and whether dated or not. Androscoggin Bank *v.* Kimball, 10 Cush. 373.]

[7] Oswald *v.* Leigh, 1 T. R. 270; Hillary *v.* Wellar, 12 Ves. 264; Colsell *v.* Budd, 1 Camph. 27; Boltz *v.* Ballman, 1 Yeates, 584; Cottle *v.* Payne, 3 Day, 289. In some cases, the presumption of payment has been made by the court, after eighteen years; Rex *v.* Stephens, 1 Burr. 434; Clark *v.* Hopkins, 7 Johns. 556; but these seem to be exceptions to the general rule.

rule, with its limitation of twenty years, was first introduced into the courts of law by Sir Matthew Hale, and has since been generally recognized, both in the courts of law and of equity.[1] It is applied not only to bonds for the payment of money, but to mortgages, judgments, warrants to confess judgments, decrees, statutes, recognizances, and other matters of record, when not affected by statutes; but with respect to all other claims not under seal nor of record, and not otherwise limited, whether for the payment of money, or the performance of specific duties, the general analogies are followed, as to the application of the lapse of time, which prevail on kindred subjects.[2] But in all these cases, the presumption of payment may be repelled by any evidence of the situation of the parties, or other circumstance tending to satisfy the jury, that the debt is still due.[3]

§ 40. Under this head of presumptions from the course of trade, may be ranked the presumptions frequently made from the regular course of business in a *public office*. Thus postmarks on letters are *primâ facie* evidence, that the letters were in the post-office at the time and place therein specified.[4] If a letter is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed, if living at the place, and usually receiving letters there.[5] [*And the same presumption has been applied to telegraphic

[1] Mathews on Presumpt. Evid. 379; Haworth *v.* Bostock, 4 Y. & C. 1; Grenfell *v.* Girdlestone, 2 Y. & C. 662.

[2] This presumption of the common law is now made absolute in the case of debts due by specialty, by Stat. 3 & 4 Wm. IV. c. 42, § 3. See also Stat. 3 & 4 Wm. IV. c. 27, and 7 Wm. IV. & 1 Vic. c. 28. It is also adopted in *New York*, by Rev. Stat. Part III. ch. 4, tit. 2, art. 5, and is repellable only by written acknowledgment, made within twenty years, or proof of part payment within that period. In *Maryland*, the lapse of twelve years is made a conclusive presumption of payment, in all cases of bonds, judgments, recognizances, and other specialties, by Stat. 1715, ch. 23, § 6; 1 Dorsey's Laws of Maryl. p. 11; Carroll *v.* Waring, 3 Gill & Johns. 491. A like provision exists in *Massachusetts*, as to judgments and decrees, after the lapse of twenty years. Rev. Stat. ch. 120, § 24.

[3] A more extended consideration of this subject being foreign from the plan of this work, the reader is referred to the treatise of Mr. Mathews on Presumptive Evidence, ch. 19, 20; and to Best on Presumptions, Part I. ch. 2, 3. [Grantham *v.* Canaan, 38 N. H. 268.]

[4] Fletcher *v.* Braddyl, 3 Stark. R. 64; Rex *v.* Johnson, 7 East, 65; Rex *v.* Watson, 1 Campb. 215; Rex *v.* Plumer, Rus. & Ry. 264; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206.

[5] Saunderson *v.* Judge, 2 H. Bl. 509; Bussard *v.* Levering, 6 Wheat. 102; Lindenberger *v.* Beal, Ib. 104; Bayley on Bills (by Phillips & Sewall), 275, 276, 277; Walter *v.* Haynes, Ry. & M. 149; Warren *v.* Warren, 1 Cr. M. & R. 250. [*Russell *v.* Beuckley, 4 R. I. Rep. 525.] [See *post*, vol. 2 (7th ed.), § 188, and note; Loud *v.* Merrill, 45 Maine, 516; *contra*, see Freeman *v.* Morey, Ib. 50.] [*It would seem that the date a letter bears will be regarded, *primâ facie*, its true date; but quere, Butler *v.* Mountgarret, 7 Ho. Lds. Cas. 633.]

messages shown to have been duly forwarded.[1]] So, where a letter was put into a box in an attorney's office, and the course of business was, that a bell-man of the post-office invariably called to take the letters from the box; this was held sufficient to presume that it reached its destination.[2] So, the time of clearance of a vessel, sailing under a license, was presumed to have been indorsed upon the license, which was lost, upon its being shown, that without such indorsement, the custom-house would not have permitted the goods to be entered.[3] So, on proof that goods which cannot be exported without license were entered at the custom-house for exportation, it will be presumed, that there was a license to export them.[4] The return of a sheriff, also, which is conclusively presumed to be true, between the parties to the process, is taken *primâ facie* as true, even in his own favor; and the burden of proving it false, in an action against him for a false return, is devolved on the plaintiff, notwithstanding it is a negative allegation.[5] In fine, it is presumed, until the contrary is proved, that every man obeys the mandates of the law, and performs all his official and social duties.[6] The like presumption is also drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting.[7]

§ 41. Other presumptions are founded on the experienced *continuance* or permanency, of longer and shorter duration, in human affairs. When, therefore, the existence of a person, a personal relation, or a state of things, is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different

[1] [*Commonwealth *v.* Jeffries, 7 Allen, 548.]

[2] Skilbeck *v.* Garbett, 9 Jur. 339; 7 Ad. & El. N. S. 846, S. C.

[3] Butler *v.* Allnut, 1 Stark. R. 222.

[4] Van Omeron *v.* Dowick, 2 Campb. 44.

[5] Clark *v.* Lyman, 10 Pick. 47; Boynton *v.* Willard, Id. 169. [*But there is no special ground for presuming the regularity of the proceedings of an administration in the sale of real estate. Doolittle *v.* Holton, 26 Vt. R. 588.]

[6] Ld. Halifax's case, Bull. N. P [298]; Bank United States *v.* Dandridge, 12 Wheat. 69, 70; Williams *v.* E. Ind. Co. 3 East, 192; Hartwell *v.* Root, 19 Johns. 345; The Mary Stewart, 2 W. Rob. Adm. R. 244; [*Lea *v.* Polk County Copper Co., 21 How. U. S. 493; Cooper *v.* Granberry, 33 Miss. 117; Curtis *v.* Herrick, 14 Cal. 117; Isbell *v.* N. Y. & N. Haven R. R. Co. 25 Conn. 556.] Hence, children born during the separation of husband and wife, by a decree of divorce *a mensa et thoro*, are, *primâ facie*, illegitimate. St. George *v.* St. Margaret, 1 Salk. 123 [*Drake *v.* Mooney, 31 Vt. 617; Shelbyville *v.* Shelbyville, 1 Met. (Ky.) 54; Cobb *v.* Newcomb, 7 Clarke (Iowa), 43].

[7] Doe *v.* Turford, 3 B. & Ad. 890, 895; Champneys *v.* Peck, 1 Stark. R. 404; Pritt *v.* Fairclough, 3 Campb. 305; Dana *v.* Kemble, 19 Pick. 112. [*An agreement requiring a stamp being lost, and not having a stamp when last seen by the witness, will be presumed never to have been stamped; and no action can be maintained by proof of its contents. Arbon *v.* Fussell, 9 Jur. N. S. 753, Exch.]

presumption is raised, from the nature of the subject in question. Thus, where the issue is upon the *life* or death of a person, once shown to have been living, the burden of proof lies upon the party who asserts the death.[1] But after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party.[2] This period was inserted, upon great deliberation, in the statute of bigamy,[3] and the statute concerning leases for lives,[4] and has since been adopted, from analogy in other cases.[5] But where the presumption of life conflicts with that of innocence, the latter is generally allowed to prevail.[6] Upon an issue of the life or death of a party, as we have seen in the like case of the presumed payment of a debt, the jury may find the fact of death from the lapse

[1] Throgmorton *v.* Walton, 2 Roll. R. 461; Wilson *v.* Hodges, 2 East, 313; Battin *v.* Bigelow, 1 Pet. C. C. R. 452; Gilleland *v.* Martin, 3 McLean, 490. Vivere etiam usque ad centum annos quilibet præsumitur, nisi probetur mortuus. Corpus Juris Glossatum, tom. 2, p. 718, note (q); Mascard. De Prob. vol. 1, Concl. 103, n. 5. [*In tracing title identity of name is *primâ facie* evidence of identity of person; Gitt *v.* Watson, 18 Mo. Rep. 274.]

[2] Hopewell *v.* De Pinna, 2 Campb. 113; Loring *v.* Steineman, 1 Met. 204; Cofer *v.* Thermond, 1 Kelly, 538. This presumption of death, from seven years' absence, was questioned by the Vice-Chancellor of England, who said it was "daily becoming more and more untenable;" in Watson *v.* England, 14 Sim. 28; and again in Dowley *v.* Winfield, Id. 277. But the correctness of his remark is doubted in 5 Law Mag. N. S. 338, 339; and the rule was subsequently adhered to by the Lord Chancellor in Cuthbert *v.* Purrier, 2 Phill. 199, in regard to the capital of a fund, the income of which was bequeathed to an absent legatee; though he seems to have somewhat relaxed the rule in regard to the accumulated dividends. See 7 Law Rep. 201. The presumption in such cases is, that the person is dead; but not that he died at the end of the seven years, nor at any other particular time. Doe *v.* Nepean, 5 B. & Ad. 86; 2 M. & W. 894. The time of the death is to be inferred by the jury, from the circumstances. Rust *v.* Baker, 8 Sim. 443; Smith *v.* Knowlton, 11 N. Hamp. 191; Doe *v.* Flanagan, 1 Kelly, 543; Burr *v.* Sim, 4 Whart. 150; Bradley *v.* Bradley, Id. 173 [Whiteside's Appeal, 23 Penn. St. R. 114; Spencer *v.* Roper, 13 Ired. 333; Primm *v.* Stewart, 7 Texas, 178. See also Creed, *in re*, 19 Eng. Law & Eq. 119; Merritt *v.* Thompson, 1 Hilton, 550]. [*Where a party who takes under a will has not been heard of for seven years, the testator having died after three years had elapsed, and advertisement issued on the death of the testator failing to produce any information, such legatee must be assumed to have survived the testator, and cannot be presumed to have died at any particular period during the seven years. Dunn *v.* Snowdon, 11 W. R. 160. A young sailor was last seen in the summer of 1840, going to Portsmouth to embark. His grandmother died in March, 1841. It was presumed that he was the survivor. Tindall, *in re*, 30 Beav. 151.]

[3] 1 Jac. 1, c. 11.

[4] 19 Car. 2, c. 6.

[5] Doe *v.* Jesson, 6 East, 85; Doe *v.* Deakin, 4 B. & Ald. 433; King *v.* Paddock, 18 Johns. 141. It is not necessary that the party be proved to be absent from the United States; it is sufficient, if it appears that he has been absent for seven years, from the particular state of his residence, without having been heard from. Newman *v.* Jenkins, 10 Pick. 515; Innis *v.* Campbell, 1 Rawle, 373; Spurr *v.* Trimble, 1 A. K. Marsh. 278; Wambough *v.* Shenk, 1 Penningt. 167; Woods *v.* Woods, 2 Bay, 476; 1 N. Y. Rev. Stat. 749, § 6.

[6] Rex *v.* Twyning, 2 B. & Ald. 385; *supra*, § 35. But there is no absolute presumption of law as to the continuance of life; nor any absolute presumption against a person's doing an act because the doing of it would be an offence against the law. In every case the circumstances must be considered. Lapsley *v.* Grierson, 1 H. L. Ca. 498.

of a shorter period than seven years, if other circumstances concur; as, if the party sailed on a voyage which should long since have been accomplished, and the vessel has not been heard from.[1] But the presumption of the common law, independent of the finding of the jury, does not attach to the mere lapse of time, short of seven years,[2] unless letters of administration have been granted on his estate within that period, which, in such case, are conclusive proof of his death.[3] [*The inquiry in regard to presumptions affecting questions depending upon the continuance of life have been a good deal considered in the American, as well as the English courts. Thus it has been held that no presumption of death, or marriage, or the birth of children, or the reverse, can be made. But if events are remote, slight proof may satisfy a jury. And, ordinarily, in the absence of evidence to the contrary, the continuance of life will be presumed, to the common age of man.[4] The fact that one sailed in a ship never heard from, after a considerable period, and the payment of the amount insured upon her as of a total loss, is good ground to presume his death.[5]]

§ 42. On the same ground, a *partnership*, or other similar *relation*, once shown to exist, is presumed to continue, until it is proved to have been dissolved.[6] And a *seisin*, once proved or admitted, is presumed to continue, until a disseisin is proved.[7] The *opinions*, also, of individuals, once entertained and expressed, and the *state of mind*, once proved to exist, are presumed to remain unchanged, until the contrary appears. Thus, all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God, until it is shown from his own declarations. In like manner, every man is presumed to be of sane

[1] In the case of a missing ship, bound from Manilla to London, on which the underwriters had voluntarily paid the amount insured, the death of those on board was presumed by the Prerogative Court, after an absence of only two years, and administration was granted accordingly. *In re* Hutton, 1 Curt. 595. See also Sillick *v.* Booth, 1 Y. & Col. N. C. 117. If the person was unmarried when he went abroad and was last heard of, the presumption of his death carries with it the presumption that he died without issue. Rowe *v.* Hasland, 1 W. Bl. 404; Doe *v.* Griffin, 15 East, 293.

[2] Watson *v.* King, 1 Stark. R. 121; Green *v.* Brown, 2 Stra. 1199; Park on Ins. 435.

[3] Newman *v.* Jenkins, 10 Pick. 515. The production of a will, with proof of payment of a legacy under it, and of an entry in the register of burials, were held sufficient evidence of the party's death. Doe *v.* Penfold, 8 C. & P. 536.

[4] [*Stevens *v.* McNamara, 36 Maine Rep. 176.

[5] Main, *in re*, 1 Sw. & Tr. 11. See also Norris, *in re*, Id. 6.]

[6] Alderson *v.* Clay, 1 Stark. R. 405; 2 Stark Evid. 590, 688 [*Eames *v.* Eames, 41 N. H. 177].

[7] Brown *v.* King, 5 Met. 173.

mind, until the contrary is shown; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue, until disproved, unless the derangement was accidental, being caused by the violence of a disease.[1] [* But those presumptions are rather matters of fact than of law; or at most partly of law, and partly fact.[2]]

§ 43. A spirit of *comity*, and a disposition to friendly intercourse, are also presumed to exist among nations, as well as among individuals. And in the absence of any positive rule, affirming or denying, or restraining the operation of foreign laws, courts of justice presume the adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interest.[3] The instances here given, it is believed, will sufficiently illustrate this head of presumptive evidence. Numerous other examples and cases may be found in the treatises already cited, to which the reader is referred.[4]

§ 44. PRESUMPTIONS OF FACT, usually treated as composing the *second general head* of presumptive evidence, can hardly be said, with propriety, to belong to this branch of the law. They are, in truth, but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions, and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket

[1] Attorney-General *v.* Parnther, 3 Bro. Ch. Ca. 443; Peaslee *v.* Robbins, 3 Met. 164; Hix *v.* Whittemore, 4 Met. 545 [Perkins *v.* Perkins, 39 N. H. 163]; 1 Collinson on Lunacy, 55; Shelford on Lunatics, 275; 1 Hal. P. C. 30; Swinb. on Wills, Part II. § iii. 6, 7. [See *post*, vol. 2, § 369–374, tit. "Insanity," and §§ 689, 690.]

[2] [* Sutton *v.* Sadler, 3 C. B. N. S. 87.]

[3] Bank of Augusta *v.* Earle, 13 Peters, 519; Story on Confl. of Laws, §§ 36, 37.

[4] See Mathews on Presumptive Evid. ch. 11 to ch. 22; Best on Presumptions, *passim*.

of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered. These presumptions remain the same in their nature and operation, under whatever code the legal effect or quality of the facts, when found, is to be decided.[1]

§ 45. There are, however, some few general propositions in regard to matters of fact, and the weight of testimony by the jury, which are universally taken for granted in the administration of justice, and sanctioned by the usage of the bench, and which, therefore, may with propriety be mentioned under this head. Such, for instance, is the caution, generally given to juries, to place little reliance on the testimony of an accomplice, unless it is confirmed, in some material point, by other evidence. There is no presumption of the common law against the testimony of an *accomplice;* yet experience has shown, that persons capable of being accomplices in crime are but little worthy of credit; and on this experience the usage is founded.[2] A similar caution is to be used in regard to mere *verbal admissions* of a party; this kind of evidence being subject to much imperfection and mistake.[3] Thus, also, though lapse of time does not, of itself, furnish a conclusive legal bar to the title of the sovereign, agreeably to the maxim, *nullum tempus occurrit regi;* yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted adverse possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued peaceable enjoyment, accompanied by the usual acts of ownership.[4] So, after less than forty years' possession of a tract of land, and proof of a prior order of council for the survey of the lot, and of an actual survey thereof accordingly, it was held, that the jury were properly instructed to presume that a patent had been duly issued.[5] In regard, however, to crown or public

[1] See 2 Stark. Evid. 684; 6 Law Mag. 370. This subject has been very successfully illustrated by Mr. Wills, in his "Essay on the Rationale of Circumstantial Evidence," *passim.* [The facts, from which a presumption or inference is to be drawn, must be proved by direct evidence, and not be presumed or inferred. Douglass *v.* Mitchell, 35 Penn. 440.]

[2] See *infra*, §§ 380, 381.

[3] Earle *v.* Picken, 5 C. & P. 542, note; Rex *v.* Simmons, 6 C. & P. 540; Williams *v.* Williams, 1 Hagg. Consist. R. 304. See *infra*, under the head of *Admissions*, § 200.

[4] Rex *v.* Brown, cited Cowp. 110; Mayor of Kingston *v.* Horner, Cowp. 102; Eldridge *v.* Knott, Cowp. 215; Mather *v.* Trinity Church, 3 S. & R. 509; Roe *v.* Ireland, 11 East, 280; Read *v.* Brookman, 3 T. R. 159; Goodtitle *v.* Baldwin, 11 East, 488; 2 Stark. Evid. 672.

[5] Jackson *v.* McCall, 10 Johns. 377. "Si probet possessionem excedentem me-

grants, a longer lapse of time has generally been deemed necessary, in order to justify this presumption, than is considered sufficient to authorize the like presumption in the case of grants from private persons.

§ 46. Juries are also often instructed or advised, in more or less forcible terms, to presume *conveyances between private individuals*, in favor of the party who has proved a right to the beneficial enjoyment of the property, and whose possession is consistent with the existence of such conveyance, as is to be presumed; especially if the possession, without such conveyance, would have been unlawful, or cannot be satisfactorily explained.[1] This is done in order to prevent an apparently just title from being defeated by matter of mere form. Thus, Lord Mansfield declared, that he and some of the other judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term, outstanding in his own trustees, nor a satisfied term to be set up by a mortgagor against a mortgagee; but that they would direct the jury to presume it surrendered.[2] Lord Kenyon also said, that in all cases where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume, where such presumption could reasonably be made, that they had conveyed accordingly.[3] After the lapse of seventy years, the jury have been instructed to presume a grant of a share in a proprietary of lands, from acts done by the supposed grantee in that capacity, as one of the proprietors.[4] The same presumption has been advised in regard to the reconveyance of mortgages, conveyances from old to new trustees, mesne assignments of leases, and any other species of

moriam hominum, habet vim tituli et privilegii, etiam a Principe. Et hæc est differentia inter possessionem xxx. vel. xl. annorum, et non memorabilis temporis; quia per illam acquiritur non directum, sed utile dominium; per istam autem directum." Mascard. De Probat. vol. 1, p. 239, Concl. 199, n. 11, 12.

[1] The rule on this subject was stated by Tindal, C. J., in Doe *v.* Cooke, 6 Bing. 174, 179. "No case can be put," says he, "in which any presumption has been made, except where a title has been shown, by the party who calls for the presumption, good in substance, but wanting some collateral matter, necessary to make it complete in point of form. In such case, where the possession is shown to have been consistent with the fact directed to be presumed, and in such cases only, has it ever been allowed." And he cites as examples, Lade *v.* Halford, Bull. N. P. 110; England *v.* Slade, 4 T. R. 682; Doe *v.* Sybourn, 7 T. R. 2; Doe *v.* Hilder, 2 B. & Ald. 782; Doe *v.* Wrighte, Id. 710. See Best on Presumptions, pp. 144–169.

[2] Lade *v.* Holford, Bull. N. P. 110.

[3] Doe *v.* Sybourn, 7 T. R. 2; Doe *v.* Staples, 2 T. R. 696. The subject of the presumed surrender of terms is treated at large in Matthews on Presumpt. Evid. ch. 13, p. 226–259, and is ably expounded by Sir Edw. Sugden, in his Treatise on Vendors and Purchasers ch. xv. sec. 3, vol. 3, p. 24–67, 10th ed. See also Best on Presumptions, § 113–122.

[4] Farrar *v.* Merrill, 1 Greenl. 17. A by-law may, in like manner, be presumed. Bull. N. P. 211. The case of Corporations, 4 Co. 78; Cowp. 110.

documentary evidence, and acts *in pais*, which is necessary for the support of a title in all other respects evidently just.[1] It is sufficient that the party, who asks for the aid of this presumption, has proved a title to the beneficial ownership, and a long possession not inconsistent therewith; and has made it not unreasonable to believe that the deed of conveyance, or other act essential to the title, was duly executed. Where these merits are wanting, the jury are not advised to make the presumption.[2] [*These presumptions for the quieting of title are not necessarily restricted to what may fairly be supposed to have in fact occurred; but rather, what may have occurred, and seems requisite to quiet the title in the possessor.[3]]

§ 47. The same principle is applied to matters belonging to the *personalty*. Thus, where one town, after being set off from another, had continued for fifty years to contribute annually to the expense of maintaining a bridge in the parent town, this was held sufficient to justify the presumption of an agreement to that effect.[4] And, in general, it may be said that long acquiescence in any adverse claim of right is good ground, on which a jury may

[1] Emery *v.* Grocock, 6 Madd. 54; Cooke *v.* Soltau, 2 Sim. & Stu. 154; Wilson *v.* Allen, 1 Jac. & W. 611, 620; Roe *v.* Reade, 8 T. R. 118, 122; White *v.* Foljambe, 11 Ves. 350; Keene *v.* Deardon, 8 East, 248, 266; Tenny *v.* Jones, 3 M. & Scott, 472; Rowe *v.* Lowe, 1 H. Bl. 446, 459; Van Dyck *v.* Van Buren, 1 Caines, 84; Jackson *v.* Murray, 7 Johns. 5; 4 Kent, Comm. 90, 91; Gray *v.* Gardiner, 3 Mass. 399; Knox *v.* Jenks, 7 Mass. 488; Society, &c. *v.* Young, 2 New Hamp. R. 310; Colman *v.* Anderson, 10 Mass. 105; Pejepscot Proprietors *v.* Ranson, 14 Mass. 145; Bergen *v.* Bennet, 1 Caines, 1; Blossom *v.* Cannon, 14 Mass. 177; Battles *v.* Holley, 6 Greenl. 145; Lady Dartmouth *v.* Roberts, 16 East, 334, 339; Livingston *v.* Livingston, 4 Johns. Ch. 287. Whether deeds of conveyance can be presumed, in cases where the law has made provision for their registration, has been doubted. The point was argued, but not decided, in Doe *v.* Hirst, 11 Price, 475. And see 24 Pick. 322. The better opinion seems to be that though the court will not, in such case, presume the existence of a deed as a mere inference of law, yet the fact is open for the jury to find, as in other cases. See Rex *v.* Long Buckby, 7 East, 45; Trials per Pais, 237; Finch, 400; Valentine *v.* Piper, 22 Pick. 85, 93, 94.

[2] Doe *v.* Cooke, 6 Bing. 173, per Tindal, C. J.; Doe *v.* Reed, 5 B. & A. 232; Livett *v.* Wilson, 3 Bing. 115; Schauber *v.* Jackson, 2 Wend. 14, 37; Hepburn *v.* Auld, 5 Cranch, 262; Valentine *v.* Piper, 22 Pick. 85. This rule has been applied to possessions of divers lengths of duration; as, fifty-two years, Ryder *v.* Hathaway, 21 Pick. 298; fifty years, Melvin *v.* Prop'rs of Locks, &c. 16 Pick. 137; 17 Pick. 255, s. c.; thirty-three years, White *v.* Loring, 24 Pick. 319; thirty years, McNair *v.* Hunt, 5 Miss. 300; twenty-six years, Newman *v.* Studley, Id. 291; twenty years, Brattle-Square Church *v.* Bullard, 2 Met. 363; but the latter period is held sufficient. The rule, however, does not seem to depend so much upon the mere lapse of a definite period of time as upon all the circumstances, taken together; the question being exclusively for the jury. [See also Attorney-General *v.* Proprietors of Meeting-house, &c. 3 Gray, 1, 62–65.]

[3] [*St. Mary's College *v.* Attorney-General, 3 Jur. N. S. 675.]

[4] Cambridge *v.* Lexington, 17 Pick. 222. See also Grote *v.* Grote, 10 Johns. 402; Schauber *v.* Jackson, 2 Wend. 36, 37.

presume that the claim had a legal commencement; since it is contrary to general experience for one man long to continue to pay money to another, or to perform any onerous duty, or to submit to any inconvenient claim, unless in pursuance of some contract, or other legal obligation.

§ 48. In fine, this class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature. It is that which prevails in the ordinary affairs of life, namely, the process of ascertaining one fact from the existence of another, without the aid of any rule of law; and, therefore, it falls within the exclusive province of the jury, who are bound to find according to the truth, even in cases where the parties and the court would be precluded by an estoppel, if the matter were so pleaded. They are usually aided in their labors by the advice and instructions of the judge, more or less strongly urged, at his discretion; but the whole matter is free before them, unembarrassed by any considerations of policy or convenience, and unlimited by any boundaries but those of truth, to be decided by themselves, according to the convictions of their own understanding.

PART II.

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CHAPTER I.

OF THE RELEVANCY OF EVIDENCE.

[* § 49. The appropriate province of the court and Jury in the trial of matters of fact.
50. Classification of the subject.
51. The proof must be confined to the point in issue.
51 *a*. Evidence receivable, although but remotely tending to prove the issue.
52. Proof of collateral facts not admissible even to discredit witness.
53. A wide range is allowed in proof of knowledge or intent.
53 *a*. So also in regard to acts of possession affecting title to land.
54. General evidence admissible in regard to character.
55. But this restricted to a very few actions where good character is in issue.]

§ 49. In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must, of necessity, be read or heard by the judge, in order to determine its character and value. In such cases, the only question, in effect, is upon the sufficiency and weight of the evidence. But in trials by jury, it is the province of the presiding judge to determine all questions on the admissibility of evidence to the jury; as well as to instruct them in the rules of law, by which it is to be weighed. Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury.[1] If the decision of the question of admissi-

[1] Per Buller, J., in Carpenter *v.* Hayward, Doug. 374. And see Best's Principles of Evidence, § 76–86. [And Chandler *v.* Von Roeder, 24 How. U. S. 224.] The notion that the jury have the right, in any case, to determine questions of law, was strongly denied, and their province defined by Story, J., in the United States *v.* Battiste, 2 Sumn. 243. "Before I proceed," said he, "to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner, upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law as well as of the fact. My opinion is, that the

bility depends on the decision of other questions of fact, such as the fact of interest, for example, or of the execution of a deed,

jury are no more judges of the law in a capital or other criminal case, upon a plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it; but, in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err, in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land, and not by the law as a jury may understand it, or choose, from wantonness or ignorance, or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion." The same opinion as to the province of the jury, was strongly expressed by Lord C. J. Best, in Levi *v.* Mylne, 4 Bing. 195.

The same subject was more fully considered in The Commonwealth *v.* Porter, 10 Met. 263, which was an indictment for selling intoxicating liquors without license. At the trial the defendant's counsel, being about to argue the questions of law to the jury, was stopped by the judge, who ruled, and so instructed the jury, that it was their duty to receive the law from the court, and implicitly to follow its direction upon matters of law. Exceptions being taken to this ruling of the judge, the point was elaborately argued in bank, and fully considered by the court, whose judgment, delivered by Shaw, C. J., concluded as follows: "On the whole subject, the views of the court may be summarily expressed in the following propositions: That, in all criminal cases, it is competent for the jury, if they see fit, to decide upon all questions of fact embraced in the issue, and to refer the law arising thereon to the court, in the form of a special verdict. But it is optional with the jury thus to return a special verdict or not, and it is within their legitimate province and power to return a general verdict, if they see fit. In thus rendering a general verdict, the jury must necessarily pass upon the whole issue, compounded of the law and of the fact, and they may thus incidentally pass on questions of law. In forming and returning such general verdict, it is within the legitimate authority and power of the jury to decide definitively upon all questions of fact involved in the issue, according to their judgment, upon the force and effect of the competent evidence laid before them; and if in the progress of the trial, or in the summing-up and charge to the jury, the court should express or intimate any opinion upon any such question of fact, it is within the legitimate province of the jury to revise, reconsider, and decide contrary to such opinion, if, in their judgment, it is not correct, and warranted by the evidence. But it is the duty of the court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions pertinent to the issue, upon which either party may request the direction of the court upon matters of law. And it is the duty of the jury to receive the law from the court, and conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in

these preliminary questions of fact are, in the first instance, to be tried by the judge; though he may, at his discretion, take the

matter of law. To this duty jurors are by a strong social and moral obligation forced by the sanction of an oath, to the extent and in the same manner are conscientiously bound to decide questions of fact according to the evidence. It is no valid objection to this view of the duties of jurors, that they are not amenable to any legal prosecution for their decision in any matter of law; that arise from an honest mistake of judgment, in their apprehension of the rules and principles of law, as laid down by the court, especially in perplexed and complicated cases, or from a mistake of judgment in applying them honestly to facts as proved. The same reason applies to the decisions of juries upon questions of fact clearly within their legitimate powers; they are not punishable for doing wrong. The law vests in them the power to judge, and it will presume they judge honestly, even though there may be reason to apprehend that the judge erroneously; they cannot, therefore, be held responsible for any such decision, unless upon evidence which clearly establishes proof of corruption, or wilful violation of duty. It is within the legitimate power, and is the duty of the court, to superintend the course of the trial; to decide upon the admission and rejection of evidence; to decide upon the use of any books, papers, documents, treatises or works of supposed authority, which may be offered upon either side; to rule upon all collateral and incidental proceedings; and to confine parties and counsel to the matters within the issue. The jury have a legitimate power to render a general verdict, and in that case to pass upon the whole issue, this court is of opinion that the defendant has a right, by himself or his counsel, to address the jury, under the general superintendence of the court, upon all the material questions involved in the issue, and to this extent, and in this connection, to address the jury upon such questions of law as come within the issue to be tried. Such address to the jury, upon questions of law embraced in the issue, by the defendant or his counsel, is warranted by the long practice of the courts in this Commonwealth in criminal cases, in which it is within the established authority of a jury, if they see fit, to return a general verdict, embracing the entire issue of law and fact." 10 Met. 285–287. See also the opinion of Lord Mansfield to the same effect, in Rex *v.* The Dean of St. Asaph, 21 How. St. Tr. 1039, 1040; and of Mr Hargrave, in his note, 276, to Co. Lit. 155, where the earlier authorities are cited. The whole subject, with particular reference to criminal cases, was reviewed with great learning and ability by Gilchrist, J., and again by Parker, C. J., in Pierce's case, 13 N. Hamp. 536, where the right of the jury to judge of the law was denied. And see, accordingly, The People *v.* Price, 2 Barb. S. C. R. 566; Townsend *v.* The State, 2 Blackf. 152; Davenport *v.* The Commonwealth, 1 Leigh, R. 588; Commonwealth *v.* Garth, 3 Leigh, R. 761; Montee *v.* The Commonwealth, 3 J. J. Marsh. 150; Pennsylvania *v.* Bell, Addis. R. 160, 161; Commonwealth *v.* Abbott, 13 Met. 123, 124; Hardy *v.* The State, 7 Misso. R. 607; Snow's case, 6 Shepl. 346, *semb. contra.* [In State *v.* Croteau, 23 Vt. (8 Washb.) 14, the Supreme Court of Vermont, Bennett, J., dissenting, decided that in criminal cases the jury has the right to determine the whole matter in issue, the law as well as the fact; and the same rule is established in several other states. The legislature of Massachusetts, in 1855 (Acts, 1855, ch. 152), enacted, "that in all trials for criminal offences, it shall be the duty of the jury to try, according to established forms and principles of law, all causes which shall be committed to them, and after having received the instructions of the court, to decide at their discretion, by a general verdict, both the fact and law involved in the issue, or to find a special verdict at their election; but it shall be the duty of the court to superintend the course of the trials, to decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon all collateral and incidental proceedings, and also to charge the jury and to allow bills of exception, and the court may grant a new trial in cases of conviction." This act has been before the Supreme Judicial Court for exposition and construction upon exceptions taken to the ruling of the court below in the trial of an indictment against a defendant for being a common seller of intoxicating liquors, and the court has decided, as appears by a note of their decision in the Monthly Law Reporter for September, 1857 (Commonwealth *v.* Anthes, 20 Law Reporter, 298), as follows: "Upon the question whether this statute purports to change the law as already existing and recognized in Commonwealth *v.* Porter, 10 Met. 263, the court were equally divided. But by a

opinion of the jury upon them. But where the question i mi d, consisting of law and fact, so intimately blended as not to e easily

majority of the court it was held, that if such change of the law is contemplated by the statute, the same is void." S. C. 5 Gray, 185. [* The question of the right of the jury to judge of the law in criminal cases has been a good deal discussed, both in England and America, and very different conclusions reached by judges of nearly equal eminence. The opinion of Hall, J., in State *v.* Croteau, *supra*, may be consulted as a very fair and able exposition of the argument and authority in favor of the opposite view from that maintained in the preceding portion of this note. For ourselves, we have always been content not to raise any such issue with the jury in criminal cases, lest they might be thereby provoked to abuse their just discretion in the application of the law to the facts. Our own views are briefly presented in State *v.* McDonnell, 32 Vt. Rep. 531–533.]

The application of this doctrine to particular cases, though generally uniform, is not perfectly so where the question is a mixed one of law and fact. Thus the question of *probable cause* belongs to the court; but where it is a mixed question of law and fact intimately blended, as, for example, where the party's *belief* is a material element in the question, it has been held right to leave it to the jury, with proper instructions as to the law. McDonald *v.* Rooke, 2 Bing. N. C. 217; Haddrick *v.* Raine, 12 Ad. & El. 267, N. S. And see Taylor *v.* Willans, 2 B. & Ad. 845; 6 Bing. 183; *post*, vol. 2, § 454. The judge has a right to act upon all the uncontradicted facts of the case; but where the credibility of witnesses is in question, or some material fact is in doubt, or some inference is attempted to be drawn from some fact not distinctly sworn to, the judge ought to submit the question to the jury. Mitchel *v.* Williams, 11 M. & W. 216, 217, per Alderson, B.

In trespass *de bonis asportatis*, the *bona fides* of the defendant in taking the goods, and the reasonableness of his belief that he was executing his duty, and of his suspicion of the plaintiff, are questions for the jury. Wedge *v.* Berkeley, 6 Ad. & El. 663; Hazeldine *v.* Grove, 3 Ad. & El. 997, N. S., Hughes *v.* Buckland, 15 M. & W. 346. In a question of *pedigree*, it is for the judge to decide whether the person whose declarations are offered in evidence was a member of the family, or so related as to be entitled to be heard on such a question. Doe *v.* Davies, 11 Jur. 607; 10 Ad. & El. 314, N. S.

The question, what are *usual* [illegible] a deed, is a question for the jury; and [illegible] matter of construction for the court. [illegible] nett *v.* Womack, 3 C. & P. 96.

In regard to *reasonableness of time*, *skill*, and the like, there seems to [illegible] been some diversity in the application of the principle; but it is conceded [illegible], "whether there has been, in any particular case, reasonable diligence [illegible] or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case." Meyer *v.* Rawdon, 9 Bing. 416, per Tindal. Nelson *v.* Patrick, 2 Car. & K. 64 Wilde, C. J. The judge is to [illegible] jury as to the degree of diligence, [illegible] skill which the law demands of the party, and what duty it devolves on him; the jury are to find whether that duty has been done. Hunter *v.* Caldwell, 11 Jur. 77[illegible] Ad. & El. 69, N. S.; Burton *v.* Gr[illegible] M. & W. 817; Facey *v.* Hurdo[illegible] C. 213; Stewart *v.* Canty, 8 M. & W. [illegible] Parker *v.* Palmer, 4 B. & Ald. 3[illegible] *v.* Shew, Id. 206; Mount *v.* Jo[illegible] Bing. 108; Phillips *v.* Irving, 7 M. [illegible] 325; Reece *v.* Rigby, 4 B. & Ald. [illegible] But where the duty in regard to [illegible] established by uniform usage and [illegible] rule is well known; as in the case of notice of the dishonor of a bill, where the parties live in the same [illegible] or of the duty of sending such notice by the *next* post, packet, or other [illegible] or of the reasonable hours of the day, within which [illegible] be presented, or goods to be delivered, or the like; in such cases, the [illegible] of the fact being proved, its reasonableness is settled by the rule, and is declared by the judge. See Story on Bills, §§ 221, 238, 338, 349; *post*, vol. 2, §§ 178, 179, 186–188 [Watson *v.* Tarpley, 18 How. U. S. 517].

Whether by the word "month," in a contract, is meant a calendar or a lunar month, is a question of law; but whether parties, in the particular case, intended to use it in the one sense or the other, is a question for the jury, upon the evidence of circumstances in the case. Simpson *v.* Margitson, 12 Jur. 155; Lang *v.* Gale, 1 M. & S. 111; Hutchinson *v.* Bowker, 5 M. & W. 535; Smith *v.* Wilson, 3 B. & Ad. 728; Jolly *v.* Young, 1 Esp. 186; Walker *v.* Hunter, 2 M. Gr. & Sc. 324.

susceptible of separate decision, it is submitted to the jury, who are first instructed by the judge in the principles and rules of law, by which they are to be governed in finding a verdict; and these instructions they are bound to follow.[1] If the genuineness of a deed is the fact in question, the preliminary proof of its execution, given before the judge, does not relieve the party offering it from the necessity of proving it to the jury.[2] The judge only decides whether there is, *primâ facie*, any reason for sending it at all to the jury.[3]

§ 50. The production of evidence to the jury is governed by certain principles, which may be treated under four general heads or rules. The *first* of these is, that the evidence must correspond with the *allegations*, and be confined to the point in issue. The *second* is, that it is sufficient, if the *substance* only of the issue be proved. The *third* is, that the burden of proving a proposition, or issue, lies on the party holding the affirmative. And the *fourth* is, that the best evidence of which the case, in its nature, is susceptible, must always be produced. These we shall now consider in their order.

§ 51. *First.* The pleadings at common law are composed of the written allegations of the parties, terminating in a single proposition, distinctly affirmed on one side, and denied on the other, called the *issue*. If it is a proposition of fact it is to be tried by the jury, upon the evidence adduced. And it is an established rule, which

[1] 1 Stark. Evid. 510, 519–526; Hutchinson *v.* Bowker, 5 M. & W. 535; Williams *v.* Byrne, 2 N. & P. 139; McDonald *v.* Rooke, 2 Bing. N. C. 217; James *v.* Phelps, 11 Ad. & El. 483; 3 P. & D. 231, s. c.; Panton *v.* Williams, 2 Ad. El. 169, N. s.; Townsend *v.* The State, 2 Blackf. 151; Montgomery *v.* Ohio, 11 Ohio R. 424. Questions of interpretation, as well as of construction of written instruments, are for the court alone. *Infra*, § 277, note (1). But where a doubt as to the application of the descriptive portion of a deed to external objects arises from a latent ambiguity, and is therefore to be solved by parol evidence, the question of intention is necessarily to be determined by the jury. Reed *v.* Proprietors of Locks, &c., 8 How. S. C. R. 274 [Savignac *v.* Garrison, 18 Ib. 136]

[2] Ross *v.* Gould, 5 Greenl. 204.

[3] The subject of the functions of the judge, as distinguished from those of the jury, is fully and ably treated in an article in the Law Review, No. 3, for May, 1845, p. 27–44. [It is the province of the judge who presides at the trial to decide all questions on the admissibility of evidence. It is also his province to decide any preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the other question of admissibility. And his decision is conclusive, unless he saves the question for revision by the full court, on a report of the evidence, or counsel bring up the question on a bill of exceptions which contains a statement of the evidence. Gorton *v.* Hadsell, 9 Cush. 511; Bartlett *v.* Smith, 11 Mees. & Wels. 483. Thus the question whether the application to a justice of the peace, under a statute, to call a meeting of the proprietors of a meeting-house, was signed by five at least of such proprietors, as preliminary to the question of the admissibility of the records of such meeting, is for the judge, and not for the jury. Gorton *v.* Hadsell, *ubi supra*.]

we state as the FIRST RULE, governing in the production of evidence, that the *evidence offered must correspond with the allegations, and be confined to the point in issue.*[1] This rule supposes the allegations to be material and necessary. Surplusage, therefore, need not be proved; and the proof, if offered, is to be rejected. The term *surplusage* comprehends whatever may be stricken from the record, without destroying the plaintiff's right of action; as if, for example, in suing the defendant for breach of warranty upon the sale of goods, he should set forth, not only that the goods were not such as the defendant warranted them to be, but that *the defendant well knew* that they were not.[2] But it is not every immaterial or unnecessary allegation that is surplusage; for if the party, in stating his title, should state it with unnecessary particularity, he must prove it as alleged. Thus, if, in justifying the taking of cattle damage-feasant, in which case it is sufficient to allege that they were doing damage in his *freehold*, he should state a seisin *in fee*, which is traversed, he must prove the seisin *in fee;*[3] for if this were stricken from the declaration, the plaintiff's entire title would be destroyed. And it appears that in determining the question, whether a particular averment can be rejected, regard is to be had to the nature of the averment itself, and its connection with the substance of the charge, or chain, rather than to its grammatical collocation or structure.[4]

§ 51*a*. It is not necessary, however, that the evidence should bear *directly* upon the issue. It is admissible if it *tends* to prove the issue, or constitutes a link in the chain of proof; although, alone, it might not justify a verdict in accordance with it.[5] Nor is it necessary that its relevancy should appear at the time when it is

[1] See Best's Principles of Evidence, § 229–249. [*The reason for this rule, and the necessity for a strict adherence to it, are well explained and illustrated in Malcomson *v.* Clayton, 13 Moore, P. C. C. 198.]

[2] Williamson *v.* Allison, 2 East, 446; Peppin *v.* Solomons, 5 T. R. 496; Bromfield *v.* Jones, 4 B. & C. 380.

[3] Sir Francis Leke's case, Dyer, 365; 2 Saund. 206 *a*, note 22; Stephen on Pleading, 261, 262; Bristow *v.* Wright, Doug. 665; Miles *v.* Sheward, 8 East, 7, 8, 9; 1 Smith's Leading Cases, 328, note.

[4] 1 Stark. Evid. 386.

[5] McAllister's case, 11 Shepl. 139; Haughey *v.* Strickler, 2 Watts & Serg. 411; Jones *v.* Vanzandt, 2 McLean, 596; Lake *v.* Mumford, 4 Sm. & Marsh. 312; Belden *v.* Lamb, 17 Conn. 441. [*Tams *v.* Bullitt, 35 Penn. St. 308; Schuchardt *v.* Allens, 2 Wallace, U. S. 359; Tucker *v.* Peaslee, 36 N. H. 167.] Where the plaintiff's witness denied the existence of a material fact, and testified that persons connected with the plaintiff had offered him money to assert its existence; the plaintiff was permitted, not only to prove the fact, but to disprove the subornation, on the ground that this latter fact had become material and relevant, inasmuch as its truth or falsehood may fairly influence the belief of the jury as to the whole case. Melhuish *v.* Collier, 15 Ad. & El. 878, N. S.

offered; it being the usual course to receive, at any proper and convenient stage of the trial, in the discretion of the judge, any evidence which the counsel shows will be rendered material by other evidence, which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case.[1]

§ 52. This rule excludes all evidence of *collateral facts*, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and moreover the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it.[2] Thus, where the question between landlord and tenant was, whether the rent was payable quarterly, or half-yearly, evidence of the mode in which other tenants of the same landlord paid their rent was held inadmissible.[3] And where, in covenant, the issue was whether the defendant, who was a tenant of the plaintiff, had committed waste, evidence of bad husbandry, not amounting to waste, was rejected.[4] So, where the issue was, whether the tenant had *permitted* the premises to be out of repair, evidence of *voluntary* waste was held irrelevant.[5] This rule was adhered to, even in the cross-examination of witnesses; the party not being permitted, as will be shown hereafter,[6] to ask the witness a question in regard to a matter not relevant to the issue, for the purpose of afterwards contradicting him.[7]

[1] McAllister's case, *supra*; Van Buren *v.* Wells, 19 Wend. 203; Crenshaw *v.* Davenport, 6 Ala. 390; Tuzzle *v.* Barclay, Id. 407; Abney *v.* Kingsland, 10 Ala. 355; Yeatman *v.* Hart, 6 Humph. 375. [*In Harris *v.* Holmes, 30 Vt. Rep. 352, the point is thus stated: In cases where the issue is not defined, and where it is impossible to anticipate what questions may arise in the course of the trial, the rule in regard to the admissibility of testimony is, that it should be received if it would be competent in any view of the case claimed, and which might be thereafter taken. And a new trial will not be granted on account of the admission of such evidence unless it appears that the evidence so admitted was improperly applied in the decision of the case.]

[2] *Infra*, § 448. But counsel may, on cross-examination, inquire as to a fact apparently irrelevant, if he will undertake afterwards to show its relevancy, by other evidence. Haigh *v.* Belcher, 7 C. & P. 339.

[3] Carter *v.* Pryke, Peake's Cas. 95. [See also Holingham *v.* Head, 4 Com. B. Rep. N. S. 388.]

[4] Harris *v.* Mantle, 3 T. R. 307. See also Balcetti *v.* Serani, Peake's Cas. 142; Furneaux *v.* Hutchins, Cowp. 807; Doe *v.* Sisson, 12 East, 61; Holcombe *v.* Hewson, 2 Campb. 391; Viney *v.* Bass, 1 Esp. 292; Clothier *v.* Chapman, 14 East, 331, note.

[5] Edge *v.* Pemberton, 12 M. & W. 187.

[6] See *infra*, §§ 448, 449, 450.

[7] Crowley *v.* Page, 7 Car. & P. 789; Harris *v.* Tippet, 2 Campb. 637; Rex *v.* Watson, 2 Stark. R. 116; Commonwealth *v.* Buzzel, 16 Pick. 157, 158; Ware *v.* Ware, 8 Greenl. 42; [Coombs *v.* Win-

§ 53. In some cases, however, evidence has been received of facts which happened before or after the principal transaction, and which had no direct or apparent connection with it; and therefore their admission might seem, at first view, to constitute an exception to this rule. But those will be found to have been cases, in which the *knowledge* or *intent* of the party was a material fact, on which the evidence, apparently collateral, and foreign to the main subject, had a direct bearing, and was therefore admitted. Thus, when the question was, whether the defendant, being the acceptor of a bill of exchange, either knew that the name of the payee was fictitious, or else had given a general authority to the drawer, to draw bills on him payable to fictitious persons, evidence was admitted to show, that he had accepted other bills, drawn in like manner, before it was possible to have transmitted them from the place at which they bore date.[1] So, in an indictment for knowingly uttering a forged document, or a counterfeit bank-note, proof of the possession, or of the prior or subsequent utterance of other false documents or notes, though of a different description, is admitted, as material to the question of guilty knowledge or intent.[2] So, in actions for defamation, evidence of other language, spoken or written by the defendant at other times, is admissible under the general issue, in proof of the spirit and intention of the party, in uttering the words or publishing the libel charged; and this, whether the language thus proved be in itself actionable or not.[3] Cases of this sort, therefore, instead of being exceptions to the rule, fall strictly within it.

chester, 39 N. H. 1]. A further reason may be, that the evidence, not being to a material point, cannot be the subject of an indictment for perjury. Odiorne *v.* Winkley, 2 Gall. 51, 53.

[1] Gibson *v.* Hunter, 2 H. Bl. 288; Minet *v.* Gibson, 3 T. R. 481; 1 H. Bl. 569.

[2] Rex *v.* Wylie, 1 New Rep. 92, 94. See other examples in McKenney *v.* Dingley, 5 Greenl. 172; Bridge *v.* Eggleston, 14 Mass. 245; Rex *v.* Ball, 1 Campb. 324; Rex *v.* Roberts, 1 Campb. 399; Rex *v.* Houghton, Russ. & Ry. 130; Rex *v.* Smith, 4 C. & P. 411; Rickman's case, 2 East, P. C. 1035; Robinson's case, Id. 1110, 1112; Rex *v.* Northampton, 2 M. & S. 262; Commonwealth *v.* Turner, 3 Met. R. 19. See also Bottomley *v.* United States, 1 Story, R. 143, 144, where this doctrine is clearly expounded by Story, J.; Pierce *v.* Hoffman, 24 Vermont, 525. [*Castle *v.* Bullard, 23 How. U. S. 172; Butler *v.* Collins, 12 Cal. 457; French *v.* White, 5 Duer, 254.]

[3] Pearson *v.* Le Maitre, 5 M. & Gr. 700, 6 Scott, N. R. 607, s. c.; Rustell *v.* Macquister, 1 Campb. 49, n.; Saunders *v.* Mills, 6 Bing. 213; Warwick *v.* Foulkes, 12 M. & W. 507; Long *v.* Barrett, 7 Ir. Law R. 439; 8 Ir. Law R. 331, s. c. on error; [*post*, vol. 2, § 418; 2 Starkie on Slander, 53–57. So for the purpose of proving that a conveyance of property made by a bankrupt was fradulent under the United States Bankrupt Act of 1841, because made to defraud the plaintiff of his debt, evidence is admissible tending to show that the defendant entertained such fraudulent intent even before the passage of said bankrupt act. Bigelow, J., in delivering the opinion of the court, said: "The inquiry before the jury in-

§ 53*a*. In proof of the *ownership of lands*, by acts of possession, the same latitude is allowed. It is impossible, as has been observed, to confine the evidence to the precise spot on which a supposed trespass was commited; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question, as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the party, if the other parts did. The evidence of such acts is admissible *proprio vigore*, as tending to prove that he who did them is the owner of the soil; though if they were done in the absence of all persons interested to dispute them, they are of less weight.[1]

§ 54. To this rule may be referred the admissibility of evidence of the *general character* of the parties.[2] In civil cases, such evidence is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it.[3] Thus,

volved two essential elements. One was the establishment of a fraudulent design on the part of the defendant towards his creditors; the other was the carrying-out and fulfilment of that design through the instrumentality of the bankrupt act. To maintain the first of these propositions, as one link in the chain of evidence, proof of an intent, prior to the passage of the bankrupt act, to defraud the plaintiff of his debt by a fraudulent concealment and conveyance of his property, was clearly competent. Whenever the intent of a party forms part of the matter in issue, upon the pleadings, evidence may be given of other acts, not in issue, provided they tend to establish the intent of the party in doing the acts in question. Rose. Crim. Ev. (3d Am. ed.) 99. The reason for this rule is obvious. The only mode of showing a present intent is often to be found in proof of a like intent previously entertained. The existence in the mind of a deliberate design to do a certain act, when once proved, may properly lead to the inference that the intent once harbored continued and was carried into effect by acts long subsequent to the origin of the motive by which they were prompted. Even in criminal cases, acts and declarations of a party made at a former time are admissible to prove the intent of the same person at the time of the commission of an offence. 2 Phil. Ev. (3d ed.) 498; Rose. Crim. Ev. (3d Amer. ed.) 95. In the proof of cases involving the motives of men as influencing and giving character to their acts, it is impossible to confine the evidence within any precise limit. It must necessarily proceed by steps or stages leading to the main point in issue. In the case at bar, when the plaintiff had proved an intent on the part of the defendant to conceal his property, for the purpose of defrauding his creditors, anterior to the passage of the bankrupt act, he had advanced one step towards the proof of the real issue before the jury, and if he satisfied the jury that this intent once harbored continued in the mind of the defendant, and was carried out by availing himself of the provisions of the bankrupt act, he had thus proved by a legitimate chain of evidence the matter set up in his specification as a ground for invalidating the defendant's discharge in bankruptcy." Cook *v.* Moore, 11 Cush. 216–217.] [*The party to a suit, if admissible as a witness, may testify to his motive in doing an act, if that become material. Wheelden *v.* Wilson, 44 Me. 1.]

[1] Jones *v.* Williams, 2 M. & W. 326, per Parke, B. And see Doe *v.* Kemp, 7 Bing. 332; 2 Bing. N. C. 102; [*Simpson *v.* Dendy, 36 Eng. L. & Eq. 366].

[2] [Commonwealth *v.* Webster, 5 Cush. 324, 325. See as to character of *witnesses*, *post*, § 469.]

[3] Attorney-General *v.* Bowman, 2 B. & P. 532, expressly adopted in Fowler *v.* Ætna Fire Ins. Co. 6 Cowen, 673, 675; Anderson *v.* Long, 10 S. & R. 55; Humphrey *v.* Humphrey, 7 Conn. 116; Nash *v.* Gilkeson, 4 S. & R. 352; Jeffries *v.* Harris, 3 Hawks, 105; [Pratt *v.* Andrews, 4 Comst. 493; Porter *v.* Seiler, 23 Penn.

evidence impeaching the previous general character of the wife or daughter, in regard to chastity, is admissible in an action by the husband or father for seduction; and this, again, may be rebutted by counter proof.[1] But such evidence, referring to a time subsequent to the act complained of, is rejected.[2] And generally, in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it.[3] So, also, in criminal prosecutions, the

St. R. 421; see also 24 Ib. 401, 408; Goldsmith *v.* Picard, 27 Ala. 142; Lander *v.* Seaver, 32 Vt. 114.]

[1] Bate *v.* Hill, 1 C. & P. 100; Verry *v.* Watkins, 7 C. & P. 308; Carpenter *v.* Wahl, 11 Ad. & El. 803; 3 P. & D. 457, s. c.; Elsam *v.* Faucett, 2 Esp. 562; Dodd *v.* Norris, 3 Campb. 519. See *contra*, McRea *v.* Lilly, 1 Iredell, R. 118.

[2] Elsam *v.* Faucett, 2 Esp. 562; Coote *v.* Berty, 12 Mod. 232. The rule is the same in an action by a woman, for a breach of a promise of marriage. See Johnson *v.* Caulkins, 1 Johns. Cas. 116; Boynton *v.* Kellogg, 3 Mass. 189; Foulkes *v.* Sellway, 3 Esp. 236; Bamfield *v.* Massey, 1 Campb. 460; Dodd *v.* Norris, 3 Campb. 519.

[3] Ruan *v.* Perry, 3 Caines, 120. See also Walker *v.* Stephenson, 3 Esp. 284. This case of Ruan *v.* Perry has sometimes been mentioned with disapprobation; but, when correctly understood, it is conceived to be not opposed to the well-settled rule, that evidence of general character is admissible only in cases where it is involved in the issue. In that case the commander of a national frigate was sued in trespass, for seizing and detaining the plaintiff's vessel, and taking her out of her course, by means whereof she was captured by an enemy. The facts were clearly proved; but the question was, whether the defendant acted in honest obedience to his instructions from the Navy Department, which were in the case, or with a *fraudulent intent*, and in *collusion* with the captors, as the plaintiff alleged to the jury, and attempted to sustain by some of the circumstances proved. It was to repel this imputation of fraudulent *intent*, inferred from slight circumstances, that the defendant was permitted to appeal to his own "fair and good reputation." And in confirming this decision in bank, it was observed, that "In actions of tort, and especially charging a defendant with gross depravity and fraud, upon circumstances merely, evidence of uniform integrity and good character is oftentimes the only testimony which a defendant can oppose to suspicious circumstances." On this ground this case was recognized by the court as good law, in Fowler *v.* Ætna Fire Ins. Co. 6 Cowen, 675. And five years afterwards, in Townsend *v.* Graves, 3 Paige, 455, 456, it was again cited with approbation by Chancellor Walworth, who laid it down as a general rule of evidence, "that if a party is charged with a crime, or any other act involving moral turpitude, which is endeavored to be fastened upon him by circumstantial evidence, or by the testimony of witnesses of doubtful credit, he may introduce proof of his former good character for honesty and integrity, to rebut the presumption of guilt arising from such evidence, which it may be impossible for him to contradict or explain." In Gough *v.* St. John, 16 Wend. 646, the defendant was sued in an action on the case, for a false representation as to the solvency of a third person. The representation itself was in writing, and verbal testimony was offered, tending to show that the defendant knew it to be false. To rebut this charge, proof that the defendant sustained a good character for honesty and fairness in dealing, was offered and admitted. Cowen, J., held, that the fraudulent intent was a necessary inference of law from the falsity of the representation; and that the evidence of character was improperly admitted. He proceeded to cite and condemn the case of Ruan *v.* Perry, as favoring the general admissibility of evidence of character in civil actions, for injuries to property. But such is manifestly not the doctrine of that case. It only decides, that where *intention* (not *knowledge*) is the point in issue, and the proof consists of slight circumstances, evidence of character is admissible. The other judges agreed that the evidence was improperly admitted in that case, but said nothing as to the case of Ruan *v.* Perry. They denied, however, that fraud was in such cases an inference of law.

The ground on which evidence of good character is admitted in criminal prosecutions is this, that the *intent* with which the act, charged as a crime, was done, is of the essence of the issue; agreeably to the

charge of a rape, or of an assault with intent to commit a rape, is considered as involving not only the general character of the prosecutrix for chastity, but the particular fact of her previous criminal connection with the prisoner, though not with other persons.[1] And in all cases, where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him.[2]

§ 55. It is not every allegation of fraud that may be said to put the character in issue; for, if it were so, the defendant's character would be put in issue in the ordinary form of declaring in assumpsit. This expression is technical, and confined to certain actions, from the nature of which, as in the preceding instances, the character of the parties, or some of them, is of particular importance. This kind of evidence is therefore rejected, wherever the general character is involved by the plea only, and not by the nature of the action.[3] Nor is it received in actions of assault and battery;[4] nor in assumpsit;[5] nor in trespass on the case for malicious prosecution;[6] nor in an information for a penalty for violation of the civil, police, or revenue laws;[7] nor in ejectment, brought in order to set aside a will for fraud committed by the defendant.[8] Whether evidence impeaching the plaintiff's previous general

maxim, "Nemo reus est, nisi *mens* sit rea;" and the prevailing character of the party's mind, as evinced by the previous habit of his life, is a material element in discovering that intent in the instance in question. Upon the same principle, the same evidence ought to be admitted in all other cases, whatever be the form of proceeding, where the *intent* is material to be found as a fact involved in the issue.

[1] Rex *v.* Clarke, 2 Stark. 241; 1 Phil. & Am. on Evid. 490; Low *v.* Mitchell, 6 Shepl. 372; Commonwealth *v.* Murphy, 14 Mass. 387; 2 Stark. Evid. (by Metcalf) 369, note (1); Rex *v.* Martin, 6 P. & C. 562; Rex *v.* Hodson, Russ. & Ry. 211; Regina *v.* Clay, 5 Cox, Cr. C. 146. But in an action on the case for seduction, evidence of particular acts of unchastity with other persons is admissible. Verry *v.* Watkins, 7 C. & P. 308. Where one is charged with keeping a house of ill fame *after* the statute went into operation, evidence of the bad reputation of the house *before* that time, was held admissible, as conducing to prove that it sustained the same reputation afterwards. Cadwell *v.* The State, 17 Conn. R. 467.

[2] Douglass *v.* Tousey, 2 Wend. 352.

[3] Anderson *v.* Long, 10 S. & R. 55; Potter *v.* Webb *et al.* 6 Greenl. 14; Gregory *v.* Thomas, 2 Bibb, 286.

[4] Givens *v.* Bradley, 3 Bibb, 192. But in the Admiralty Courts, where a seaman sues against the master for damages, for illegal and unjustifiable punishment, his general conduct and character during the voyage are involved in the issue. Pettingill *v.* Dinsmore, Daveis, R. 208, 214.

[5] Nash *v.* Gilkeson, 5 S. & R. 352.

[6] Gregory *v.* Thomas, 2 Bibb, 286.

[7] Attorney-General *v.* Bowman, 2 B. & P. 532, note.

[8] Goodright *v.* Hicks, Bull. N. P. 296. [Nor is the character of the plaintiff involved in the issue, where the action is on a policy of insurance against loss by fire, and the defence is that the fire was occasioned by the wilful and fraudulent act of the plaintiff. The nature of the action excludes all such inquiry or evidence in relation thereto. Schmidt *v.* New York, &c., Ins. Co. 1 Gray, 529, 535; nor in an action for commencing a suit against the plaintiff without authority, where the plaintiff at the trial gives notice that he shall claim no damages for special injury to his character by reason of the suit. Smith *v.* Hyndman, 10 Cush. 554.]

character is admissible in an action of slander, as affecting the question of damages, is a point which has been much controverted; but the weight of authority is in favor of admiting such evidence.[1] But it seems that the character of the party, in regard to any particular trait, is not in issue, unless it be the trait which is involved in the matter charged against him; and of this it is only evidence of general *reputation*, which is to be admitted, and not positive evidence of general bad *conduct*.[2]

[1] 2 Starkie on Slander, 88, 89–95, note; Root *v.* King, 7 Cowen, 613; Bailey *v.* Hyde, 3 Conn. 463; Bennett *v.* Hyde, 6 Conn. 24; Douglass *v.* Tousey, 2 Wend. 353; Inman *v.* Foster, 8 Wend. 602; Larned *v.* Buffington, 3 Mass. 552; Walcott *v.* Hall, 6 Mass. 514; Ross *v.* Lapham, 14 Mass. 275; Bodwell *v.* Swan, 3 Pick. 378; Buford *v.* McLuny, 1 Nott & McCord, 268; Sawyer *v.* Eifert, 2 Nott & McCord, 511; King *v.* Waring *et ux.* 5 Esp. 14; Rodriguez *v.* Tadmire, 2 Esp. 721; ——— *v.* Moore, 1 M. & S. 284; Earl of Leicester *v.* Walter, 2 Campb. 251; Williams *v.* Callendar, Holt's Cas. 307; 2 Stark. Evid. 216. In Foot *v.* Tracy, 1 Johns. 45, the Supreme Court of New York was equally divided upon this question; Kent and Thompson, Js., being in favor of admitting the evidence, and Livingston and Tompkins, Js., against it. [In a later case, Springstein *v.* Field, Anthon, 185, Spencer, J., said he had no doubt about the admissibility of the evidence offered in the case of Foot *v.* Tracy, but for particular reasons connected with that case, he forbore to express any opinion on the hearing of the same. In Paddock *v.* Salisbury, 2 Cowen, 811, the question came again before the Supreme Court of New York, and the evidence was admitted in mitigation of damages, under the general issue, which was the only plea in that case.] In England, according to the later authorities, evidence of the general bad character of the plaintiff seems to be regarded as irrelevant, and therefore inadmissible. Phil. & Am. on Evid. 488, 489; Cornwall *v.* Richardson, Ry. & Mood. 305; Jones *v.* Stevens, 11 Price, 235. In this last case it is observable, that though the reasoning of the learned judges, and especially of Wood, B., goes against the admission of the evidence, even though it be of the most general nature, in any case, yet the record before the court contained a plea of justification aspersing the professional character of the plaintiff in general averments, without stating any particular acts of bad conduct; and the point was, whether, in support of this plea, as well as in contradiction of the declaration, the defendant should give evidence that the plaintiff was of general bad character and repute, in his practice and business of an attorney. The court strongly condemned the pleading as reprehensible, and said that it ought to have been demurred to, as due to the court, and to the judge who tried the cause. See J'Anson *v.* Stuart, 1 T. R. 747; 2 Smith's Leading Cases, 37. See also Rhodes *v.* Bunch, 3 McCord, 66. In Williston *v.* Smith, 3 Kerr, 443, which was an action for slander by charging the defendant with larceny, the defendant, in mitigation of damages, offered evidence of the plaintiff's *general* bad character; which the judge at *Nisi Prius* rejected; and the court held the rejection proper; observing, that had the evidence been to the plaintiff's general character *for honesty*, it might have been admitted. [See *post*, vol. 2, § 424.]

[2] Swift's Evid. 140; Ross *v.* Lapham, 14 Mass. 275; Douglass *v.* Tousey, 2 Wend. 352; Andrews *v.* Vanduzer, 11 Johns. 38; Root *v.* King, 7 Cowen, 613; Newsam *v.* Carr, 2 Stark. 69; Sawyer *v.* Eifert, 2 Nott & McCord, 911 [Stone *v.* Varney, 7 Met. 86; Leonard *v.* Allen, 11 Cush. 241, 245; Watson *v.* Moore, 2 Ib. 133; Orcutt *v.* Ranney, 10 Ib. 183]. [* The best evidence of good character seems to be that the witness, if thoroughly conversant with the history of the party for years, never heard any question raised in regard to it. Gandolfo *v.* State, 11 Ohio, N. S. 114.]

CHAPTER II.

OF THE SUBSTANCE OF THE ISSUE.

[* § 56. Sufficient to prove substance of issue, unless in matters of description.
57. How far an allegation is descriptive, depends upon its form and subject-matter.
58. Allegations as to contracts, prescriptions, and character, held descriptive.
59. Traverse, *modo et formâ* only puts in issue the substance of the averments.
60. Allegation, with or without *videlicet*, will not generally affect the proof, but sometimes it will.
61. Allegations of time, place, quantity, quality, value, and in aggravation of damages, not material to be strictly proved, unless descriptive.
62. In local actions, place material, and so of the kind, and boundaries, of land.
63. Variance consists in a departure from legal proof.
64. Circumstantial averment not required to be proved, unless requisite to identity.
65. The same latitude in proving only the substance of the issue, in criminal as in civil cases.
66. Slight variances in description of contracts often material.
67. Distinction between redundancy of allegation, and of proof.
68. Consideration must be laid fully, and proved as laid.
69. Description of deeds must be accurate; may be by import; on *oyer* must be precisely accurate.
70. Records, as inducement, must be substantially proved; but strictly, if it be the ground of action.
71. Prescriptive grants and rights must be strictly proved.
72. Less strictness required in proof of prescriptions upon which the action is founded. Excess of proof will not vitiate.
73. Most questions of variances may be relieved by amendment.]

§ 56. A SECOND RULE, which governs in the production of evidence, is that *it is sufficient, if the substance of the issue be proved.* In the application of this rule, a distinction is made between allegations of matter of *substance*, and allegations of matter of *essential description*. The former may be substantially proved; but the latter must be proved with a degree of strictness, extending in some cases even to literal precision. No allegation, descriptive of the identity of that which is legally essential to the claim or charge, can ever be rejected.[1] Thus in an action of malicious prosecution,

[1] Stark. Evid. 373; Purcell *v.* Macnamara, 9 East, 160; Stoddard *v.* Palmer, 3 B. & C. 4; Turner *v.* Eyles, 3 B. & P. 456; Ferguson *v.* Harwood, 7 Cranch, 408, 413 [*post*, vol. 2, § 2–11].

the plaintiff alleges that he was acquitted of the charge on a certain day: here the substance of the allegation is the acquittal, and it is sufficient, if this fact be proved on any day, the time not being material. But if the allegation be, that the defendant drew a bill of exchange of a certain date and tenor, here every allegation, even to the precise day of the date, is descriptive of the bill, and essential to its identity, and must be literally proved.[1] So also, as we have already seen, in justifying the taking of cattle damage-feasant, because it was upon the close of the defendant, the allegation of a general freehold title is sufficient; but if the party states, that he was seised of the close in fee, and it be traversed, the precise estate, which he has set forth, becomes an essentially descriptive allegation, and must be proved as alleged. In this case the essential and non-essential parts of the statement are so connected, as to be incapable of separation, and therefore both are alike material.[2]

§ 57. Whether an allegation is or is not so essentially descriptive, is a point to be determined by the judge in the case before him; and it depends so much on the particular circumstances, that it is difficult to lay down any precise rules by which it can in all cases be determined. It may depend, in the *first* place, on the nature of the averment itself, and the subject to which it is applied. But *secondly*, some averments the law pronounces formal, which otherwise, would, on general principles, be descriptive. And *thirdly*, the question, whether others are descriptive or not, will often depend on the technical manner in which they are framed.

§ 58. In the *first* place, it may be observed, that any allegation, which narrows and limits that, which is essential, is necessarily *descriptive*. Thus, in contracts, libels in writing, and written instruments in general, every part operates by way of description of the whole. In these cases, therefore, allegations of names, sums, magnitudes, dates, durations, terms, and the like, being essential to the identity of the writing set forth, must, in general, be

[1] 3 B. & C. 4, 5; Glassford on Evid. 309.

[2] Stephen on Pleading, 261, 262, 419; Turner *v.* Eyles, 3 B. & P. 456; 2 Saund. 206 *a*, n. 22; Sir Francis Leke's case, Dyer, 364 *b*. Perhaps the distinction taken by Lord Ellenborough, in Purcell *v.* Macnamara, and recognized in Stoddard *v.* Palmer, 3 B. & C. 4, will, on closer examination, result merely in this, that matters of description are matters of substance, when they go to the identity of any thing material to the action. Thus the rule will stand, as originally stated, that the substance, and this alone, must be proved.

precisely proved.[1] Nor is it material whether the action be founded in contract or in tort; for in either case, if a contract be set forth, every allegation is descriptive. Thus, in an action on the case for deceit in the sale of lambs by two defendants, jointly, proof of sale and warranty by one only, as his separate property, was held to be a fatal variance.[2] So, also, if the contract described be absolute, but the contract proved be conditional, or in the alternative, it is fatal.[3] The consideration is equally descriptive and material, and must be strictly proved as alleged.[4] Prescriptions, also, being founded in grants presumed to be lost from lapse of time, must be strictly proved as laid; for every allegation, as it is supposed to set forth that which was originally contained in a deed, is of course descriptive of the instrument, and essential to the identity of the grant.[5] An allegation of the character in which the plaintiff sues, or of his title to damages, though sometimes superfluous, is generally descriptive in its nature, and requires proof.[6]

§ 59. *Secondly*, as to those averments which *the law* pronounces *formal*, though, on general principles, they seem to be descriptive and essential; these are rather to be regarded as exceptions to the rule already stated, and are allowed for the sake of convenience. Therefore, though it is the nature of a traverse to deny the allegation in the *manner and form* in which it is made, and, consequently to put the party to prove it to be true in the manner and form, as well as in general effect;[7] yet where the issue goes to the *point of the action*, these words, *modo et formâ*, are but words of form.[8] Thus, in trover, for example, the allegation, that the plaintiff lost the goods and that the defendant found them is regarded as

[1] Bristow *v.* Wright, Doug. 665, 667; Churchill *v.* Wilkins, 1 T. R. 447; 1 Stark. Evid. 386, 388.

[2] Weal *v.* King, *et al.* 12 East, 452.

[3] Penny *v.* Porter, 2 East, 2; Lopez *v.* De Tastet, 1 B. & B. 538; Higgins *v.* Dixon, 10 Jur. 376; Hilt *v.* Campbell, 6 Greenl. 109; Stone *v.* Knowlton, 3 Wend. 374. See also Saxton *v.* Johnson, 10 Johns. 581; Snell *v.* Moses, 1 Johns. 96; Crawford *v.* Morrell, 8 Johns. 153; Baylies *v.* Fettyplace, 7 Mass. 325; Robbins *v.* Otis, 1 Pick. 368; Harris *v.* Raynor, 8 Pick. 541; White *v.* Wilson, 2 Bos. & Pul. 116; Whitaker *v.* Smith, 4 Pick. 83; Lower *v.* Winters, 7 Cowen, 263; Alexander *v.* Harris, 4 Cranch, 299.

[4] Sallow *v.* Beaumont, 2 B. & Ald. 765; Robertson *v.* Lynch, 18 Johns. 451; [*post*, § 68].

[5] Morewood *v.* Wood, 4 T. R. 157; Rogers *v.* Allen, 1 Campb. 309, 314, 315, note (a). But proof of a more ample right than is alleged, will be regarded as mere redundancy. Johnson *v.* Thoroughgood, Hob. 64; Bushwood *v.* Pond, Cro. El. 722; Bailiffs of Tewksbury *v.* Bricknell, 1 Taunt. 142; Burges *v.* Steer, 1 Show, 347; 4 Mod. 89, s. c. [*post*, § 71].

[6] 1 Stark. Evid. 390; Moises *v.* Thornton, 8 T. R. 303, 308; Berryman *v.* Wise, 4 T. R. 366.

[7] Stephen on Pleading, 213.

[8] Trials *per pais*, 308 (9th ed.); Co. Lit. 281 *b*.

purely formal, requiring no proof; for the *gist* of the action is the conversion. So, in indictments for homicide, though the death is alleged to have been caused by a particular instrument, this averment is but formal; and it is sufficient if the manner of death agree in substance with that which is charged, though the instrument be different; as, if a wound alleged to have been given with a sword, be proved to have been inflicted with an axe.[1] But, where the traverse is of a *collateral point in pleading*, there the words, *modo et formâ*, go to the substance of the issue, and are descriptive, and strict proof is required; as, if a feoffment is alleged by deed, which is traversed *modo et formâ*, evidence of a feoffment without deed will not suffice.[2] Yet, if in issues upon a collateral point, where the affirmative is on the defendant, partial and defective proof on his part should show that the plaintiff had no cause of action, as clearly as strict and full proof would do, it is sufficient.[3]

§ 60. *Thirdly*, as to those averments, whose character, as being descriptive or not, depends on the *manner in which they are stated*. Every allegation, essential to the issue, must, as we have seen, be proved, in whatever form it be stated; and things immaterial in their nature to the question at issue may be omitted in the proof, though alleged with the utmost explicitness and formality. There is, however, a middle class of circumstances, not essential in their nature, which may become so by being inseparably connected with the essential allegations. These must be proved as laid, unless they are stated under a *videlicet;* the office of which is to mark, that the party does not undertake to prove the precise circumstances alleged; and in such cases he is ordinarily not holden to prove them.[4] Thus in a declaration upon a bill of exchange, the date is in its nature essential to the identity of the bill, and must be precisely proved, though the form of allegation were, "of a certain date, to wit," such a date. On the other hand, in the case before cited, of an action for maliciously prosecuting the plaintiff for a crime, whereof he was acquitted on a certain day; the time of acquittal is not essential to the charge,

[1] 2 Russell on Crimes, 711; 1 East, P. C. 341.

[2] Bull. N. P. 301; Co. Lit. 281, B. Whether *virtute cujus*, in a sheriff's plea in justification, is traversable, and in what cases, is discussed in Lucas *v.* Nockells, 7 Bligh, N. S. 140.

[3] Ibid.; 2 Stark. Ev. 394.

[4] Stephen on Pleading, 309; 1 Chitty on Pl. 261, 262, 348 (6th ed.); Stukeley *v.* Butler, Hob. 168, 172; 2 Saund. 291, note (1); Gleason *v.* McVickar, 7 Cowen, 42.

and need not be proved, though it be directly and expressly alleged.[1] But where, in an action for breach of warranty upon the sale of personal chattels, the plaintiff set forth the price paid for the goods, without a *videlicet*, he was held bound to prove the exact sum alleged, it being rendered material by the form of allegation;[2] though, had the averment been, that the sale was for a valuable consideration, *to wit*, for so much, it would have been otherwise. A *videlicet* will not avoid a variance, or dispense with exact proof, in an allegation of material matter; nor will the omission of it always create the necessity of proving, precisely as stated, matter which would not otherwise require exact proof. But a party may, in certain cases, impose upon himself the necessity of proving precisely what is stated, if not stated under a *videlicet*.[3]

§ 61. But, in general, the allegations of *time*, *place*, *quantity*, *quality*, and *value*, when not descriptive of the identity of the subject of the action, will be found immaterial, and need not be proved strictly as alleged. Thus, in trespass to the person, the material fact is the assault and battery; the time and place not being material, unless made so by the nature of the justification, and the manner of pleading. And, in an action on a policy of

[1] *Supra*, § 56; Purcell *v.* Macnamara, 9 East, 160; Gwinnett *v.* Phillips, 3 T. R. 643; Vail *v.* Lewis, 4 Johns. 450.

[2] Durston *v.* Tuthan, cited in 3 T. R. 67; Symmons *v.* Knox, 3 T. R. 65; Arnfield *v.* Bates, 3 M. & S. 173; Sir Francis Leke's case, Dyer, 364 *b*; Stephen on Pleading, 419, 420; 1 Chitty on Pl. 340 (6th ed).

[3] Crispin *v.* Williamson, 8 Taunt. 107, 112; Attorney-Gen. *v.* Jeffreys, M'Cl. R. 277; 2 B. & C. 3, 4; 1 Chitty on Plead. 348 *a*; Grimwood *v.* Barrett, 6 T. R. 460, 463; Bristow *v.* Wright, Doug. 667, 668. These terms, "immaterial," and "impertinent," though formerly applied to two classes of averments, are now treated as synonymous; 3 D. & R. 209; the more accurate distinction being between these, and *unnecessary* allegations. Immaterial or impertinent averments are those which need neither be alleged nor proved if alleged. Unnecessary averments consist of matters which need not be alleged; but, being alleged, must be proved. Thus, in an action of assumpsit upon a warranty on the sale of goods, an allegation of deceit on the part of the seller is impertinent, and need not be proved. Williamson *v.* Allison, 2 East, 416; Panton *v.* Holland, 17 Johns. 92; Twiss *v.* Baldwin, 9 Conn. 292. So, where the action was for an injury to the plaintiff's reversionary interest in land, and it was alleged, that the close at the time of the injury, was, and "continually from thence hitherto hath been, and still is," in the possession of one J. V., this latter part of the averment was held superfluous, and not necessary to be proved. Vowels *v.* Miller, 3 Taunt. 137. But if, in an action by a lessor against his tenant, for negligently keeping his fire, a demise for *seven years* be alleged, and the proof be of a lease at will only, it will be a fatal variance; for though it would have sufficed to have alleged the tenancy generally, yet having unnecessarily qualified it, by stating the precise term, it must be proved as laid. Cudlip *v.* Rundle, Carth. 202. So, in debt against an officer for extorting illegal fees on a *fieri facias*, though it is sufficient to allege the issuing of the writ of *fieri facias*, yet if the plaintiff also unnecessarily allege the judgment on which it was founded, he must prove it, having made it descriptive of the principal thing. Savage *v.* Smith, 2 W. Bl. 1101; Bristow *v.* Wright, Doug. 668; Gould's Pl. 160–165; Draper *v.* Garratt, 2 B. & C. 2.

insurance, the material allegation is the loss; but whether total or partial is not material; and if the former be alleged, proof of the latter is sufficient. So in assumpsit, an allegation, that a bill of exchange was *made* on a certain day, is not descriptive, and therefore strict proof, according to the precise day laid, is not necessary; though, if it were stated, that the bill *bore date* on that day, it would be otherwise.[1] Thus, also, proof of cutting the precise number of trees alleged to have been cut, in trespass; or, of the exact amount of rent alleged to be in arrear in replevin; or the precise value of the goods taken, in trespass or trover, is not necessary.[2] Neither is matter of aggravation, namely, that which only tends to increase the damages, and does not concern the right of action itself, of the substance of the issue. But, if the matter, alleged by way of aggravation, is essential to the support of the charge or claim, it must be proved as laid.

§ 62. But in *local actions* the allegation of place is material and must strictly be proved, if put in issue. In *real actions*, also, the statement of quality, as arable or pasture land, is generally descriptive, if not controlled by some other and more specific designation. And in these actions, as well as in those for injuries to real property, the abuttals of the close in question must be proved as laid; for if one may be rejected, all may be equally disregarded, and the identity of the subject be lost.[3]

§ 63. It being necessary to prove the substance of the issue, it follows, that any departure from the substance, in the evidence adduced, must be fatal; constituting what is termed in the law a *variance*. This may be defined to be a disagreement between the allegation and the proof, in some matter, which, in point of law, is essential to the charge or claim.[4] It is the legal, and not the natural identity, which is regarded; consisting of those particulars only, which are in their nature essential to the action, or to the justification, or have become so by being inseparably connected, by the mode of statement, with that which is essential; of which an example has already been given,[5] in the allegation of an estate in fee, when a general averment of freehold would suffice. It is

[1] Gardiner *v.* Croadales, 2 Burr. 904; Coxon *v.* Lyon, 2 Campb. 307, n.

[2] Harrison *v.* Barnby, 5 T. R. 248; Co. Lit. 282 *a*; Stephen on Pleading, 318; Hutchins *v.* Adams, 3 Greenleaf, 174.

[3] Mersey & Irwell Nav. Co. *v.* Douglas, 2 East, 497, 502; Bull. N. P. 89; Vowels *v.* Miller, 3 Taunt. 139, per Lawrence, J.; Regina *v.* Cranage, 1 Salk. 385. [See *post*, vol. 2, § 618 *a*.]

[4] Stephen on Pl. 107, 108.

[5] *Supra*, § 51–56.

necessary, therefore, in these cases, first to ascertain what are the essential elements of the legal proposition in controversy, taking care to include all, which is indispensable to show the right of the plaintiff, or party affirming. The rule is, that whatever cannot be stricken out without getting rid of a part essential to the cause of action, must be retained, and of course must be proved, even though it be described with unnecessary particularity.[1] The defendant is entitled to the benefit of this rule, to protect himself by the verdict and judgment, if the same rights should come again in controversy. The rule, as before remarked, does not generally apply to allegations of number, magnitude, quantity, value, time, sums of money, and the like, provided the proof in regard to these is sufficient to constitute the offence charged, or to substantiate the claim set up; except in those cases where they operate by way of limitation, or description of other matters, in themselves essential to the offence or claim.[2]

§ 64. A few examples will suffice to illustrate this subject. Thus, in tort, for removing earth from the defendant's land, whereby the foundation of the plaintiff's house was injured, the allegation of bad intent in the defendant is not necessary to be proved, for the cause of action is perfect, independent of the intention.[3] So, in trespass, for driving against the plaintiff's cart, the allegation, that he was in the cart, need not be proved.[4] But, if the allegation contains matter of description, and is not proved as laid, it is a variance, and is fatal. Thus, in an action

[1] Bristow *v.* Wright, Doug. 668; Peppin *v.* Solomons, 5 T. R. 496; Williamson *v.* Allison, 2 East, 446, 452.

[2] *Supra*, § 61; Rickets *v.* Salwey, 2 B. & Ald. 363; May *v.* Brown, 3 B. & C. 113, 122. It has been said, that allegations, which are merely *matters of inducement*, do not require such strict proof, as those which are precisely put in issue between the parties. Smith *v.* Taylor, 1 New Rep. 210, per Chambre, J. But this distinction as Mr. Starkie justly observes, between that which is the gist of the action, and that which is inducement, is not always clear in principle. 1 Stark. Evid. 391, note (b); 3 Stark. Evid. 1551, note (x) Metcalf's ed. Certainly that which may be traversed, must be proved, if it is not admitted; and some facts, even though stated in the form of inducement, may be traversed, because they are material; as, for example, in action for slander, upon a charge for perjury, where the plaintiff alleged, by way of inducement, that he was sworn before the Lord Mayor. Stephen on Pleading, 258. The question whether an allegation must be proved, or not, turns upon its materiality to the case, and not upon the form in which it is stated, or its place in the declaration. In general, every allegation in an inducement, which is material, and not impertinent, and foreign to the case, and which consequently cannot be rejected as surplusage, must be proved as alleged. 1 Chitty on Pl. 262, 320. It is true that those matters which need not be alleged with particularity, need not be proved with particularity, but still, all allegations, if material, must be proved substantially *as alleged*.

[3] Panton *v.* Holland, 17 Johns. 92; Twiss *v.* Baldwin, 9 Conn. 291.

[4] Howard *v.* Peete, Chitty R. 315.

for malicious prosecution of the plaintiff, upon a charge of felony, before Baron Waterpark of *Waterfork*, proof of such a prosecution before Baron Waterpark of *Waterpark* was held to be fatally variant from the declaration.[1] So, in an action of tort founded on a contract, every particular of the contract is descriptive, and a variance in the proof is fatal. As, in an action on the case for deceit, in a contract of sale, made by the two defendants, proof of a sale by one of them only, as his separate property, was held insufficient; for the joint contract of sale was the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity.[2]

§ 65. In *criminal prosecutions*, it has been thought that greater strictness of proof was required than in civil cases, and that the defendant might be allowed to take advantage of nicer exceptions.[3] But whatever indulgence the humanity and tenderness of judges may have allowed in practice, in favor of life or liberty, the better opinion seems to be, that the rules of evidence are in both cases the same.[4] If the averment is divisible, and enough is proved to constitute the offence charged, it is no variance, though the remaining allegations are not proved. Thus, an indictment for embezzling two bank-notes of equal value is supported by proof of the embezzlement of one only.[5] And in an indictment for obtaining money upon several false pretences, it is sufficient to prove any material portion of them.[6] But where a person or thing, necessary to be mentioned in an indictment, is described with unnecessary particularity, all the circumstances of the description must be proved; for they are all made essential to the identity. Thus, in an indictment for stealing a *black* horse, the animal is necessarily mentioned, but the color need not be stated; yet if it is stated, it is made descriptive of the particular animal stolen, and a variance in the proof of the color is fatal.[7] So, in an indictment for stealing a bank-note, though it would be sufficient to describe it generally as a bank-note of such a denomination

[1] Walters *v.* Mace, 2 B. & Ald. 756.

[2] Weall *v.* King, *et al.* 12 East, 452; Lopes *v.* De Tastet, 1 B. & B. 538. [See Ashley *v.* Wolcott, 11 Cush. 192.]

[3] Beech's case, 1 Leach's Cas. 158; United States *v.* Porter, 3 Day, 283, 286.

[4] Roscoe's Crim. Evid. 73; 1 Deacon's Dig. Crim. Law, 459, 460. And see 2 East, P. C. 785, 1021; 1 Phil. Evid. 506; Rex *v.* Watson, 2 Stark. R. 116, 155, per Abbott, J.: Lord Melville's case, 29 Howell's St. Tr. 376; 2 Russell on Crimes, 588; United States *v.* Britton, 2 Mason, 464, 468.

[5] Carson's case, Russ. & Ry. 303; Furneaux's case, Id. 335; Tyer's case, Id. 402.

[6] Hill's case, Russ. & Ry. 190.

[7] 1 Stark. Evid. 374.

or value, yet, if the name of the officer who signed it be also stated, it must be strictly proved.[1] So, also, in an indictment for murder, malicious shooting, or other offence to the person, or for an offence against the habitation, or goods, the name of the person who was the subject of the crime, and of the owner of the house or goods, are material to be proved as alleged.[2] But where the time, place, person, or other circumstances are not descriptive of the fact or degree of the crime, nor material to the jurisdiction, a discrepancy between the allegation and the proof is not a variance. Such are statements of the house or field, where a robbery was committed, the time of the day, the day of the term in which a false answer in chancery was filed, and the like.[3] In an indictment for murder, the substance of the charge is, that the prisoner feloniously killed the deceased by means of shooting, poisoning, cutting, blows or bruises, or the like; it is, therefore, sufficient, if the proof agree with the allegation in its substance and general character without precise conformity in every particular. In other words, an indictment describing a thing by its generic term is supported by proof of a species which is clearly comprehended within such description. Thus, if the charge be of poisoning by a certain drug, and the proof be of poisoning by another drug; or the charge be of felonious assault with a staff, and the proof be of such assault with a stone; or the charge be of a wound with a sword, and the proof be of a wound with an axe; yet the charge is substantially proved, and there is no variance.[4] But where the matter, whether introductory or

[1] Craven's case, Russ. & Ry. 14. So, where the charge in an indictment was of stealing 70 pieces of the current coin called sovereigns, and 140 pieces called half sovereigns, and 500 pieces called crowns; it was held, that it was not supported by evidence of stealing a *sum of money* consisting of some of the coins mentioned in the indictment, without proof of some one or more of the specific coins charged to have been stolen. Regina *v.* Bond, 1 Den. Cr. Cas. R. 517; 14 Jur. 390.

[2] Clark's case, Russ. & Ry. 358; White's case, 1 Leach's Cas. 286; Jenks's case, 2 East, P. C. 514; Durore's case, 1 Leach's Cas. 390. But a mistake in spelling the name is no variance, if it be *idem sonans* with the name proved. Williams *v.* Ogle, 2 Stra. 889; Foster's case, Russ. & Ry. 412; Tannet's case, Id. 351; Bingham *v.* Dickie, 5 Taunt. 814. So, if one be indicted for an assault upon A. B., a deputy-sheriff, and in the officer's commission he is styled A. B. junior, it is no variance if the person is proved to be the same. Commonwealth *v.* Beckley, 3 Metcalf, R. 330.

[3] Wardle's case, 2 East, P. C. 785; Pye's case, Ib.; Johnstone's case, Id. 786; Minton's case, Id. 1021; Rex *v.* Waller, 2 Stark. Evid. 623; Rex *v.* Hucks, 1 Stark. R. 521.

[4] 1 East, P. C. 341; Martin's case, 5 Car. & P. 128; Culkin's case, Id. 121; *supra*, § 58. An indictment for stealing "a sheep" is supported by proof of the stealing of any sex or variety of that animal; for the term is *nomen generalissimum*. M'Cully's case, 2 Lew. C. C. 272; Regina *v.* Spicer, 1 Dennis, C. C. 82. So, if the charge be of death by suffocation, by the hand over the mouth, and the proof be that respiration was stopped, though by

otherwise, is descriptive, it must be proved as laid, or the variance will be fatal. As, in an indictment for perjury in open court, the term of the court must be truly stated and strictly proved.[1] So, in an indictment for perjury before a select committee of the House of Commons, in a contested election, it was stated that an election was holden by virtue of a precept duly issued to the bailiff of the borough of New Malton, and that A and B were returned to serve as members for the said borough of New Malton; but the writ appeared to be directed to the bailiff of Malton. Lord Ellenborough held this not matter of description; and the precept having been actually issued to the bailiff of the borough of New Malton, it was sufficient. But the return itself was deemed descriptive; and the proof being that the members were in fact returned as members of the borough of Malton, it was adjudged a fatal variance.[2] So, a written contract, when set out in an indictment, must be strictly proved.[3]

§ 66. Thus, also, in *actions upon contract*, if any part of the contract proved should vary materially from that which is stated in the pleadings, it will be fatal; for a contract is an entire thing, and indivisible. It will not be necessary to state all the parts of a contract, which consists of several distinct and collateral provisions: the *gravamen* is, that a certain act, which the defendant engaged to do, has not been done; and the legal proposition to be maintained is, that, for such a consideration, he became bound to do such an act, including the time, manner, and other circumstances of its performance. The entire consideration must be stated, and the entire act to be done, in virtue of such consideration, together with the time, manner, and circumstances; and with all the parts of the proposition, as thus stated, the proof must agree.[4] If the allegation be of an absolute contract, and the proof be of a contract in the alternative, at the option of the defendant: or a promise be stated to deliver merchantable goods, and the proof be of a promise to deliver goods of a second quality;

some other violent mode of strangulation, it is sufficient. Rex *v.* Waters, 7 C. & P. 250 [Commonwealth *v.* Webster, 5 Cush. 321, 323].

[1] Where the term is designated by the day of the month, as in the Circuit Courts of the United States, the precise day is material. United States *v.* McNeal, 1 Gall. 387.

[2] Rex *v.* Leefe, 2 Campb. 134, 140.

[3] 2 East, P. C. 977, 978, 981, 982; Commonwealth *v.* Parmenter, 5 Pick. 279; The People *v.* Franklin, 3 Johns. 299.

[4] Clarke *v.* Gray, 6 East, 564, 567, 568; Gwinnett *v.* Phillips, 3 T. R. 643, 646; Thornton *v.* Jones, 2 Marsh. 287; Parker *v.* Palmer, 4 B. & A. 387; Swallow *v.* Beaumont, 2 B. & A. 765.

or the contract stated be to pay or perform in a reasonable time, and the proof be to pay or perform on a day certain, or on the happening of a certain event; or the consideration stated be one horse, bought by the plaintiff of the defendant, and the proof be of two horses; in these and the like cases, the variance will be fatal.[1]

§ 67. There is, however, a material distinction to be observed between the redundancy in the allegation, and *redundancy* only *in the proof*. In the former case, a variance between the allegations and the proof will be fatal, if the redundant allegations are descriptive of that which is essential. But in the latter case, redundancy cannot vitiate, merely because more is proved than is alleged; unless the matter superfluously proved goes to contradict some essential part of the allegation. Thus, if the allegation were, that in consideration of £100, the defendant promised to go to Rome, and also to deliver a certain horse to the plaintiff, and the plaintiff should fail in proving the latter branch of the promise, the variance would be fatal, though he sought to recover for the breach of the former only, and the latter allegation was unnecessary. But, if he had alleged only the former branch of the promise, the proof of the latter along with it would be immaterial. In the first case, he described an undertaking which he

[1] Penny *v.* Porter, 2 East, 2; Bristow *v.* Wright, 2 Doug. 665; Hilt *v.* Campbell, 6 Greenl. 109; Symonds *v.* Carr, 1 Campb. 361; King *v.* Robinson, Cro. El. 79. See *post*, vol. 2, § 11 *d*. [Where the declaration set forth an executory agreement of the defendant to do certain work for a certain sum, and within a certain time, on materials to be furnished by the plaintiff, and alleged that the plaintiff did furnish the materials to the defendant in season for him to complete the stipulated work within the stipulated time, and the proof was that the plaintiff had not performed in full his agreement, but that he was excused from the performance thereof by the waiver of the defendant; the variance was held fatal. Colt *v.* Miller, 10 Cush. 49, 51; see also Metzner *v.* Bolton, 24 Eng. Law & Eq. 537. And where the declaration alleged an authority to one G. W., trading as G. W. & Co., to sell goods as the goods of G. W., and the proof was of an authority to G. W. to sell the goods as the goods of G. W. & Co., the variance was held fatal. Addington *v.* Magan, 2 Eng. Law & Eq. 327. A declaration setting out a note payable "without defalcation or discount" is not supported by proof of a note payable "without defalcation." Addis *v.* Van Buskirk, 4 Zabr. 218. Where a note was described in the declaration as payable "on or before" a certain day, and the proof was that it was payable "on" the day named, it was held no variance. Morton *v.* Penny, 16 Ill. 494; see also Walker *v.* Welch, 14 Ill. 277. The declaration was on a promise to pay money on demand; the proof was a promise to pay incommodities; and it was held to be a variance. Titus *v.* Ash, 4 Foster, N. H. 319. So a declaration on a note not alleged to be upon interest is not sustained by proof of a note in other respects similar, but drawing interest. Gragg *v.* Frye, 32 Maine, 283. There can be no doubt of the admissibility of a written contract in evidence to prove the contract declared on, though the declaration does not aver that it was in writing. It is generally unnecessary in declaring on a simple contract in writing to allege it to be so. This allegation is not required even in declarations on contracts that are within the statute of frauds. Fiedler *v.* Smith, 6 Cush. 340; see Irvine *v.* Stone, Ib. 508.]

has not proved; but in the latter, he has merely alleged one promise, and proved that, and also another.[1]

§ 68. But where the subject is entire, as, for example, the *consideration* of a contract,[2] a variance in the proof, as we have just seen, shows the allegation to be defective, and is, therefore, material. Thus, if it were alleged, that the defendant promised to pay £100, in consideration of the plaintiff's going to Rome, and also delivering a horse to the defendant, an omission to prove the whole consideration alleged would be fatal. And if the consideration had been alleged to consist of the going to Rome only, yet if the agreement to deliver the horse were also proved, as forming part of the consideration, it would be equally fatal; the entire thing alleged, and the entire thing proved, not being identical.[3] Upon the same principle, if the consideration alleged be a contract of the plaintiff to *build* a ship, and the proof be of one to *finish* a ship partly built;[4] or the consideration alleged be the delivery of *pine* timber, and the proof be of *spruce* timber;[5] or the consideration alleged be, that the plaintiff *would* indorse a note, and the proof be of a promise in consideration that he *had* indorsed a note;[6] the variance is equally fatal. But though no part of a valid consideration may be safely omitted, yet that which is merely frivolous need not be stated;[7] and, if stated, need not be proved; for the court will give the same construction to the declaration, as to the contract itself, rejecting that which is nonsensical or repugnant.[8]

§ 69. In the case of *deeds*, the same general principles are

[1] Stark. Evid. 401. Where the agreement, as in this case, contains several distinct promises, and for the breach of one only the action is brought, the consequences of a variance may be avoided by alleging the promise, as made *inter alia*. And no good reason, in principle, is perceived, why the case mentioned in the following section might not be treated in a similar manner; but the authorities are otherwise. In the example given in the text, the allegation is supposed to import that the undertaking consisted of neither more nor less than is alleged.

[2] Swallow *v.* Beaumont, 2 B. & A. 765; White *v.* Wilson, 2 B. & P. 116; *supra*, § 58.

[3] 1 Stark. Evid. 401; Lansing *v.* McKillip, 3 Caines, 286; Stone *v.* Knowlton, 3 Wend. 374.

[4] Smith *v.* Barker, 3 Day, 312.

[5] Robbins *v.* Otis, 1 Pick. 368.

[6] Bulkley *v.* Landon, 2 Conn. 404. [So if the allegation be of an agreement to obtain insurance on property, "in consideration of a *reasonable commission*," and the proof be of an agreement to obtain the insurance in consideration of a *definite sum*, the variance is fatal. Cleaves *v.* Lord, 3 Gray, 66, 71. And where the declaration alleged that the defendant, "in consideration that said, &c., had accepted the assignment of a certain policy, &c.," and the proof was that "the policy having been assigned to us, in consideration thereof, we promise, &c.," it was held that there was a variance. New Hampshire Mutual, &c., Ins. Co. *v.* Hunt, 10 Foster, 219.]

[7] Brooks *v.* Lowrie, 1 Nott & McCord, 342.

[8] Ferguson *v.* Harwood, 8 Cranch, 408, 414.

applied. If the deed is declared upon, every part stated in the pleadings, *as descriptive* of the deed, must be exactly proved, or it will be a variance; and this, whether the parts set out at length were necessary to be stated or not.[1] If a qualified covenant be set out in the declaration as a general covenant, omitting the exception or limitation, the variance between the allegation and the deed will be fatal. If the condition, proviso, or limitation affects the original cause of action itself, it constitutes an essential element in the original proposition to be maintained by the plaintiff; and, therefore, must be stated, and proved as laid; but, if it merely affects the amount of damages to be recovered, or the liability of the defendant as affected by circumstances occurring after the cause of action, it need not be alleged by the plaintiff, but properly comes out in the defence.[2] And where the deed is not described according to its tenor, but according to its legal effect, if the deed agrees in legal effect with the allegation, any verbal discrepancy is not a variance. As, in covenant against a tenant for not repairing, the lease being stated to have been made by the plaintiff, and the proof being of a lease by the plaintiff and his wife, she having but a chattel interest; or, if debt be brought by the husband alone, on a bond as given to himself, the bond appearing to have been given to the husband and wife; yet, the evidence is sufficient proof of the allegation.[3] But, where the deed

[1] Bowditch *v.* Mawley, 2 Campb. 195; Dundas *v.* Ld. Weymouth, Cowp. 665; *supra*, § 55; Ferguson *v.* Harwood, 7 Cranch, 408, 413; Sheehy *v.* Mandeville, Id. 208, 217.

[2] 1 Chitty, Pl. 268, 269 (5th Am. ed.); Howell *v.* Richards, 11 East, 633; Clarke *v.* Gray, 6 East, 564, 570.

[3] Beaver *v.* Lane, 2 Mod. 217; Arnold *v.* Rivoult, 1 Br. & B. 442; Whitlock *v.* Ramsey, 2 Munf. 510; Ankerstein *v.* Clark, 4 T. R. 616. It is said that an allegation, that J. S. otherwise R. S. made a deed, is not supported by evidence, that J. S. made a deed by the name of R. S. 1 Stark. Evid. 513, cites Hyckman *v.* Shotbolt, Dyer, 279, pl. 9. The doctrine of that case is very clearly expounded by Parke, B., in Williams *v.* Bryant, 5 Mees. & Wels. 447. In regard to a discrepancy between the name of the obligor in the body of a deed, and in the signature, a distinction is to be observed between transactions which derive their efficacy wholly from the deed, and those which do not. Thus, in a feoffment at the common law, or a sale of personal property by deed, or the like, livery being made in the one case, and possession delivered in the other, the transfer of title is perfect, notwithstanding any mistake in the name of the grantor; for it takes effect by delivery, and not by the deed. Perk. sec. 38–42. But where the efficacy of the transaction depends on the instrument itself, as in the case of a bond for the payment of money, or any other executory contract by deed, if the name of the obligor in the bond is different from the signature, as if it were written John and signed William, it is said to be void at law for uncertainty, unless helped by proper averments on the record. A mistake in this matter, as in any other, in drawing up the contract, may be reformed by bill in equity. At law, where the obligor has been sued by his true name, signed to the bond, and not by that written in the body of it, and the naked fact of the discrepancy, unexplained, is all which is presented by the record, it has always been held bad. This rule was originally founded in this, that a man cannot have two names of baptism at the same time; for whatever name was

is set out, *on oyer*, the rule is otherwise; for, to have *oyer*, is, in modern practice, to be furnished with an exact and literal copy

imposed at his baptism, whether single or compounded of several names, he being baptized but once, that and that alone was his baptismal name; and by that name he declared himself bound. So it was held in Serchor *v.* Talbot, 3 Hen. VI. 25, pl. 6, and subsequently in Thornton *v.* Wikes, 34 Hen. VI. 19, pl. 36; Field *v.* Winslow, Cro. El. 897; Oliver *v.* Watkins, Cro. Jac. 558; Maby *v.* Shepherd, Cro. Jac. 640; Evans *v.* King, Willes, 554; Clerke *v.* Isted, Lutw. 275; Gould *v.* Barnes, 3 Taunt. 504. "It appears from these cases to be a settled point," said Parke, B., in Williams *v* Bryant, "that if a declaration against a defendant by one Christian name, as, for instance, Joseph, state that he executed a bond by the name of Thomas, *and there be no averment to explain the difference, such as that he was known by the latter name at the time of the execution*, such a declaration would be bad on demurrer, or in arrest of judgment, even after issue joined on a plea of *non est factum*. And the reason appears to be, that in bonds and deeds, the efficacy of which depends on the instrument itself, and not on matter *in pais*, there must be a certain *designatio personæ* of the party, which regularly ought to be by the true first name or name of baptism, and surname; of which the first is the most important." "But on the other hand," he adds, "it is certain, that a person may at this time sue or be sued, not merely by his true name of baptism, but by any first name which he has acquired by usage or reputation." "If a party is called and known by any proper name, by that name he may be sued, and the misnomer could not be pleaded in abatement; and not only is this the established practice, but the doctrine is promulgated in very ancient times. In Bracton, 188, b, it is said, "Item, si quis *binominis* fuerit, *sive* in nomine *proprio* sive in *cognomine*, illud nomen tenendum erit, quo solet frequentius appellari, quia adeo imposita sunt, ut demonstrent voluntatem dicentis, et ntimur notis in vocis ministerio." And if a party may sue or be sued by the proper name, by which he is known, it must be a sufficient designation of him, if he enter into a bond by that name. It by no means follows, therefore, that the decision in the case of Gould *v.* Barnes, and others before referred to, in which the question arose on the record, would have been the same, if *there had been an averment on the face of the declaration, that the party was known by the proper name in which the bond was made, at the time of making it*. We find no authorities for saying, that the declaration would have been bad with such an averment, *even if there had been a total variance of the first names;* still less, where a man, having two proper names, or names of baptism, has bound himself by the name of one. And on the plea of "non est factum," *where the difference of name does not appear* on the record, and there is evidence of the party having been known, at the time of the execution, by the name on the instrument, there is no case, that we are aware of, which decides that the instrument is void." The name written in the body of the instrument is that which the party by the act of execution and delivery, declares to be his own, and by which he acknowledges himself bound. By this name, therefore, he should regularly be sued; and if sued with an *alias dictus* of his true name, by which the instrument was signed, and an averment in the declaration, that at the time of executing the instrument he was known as well by the one name as the other, it is conceived that he can take no advantage of the discrepancy; being estopped by the deed, to deny this allegation. Evans *v.* King, Willes, 555, note (b); Reeves *v.* Slater, 7 Barn. & Cress. 486, 490; Cro. El. 897, note (a). See also Regina *v.* Wooldale, 6 Ad. & El. 549, n. s.; Wooster *v.* Lyons, 5 Blackf. 60. If sued by the name written in the body of the deed, without any explanatory averment, and he pleads a misnomer in abatement, the plaintiff, in his replication, may estop him by the deed. Dyer, 279, b, pl. 9, note; Story's Pleadings, 43; Willes, 555, note. And if he should be sued by his true name, and plead *non est factum*, wherever this plea, as is now the case in England, since the rule of Hilary Term, 4 Wm. IV. R. 21, "operates as a denial of the deed in point of fact only," all other defences against it being required to be specially pleaded, the difficulty occasioned by the old decisions may now be avoided by proof, that the party, at the time of the execution, was known by the name on the face of the deed. In those American States which have abolished special pleading, substituting the general issue in all cases, with a brief statement of the special matter of defence, probably the new course of practice thus introduced, would lead to a similar result.

of the deed declared on, every word and part of which is thereby made descriptive of the deed to be offered in evidence. In such case, if the plaintiff does not produce in evidence a deed literally corresponding with the copy, the defendant may well say it is not the deed in issue, and it will be rejected.[1]

§ 70. Where a *record* is mentioned in the pleadings, the same distinction is now admitted in the proof, between allegations of matter of substance, and allegations of matter of description; the former require only substantial proof, the latter must be *literally* proved. Thus, in an action for malicious prosecution, the day of the plaintiff's acquittal is not material. Neither is the term in which the judgment is recovered, a material allegation, in an action against the sheriff for a false return on the writ of execution. For in both cases, the record is alleged by way of inducement only, and not as the foundation of the action; and therefore literal proof is not required.[2] So, in an indictment for perjury in a case in chancery, where the allegation was, that the bill was addressed to Robert, Lord Henly, and the proof was of a bill addressed to Sir Robert Henly, Kt., it was held no variance; the substance being, that it was addressed to the person holding the great seal.[3] But where the record is the foundation of the action, the term in which the judgment was rendered, and the number and names of the parties, are descriptive, and must be strictly proved.[4]

§ 71. In regard to *prescriptions*, it has been already remarked, that the same rules apply to them which are applied to contracts; a prescription being founded on a grant supposed to be lost by

[1] Waugh *v.* Bussel, 5 Taunt. 707, 709, per Gibbs, C. J.; James *v.* Walruth, 8 Johns. 410; Henry *v.* Cleland, 14 Johns. 400; Jansen *v.* Ostrander, 1 Cowen, 670, acc. In Henry *v.* Brown, 14 Johns. 49, where the condition of the bond was "without fraud or *other* delay," and in the oyer the word "other" was omitted, the defendant moved to set aside a verdict for the plaintiff, because the bond was admitted in evidence without regard to the variance; but the court refused the motion, partly on the ground that the variance was immaterial, and partly, that the oyer was clearly amendable. See also Dorr *v.* Fenno, 12 Pick. 521.

[2] Purcell *v.* Macnamara, 9 East, 157; Stoddart *v.* Palmer, 4 B. & B. 2; Phillips *v.* Shaw, 4 B. & A. 435; 5 B. & A. 964.

[3] Per Buller, J., in Rex *v.* Pippett, 1 T. R. 240; Rodman *v.* Forman, 8 Johns. 29; Brooks *v.* Bemiss, Id. 455; The State *v.* Calley, 2 Murphy, 320.

[4] Rastall *v.* Stratton, 1 H. Bl. 49; Woodford *v.* Ashley, 11 East, 508; Black *v.* Braybrook, 2 Stark. R. 7; Baynes *v.* Forrest, 2 Str. 892; United States *v.* McNeal, 1 Gall. 387. [And where in a writ of error brought to reverse the judgment of *ivaiver*, the judgment was called a judgment of *outlawry*, the variance, upon a plea of *nul tiel record*, was held fatal. Burnett *v.* Phillips, 6 Eng. Law & Eq. 467. And though the variance be in regard to facts and circumstances which need not have been stated, it is still fatal. Whitaker *v.* Bramson, 2 Paine, C. C. 209.]

lapse of time.[1] If, therefore, a prescriptive right be set forth as the foundation of the action, or be pleaded in bar and put in issue, it must be proved to the full extent to which it is claimed; for every fact alleged is descriptive of the supposed grant. Thus, if in trespass, for breaking and entering a several fishery, the plaintiff, in his replication, prescribes for a sole and exclusive right of fishing in four places, upon which issue is taken, and the proof be of such right in only three of the places, it is a fatal variance. Or, if in trespass, the defendant justify under a prescriptive right of common on five hundred acres, and the proof be, that his ancestor had released five of them, it is fatal. Or if, in replevin of cattle, the defendant avow the taking damage feasant, and the plaintiff plead in bar a prescriptive right of common for all the cattle, on which issue is taken, and the proof be of such right for only a part of the cattle, it is fatal.[2]

§ 72. But a *distinction* is to be observed between cases, where the prescription is the foundation of the claim, and is put in issue, and cases where the action is founded in tort, for a disturbance of the plaintiff in his enjoyment of a prescriptive right. For in the latter cases it is sufficient for the plaintiff to prove a right of the same nature with that alleged, though not to the same extent; the gist of the action being the wrongful act of the defendant, in disturbing the plaintiff in his right; and not the extent of that right. Therefore, where the action was for the disturbance of the plaintiff in his right of common, by opening stone quarries there, the allegation being of common, by reason both of a messuage and of land, whereof the plaintiff was possessed, and the proof, in a trial upon a general issue, being of common by reason of the land only, it was held no variance; the court observing, that the proof was not of a different allegation, but of the same allegation in part, which was sufficient, and that the damages might be given accordingly.[3] Yet in the former class of cases, where the prescription is expressly in issue, proof of a more ample right than is claimed will not be a variance; as, if the allegation be of a right of common for sheep, and the proof be of such right, and also of common for cows.[4]

[1] *Supra*, § 58 [*post*, vol. 2, § 537–546, tit. PRESCRIPTION].

[2] Rogers *v.* Allen, 1 Campb. 313, 315; Rotherham *v.* Green, Noy, 67; Conyers *v.* Jackson, Clayt. 19; Bull. N. P. 299.

[3] Rickets *v* Salway, 2 B. & A. 860; Yarley *v.* Turnock, Cro. Jac. 629; Manifold *v.* Pennington, 4 B. & C. 161.

[4] Bushwood *v.* Pond, Cro. El. 722; Tewksbury *v.* Bricknell, 1 Taunt. 142; *supra*, §§ 58, 67, 68.

§ 73. But the party may now, in almost every case, *avoid the consequences of a variance* between the allegation in the pleadings and the state of facts proved, *by amendment* of the record. This power was given to the courts in England by Lord Tenterden's Act,[1] in regard to variances between matters in writing or in print, produced in evidence, and the recital thereof upon the record; and it was afterwards extended[2] to all other matters, in the judgment of the court or judge not material to the merits of the case, upon such terms as to costs and postponement as the court or judge may deem reasonable. The same power, so essential to the administration of substantial justice, has been given by statutes to the courts of most of the several states, as well as of the United States; and in both England and America these statutes have, with great propriety, been liberally expounded, in furtherance of their beneficial design.[3] The judge's discretion, in allowing or refusing amendments, like the exercise of judicial discretion in other cases, cannot, in general, be reviewed by any other tribunal.[4] It is only in the cases and in the manner mentioned in the statutes, that the propriety of its exercise can be called in question.

[1] 9 Geo. IV. c. 15.

[2] By Stat. 3 & 4 Wm. IV. c. 42, § 23.

[3] See Hanbury *v.* Ella, 1 Ad. & El. 61; Parry *v.* Fairhurst, 2 Cr. M. & R. 190, 196; Doe *v.* Edwards, 1 M. & Rob. 319; 6 C. & P. 208, s. c.; Hemming *v.* Parry, 6 C. & P. 580; Mash *v.* Densham, 1 M. & Rob. 442; Ivey *v.* Young, Id. 545; Howell *v.* Thomas, 7 C. & P. 342; Mayor, &c., of Carmarthen *v.* Lewis, 6 C. & P. 608; Hill *v.* Salt, 2 C. & M. 420; Cox *v.* Painter, 1 Nev. & P. 581; Doe *v.* Long, 9 C. & P. 777; Ernest *v.* Brown, 2 M. & Rob. 13; Story *v.* Watson, 2 Scott, 842; Smith *v.* Brandram, 9 Dowl. 430; Whitwell *v.* Scheer, 8 Ad. & El. 301; Read *v.* Dunsmore, 9 C. & P. 588; Smith *v.* Knowelden, 8 Dowl. 40; Norcott *v.* Mottram, 7 Scott, 176; Legge *v.* Boyd, 5 Bing. N. C. 240. Amendments were refused in Doe *v.* Errington, 1 Ad. & El. 750; Cooper *v.* Whitehouse, 1 C. & P. 545; John *v.* Currie, Id. 618; Watkins *v.* Morgan, Id. 661; Adams *v.* Power, 7 C. & P. 76; Brashier *v.* Jackson, 6 M. & W. 549; Doe *v.* Rowe, 8 Dowl. 441; Empson *v.* Griffin, 3 P. & D. 168. The following are cases of variance, arising under Lord Tenterden's Act. Bentzing *v.* Scott, 4 C. & P. 24; Moilliet *v.* Powell, 6 C. & P. 223; Lamey *v.* Bishop, 4 B. & Ad. 479; Briant *v.* Eicke, Mood. & Malk. 359; Parks *v.* Edge, 1 C. & M. 429; Masterman *v.* Judson, 8 Bing. 224; Brooks *v.* Blanchard, 1 C. & M. 779; Jelf *v.* Oriel, 4 C. & P. 22. The American cases, which are very numerous, are stated in 1 Metcalf & Perkins's Digests, p. 145–162, and in Putnam's Supplement, vol. 2. p. 727–730. [See also *post*, vol. 2, § 11 *a*–11 *e*.]

[4] Doe *v.* Errington, 1 M. & Rob. 344, note; Mellish *v.* Richardson, 9 Bing. 125; Parks *v.* Edge, 1 C. & M. 429; Jenkins *v.* Phillips, 9 C. & P. 766; Merriam *v.* Langdon, 10 Conn. 460, 473; Clapp *v.* Balch, 3 Greenl. 216, 219; Mandeville *v.* Wilson, 5 Cranch, 15; Marine Ins. Co. *v.* Hodgson, 6 Cranch, 206; Walden *v.* Craig, 9 Wheat. 576; Chirac *v.* Reinicker, 11 Wheat. 302; United States *v.* Buford, 3 Peters, 12, 32; Benner *v.* Frey, 1 Binn. 366; Bailey *v.* Musgrave, 2 S. & R. 219; Bright *v.* Sugg, 4 Dever. 492. But if the judge exercises his discretion in a manner clearly and manifestly wrong, it is said that the court will interfere and set it right. Hackman *v.* Fernie, 1 M. & W. 505; Geach *v.* Ingall, 9 Jur. 691; 14 M. & W. 95.

CHAPTER III.

OF THE BURDEN OF PROOF.

[* § 74. The burden of proof is upon him who takes the affirmative of the issue.
75. The plaintiff will have the open and close, if it be necessary for him to give any proof, in the first instance, even as to damages.
76. This will embrace all actions where damages are unliquidated, even where no general issue is pleaded.
77. Proceedings not according to the common law, are conducted in a similar mode.
78. Where the action is based upon negative averments, proof must be given in their support in the first instance.
79 and n. But where the negative fact is peculiarly in the knowledge of defendant, slight proof is sufficient.
80. Where the action is based upon a negative breach of duty, some evidence must be given in support of the allegations.
81. Many other cases where negative is required to be proved.]

§ 74. A THIRD RULE, which governs in the production of evidence, is, that *the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue.* This is a rule of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable.[1] It is, therefore, generally deemed sufficient, where the allegation is affirmative, to oppose it with a bare denial, until it is established by evidence. Such is the rule of the Roman law. *Ei incumbit probatio qui dicit, non qui negat.*[2] As a consequence of this rule, the party who asserts the affirmative of the issue is entitled to begin and to reply; and having begun, he is not permitted to go into half of his case, and

[1] Drangnet *v.* Prudhomme, 3 Louis. R. 83, 86; Costigan *v.* Mohawk & Hudson R. Co. 2 Denio, 609. [Powers *v.* Russell, 13 Pick. 69, 76; Commonwealth *v.* Tuey, 8 Cush. 1; Burnham *v.* Allen, 1 Gray, 496, 499; Crowninshield *v.* Crowninshield, 2 Gray, 524, 529. The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial according to the nature and strength of the proofs offered in support or denial of the main fact to be established. Central Bridge Corporation *v.* Butler, 2 Gray, 132; Blanchard *v.* Young, 11 Cush. 345; Spaulding *v.* Hood, 8 Cush. 605, 606].

[2] Dig. lib. 22, tit. 3, l. 2; Mascard. de Prob. Concl. 70, tot.; Concl. 1128, n. 10. See also Tait on Evid. p. 1.

reserve the remainder; but is generally obliged to develop the whole.[1] Regard is had, in this matter, to the substance and effect of the issue, rather than to the form of it; for in many cases the party, by making a slight change in his pleading, may give the issue a negative or an affirmative form, at his pleasure. Therefore in an action of covenant for not repairing, where the breach assigned was that the defendant did not repair, but suffered the premises to be ruinous, and the defendant pleaded that he did repair, and did not suffer the premises to be ruinous, it was held, that on this issue the plaintiff should begin.[2] If the record contains several issues, and the plaintiff hold the affirmative in any one of them, he is entitled to begin; as, if in an action of slander for charging the plaintiff with a crime, the defendant should plead not guilty, and a justification. For wherever the plaintiff is obliged to produce any proof in order to establish his right to recover, he is generally required to go into his whole case, according to the rule above stated, and therefore is entitled to reply. How far he shall proceed in his proof, in anticipation of the defence on that or the other issues, is regulated by the discretion of the judge, according to the circumstances of the case; regard being generally had to the question, whether the whole defence is indicated by the plea, with sufficient particularity to render the plaintiff's evidence intelligible.[3]

§ 75. Whether the necessity of proving *damages*, on the part of the plaintiff, is such an affirmative as entitles him to begin and

[1] Rees *v.* Smith, 2 Stark. R. 31; 3 Chitty, Gen. Pract. 872–877; Swift's Law of Evid. p. 152; Bull. N. P. 298; Browne *v.* Murray, R. & Mood. 254; Jones *v.* Kennedy, 11 Pick. 125, 132. The true test to determine which party has the right to begin, and of course to determine where is the burden of proof, is to consider which party would be entitled to the verdict, if no evidence were offered on either side; for the burden of proof lies on the party against whom, in such case, the verdict ought to be given. Lecte *v.* Gresham Life Ins. Co. 7 Eng. Law & Eq. Rep. 578; 15 Jur. 1161. And see Hackman *v.* Fernie, 3 M. & W. 510. [* Mr. Taylor suggests another test: To examine what would be the effect of striking out of the record the allegations to be proved, that the burden of proof rests upon the party whose case would be thereby destroyed. 1 Taylor Ev. § 338; Amos *v.* Hughes, 1 M. & Rob. 464, per Alderson, B.]

[2] Soward *v.* Leggatt, 7 C. & P. 613.

[3] Rees *v.* Smith, 2 Stark. R. 31; Jackson *v.* Hesketh, Id. 518; James *v.* Salter, 1 M. & Rob. 501; Rawlins *v.* Desborough, 2 M. & Rob. 328; Comstock *v.* Hadlyme, 8 Conn. 261; Curtis *v.* Wheeler, 4 C. & P. 196; 1 M. & M. 493, s. c.; Williams *v.* Thomas, 4 C. & P. 234; 7 Pick. 100, per Parker, C. J. In Browne *v.* Murray, Ry. & Mood. 254, Lord C. J. Abbott gave the plaintiff his election, after proving the general issue, either to proceed immediately with all his proof to rebut the anticipated defence, or to reserve such proof till the defendant had closed his own evidence; only refusing him the privilege of dividing his case into halves, giving part in the first instance, and the residue after the defendant's case was proved. [York *v.* Pease, 2 Gray, 282; Holbrook *v.* McBride, 4 Ib. 218; Cushing *v.* Billings, 2 Cush 158.]

reply, is not perfectly clear by the authorities. Where such evidence forms part of the proof necessary to sustain the action, it may well be supposed to fall within the general rule; as, in an action of slander, for words actionable only in respect of the special damage thereby occasioned; or, in an action on the case, by a master for the beating of his servant *per quod servitium amisit*. It would seem, however, that where it appears by the record, or by the admission of counsel, that the damages to be recovered are only nominal, or are mere matter of computation, and there is no dispute about them, the formal proof of them will not take away the defendant's right to begin and reply, whatever be the form of the pleadings, provided the residue of the case is affirmatively justified by the defendant.[1] And if the general issue alone is pleaded, and the defendant will, at the trial, admit the whole of the plaintiff's case, he may still have the advantage of the beginning and reply.[2] So also in trespass *quare clausum fregit*, where the defendant pleads not guilty as to the force and arms and whatever is against the peace, and justifies as to the residue, and the damages are laid only in the usual *formula* of treading down the grass, and subverting the soil, the defendant is permitted to begin and reply: there being no necessity for any proof on the part of the plaintiff.[3]

§ 76. The difficulty in determining this point exists chiefly in those cases, where the action is for *unliquidated damages*, and the defendant has met the whole case with an affirmative plea. In these actions the practice has been various in England; but it has

[1] Fowler *v.* Coster, 1 Mood. & M. 243, per Lord Tenterden. And see the reporter's note on that case, in 1 Mood. & M. 278–281. The dictum of the learned judge, in Brooks *v.* Barrett, 7 Pick. 100, is not supposed to militate with this rule; but is conceived to apply to cases where proof of the note is required of the plaintiff. Sanford *v.* Hunt, 1 C. & P. 118; Goodtitle *v.* Braham, 4 T. R. 497. [For a qualification of Brooks *v.* Barrett, see Crowninshield *v.* Crowninshield, 2 Gray, 528.]

[2] Tucker *v.* Tucker, 1 Mood. & M. 536; Fowler *v.* Coster, Id. 241; Doe *v.* Barnes, 1 M. & Rob. 386; Doe *v.* Smart, Id. 476; Fish *v.* Travers, 3 C. & P. 578; Comstock *v.* Hadlyme, 8 Conn. 261; Lacon *v.* Higgins, 3 Stark. R. 178; Corbett *v.* Corbett, 3 Campb. 368; Foman *v.* Thompson, 6 C. & P. 717; Smart *v.* Rayner, Id. 721; Mills *v.* Oddy, Id. 728; Scott *v.* Hull, 8 Conn. 296. But see *infra*, § 76, n. 4.

[3] Hodges *v.* Holden, 3 Campb. 366; Jackson *v.* Hesketh, 2 Stark. R. 518; Pearson *v.* Coles, 1 Mood. & Rob. 206; Davis *v.* Mason, 4 Pick. 156; Leech *v.* Armitage, 2 Dall. 125. [Where a defendant under a rule of court filed an admission of the plaintiff's *prima facie* case, in order to obtain the right to open and close, he was held not to be thereby estopped from setting up in defence the statute of limitations. Emmons *v.* Hayward, 11 Cush. 48; nor from showing that the plaintiff had no title to the note sued on. Spaulding *v.* Hood, 8 Cush. 602. An auditor's report in favor of the plaintiff will not give the defendant the right to open and close. Snow *v.* Batchelder, 8 Cush. 513.]

at length been settled by a rule, by the fifteen judges, that the plaintiff shall begin in all actions for personal injuries, libel, and slander, though the general issue may not be pleaded, and the affirmative be on the defendant.[1] In actions upon contract, it was, until recently, an open question of practice; having been sometimes treated as a matter of right in the party, and at other times regarded as resting in the discretion of the judge, under all the circumstances of the case.[2] But it is now settled, in accordance with the rule adopted in other actions.[3] In this country it is generally deemed a matter of discretion, to be ordered by the judge at the trial, as he may think most conducive to the administration of justice; but the weight of authority, as well as the analogies of the law, seem to be in favor of giving the opening and closing of the cause to the plaintiff, wherever the damages are in dispute, unliquidated, and to be settled by the jury upon such evidence as may be adduced, and not by computation alone.[4]

§ 77. Where the proceedings are not according to the course of

[1] Carter *v.* Jones, 6 C. & P. 64.

[2] Bedell *v.* Russell, Ry. & M. 293; Fowler *v.* Coster, 1 M. & M. 241; Revett *v.* Braham, 4 T. R. 497; Hare *v.* Munn, 1 M. & M. 241, note; Scott *v.* Hull, 8 Conn. 296; Burrell *v.* Nicholson, 6 C. & P. 202; 1 M. & R. 304, 306; Hoggett *v.* Exley, 9 C. & P. 324. See also 3 Chitty, Gen. Practice, 872–877.

[3] Mercer *v.* Whall, 9 Jur. 576; 5 Ad. & El. 447, N. S.

[4] Such was the course in Young *v.* Bairner, 1 Esp. 103, which was assumpsit for work, and a plea in abatement for the non-joinder of other defendants; Robey *v.* Howard, 2 Stark. R. 555, S. P.; — Stansfield *v.* Levy, 3 Stark. R. 8, S. P.; — Lacon *v.* Higgins, 2 Stark. R. 178, where in assumpsit for goods, coverture of the defendant was the sole plea; — Hare *v.* Munn, 1 M. & M. 241, note, which was assumpsit for money lent, with a plea in abatement for the non-joinder of other defendants; — Morris *v.* Lotan, 1 M. & Rob. 233, S. P.; Wood *v.* Pringle, Id. 277, which was an action for a libel, with several special pleas of justification as to part, but no general issue; and as to the parts not justified, judgment was suffered by default. See acc. Comstock *v.* Hadlyme, 8 Conn. 261; Ayer *v.* Austin, 6 Pick. 225; Hoggett *v.* Exley, 9 C. & P. 324; 2 M. & Rob. 251, S. C. On the other hand are Cooper *v.* Wakley, 3 Car. & P. 474; 1 M. & M. 248, S. C., which was a case for a libel, with pleas in justification, and no general issue; but this is plainly contradicted by the subsequent case of Wood *v.* Pringle, and has since been overruled in Mercer *v.* Whall; — Cotton *v.* James, 1 M. & M. 273; 3 Car. & P. 505, S. C., which was trespass for entering the plaintiff's house, and taking his goods with a plea of justification under a commission of bankruptcy; but this also is expressly contradicted in Morris *v.* Lotan; — Bedell *v.* Russell, Ry. & M. 293, which was trespass of assault and battery, and battery, and for shooting the plaintiff, to which a justification was pleaded; where Best, J., reluctantly yielded to the supposed authority of Hodges *v.* Holden, 3 Campb. 366, and Jackson *v.* Hesketh, 2 Stark. R. 581; in neither of which, however, were the damages controverted; — Fish *v.* Travers, 3 Car. & P. 578, decided by Best, J., on the authority of Cooper *v.* Wakley, and Cotton *v.* James; — Burrell *v.* Nicholson, 6 Car. & P. 202, which was trespass for taking the plaintiff's goods in his house, and detaining them one hour, which the defendant justified as a distress for parish rates; and the only issue was, whether the house was within the parish or not. But here, also, the damages were not in dispute, and seem to have been regarded as merely nominal. See also Scott *v.* Hull, 8 Conn. 296. In Norris *v.* Ins. Co. of North America, 3 Yeates, 84, which was covenant on a policy of insurance, to which performance was pleaded, the damages were not then in dispute, the

the common law, and where, consequently, the *onus probandi* is not technically presented, the courts adopt the same principles

parties having provisionally agreed upon a mode of liquidation. But in England the entire subject has recently undergone a review, and the rule has been established, as applicable to all personal actions, that the plaintiff shall begin, wherever he goes for substantial damages not already ascertained. Mercer *v.* Whall, 9 Jur. 576; 5 Ad. & El. 447, N. S. In this case Lord Denman, C. J., in delivering the judgment of the court, expressed his opinion as follows: "The natural course would seem to be, that the plaintiff should bring his own cause of complaint before the court and jury, in every case where he has any thing to prove either as to the facts necessary for his obtaining a verdict, or as to the amount of damage to which he conceives the proof of such facts may entitle him. The law, however, has by some been supposed to differ from this course and to require that the defendant by admitting the cause of action stated on the record, and pleading only some affirmative fact, which, if proved, will defeat the plaintiff's action, may entitle himself to open the proceeding at the trial, anticipating the plaintiff's statement of his injury, disparaging him and his ground of complaint, offering or not offering, at his own option, any proof of his defensive allegation, and, if he offers that proof, adapting it not to the plaintiff's case as established, but to that which he chooses to represent that the plaintiff's case will be. It appears expedient that the plaintiff should begin, in order that the judge, the jury, and the defendant himself should know precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. Thus the affair reaches its natural and best conclusion. If this does not occur, the plaintiff, by bringing forward his case, points his attention to the proper object of the trial, and enables the defendant to meet it with a full understanding of its nature and character. If it were a presumption of law, or if experience prove, that the plaintiff's evidence must always occupy many hours, and that the defendant's could not last more than as many minutes, some advantage would be secured by postponing the plaintiff's case to that of the defendant. But, first, the direct contrary in both instances may be true; and, secondly, the time would only be saved by stopping the cause for the purpose of taking the verdict at the close of the defendant's proofs, if that verdict were in favor of the defendant. This has never been done or proposed; if it were suggested, the jury would be likely to say, on most occasions, that they could not form a satisfactory opinion on the effect of the defendant's proofs till they had heard the grievance on which the plaintiff founds his action. In no other case can any practical advantage be suggested as arising from this method of proceeding. Of the disadvantages that may result from it, one is the strong temptation to a defendant to abuse the privilege. If he well knows that the case can be proved against him, there may be skilful management in confessing it by his plea, and affirming something by way of defence which he knows to be untrue, for the mere purpose of beginning." See 9 Jur. 578; 5 Ad. & El. 458, N. S. Ordinarily speaking, the decision of the judge, at *Nisi Prius*, on a matter resting in his discretion, is not subject to revision in any other court. But in Hackman *v.* Fernie, 5 M. & W. 505, the court observed, that though they might not interfere in a very doubtful case, yet if the decision of the judge "were clearly and manifestly wrong," they would interfere to set it right. In a subsequent case, however, it is said that instead of "were clearly and manifestly wrong," the language actually used by the court was, "did clear and manifest wrong;" meaning that it was not sufficient to show merely that the wrong party had begun, but that some injustice had been done in consequence. See Edwards *v.* Matthews, 11 Jur. 398. See also Geach *v.* Ingall, 9 Jur. 691; 14 M. & W. 95. [In Page *v.* Osgood, 2 Gray, 260, the question arose, who should have the opening and close to the jury, the defendant admitting the plaintiff's cause of action, and the only issue being on the defendant's declaration in set-off; which demand in set-off the statute provides "shall be tried in like manner as if it had been set forth in an action brought by him," and there being a uniform rule of court giving the right of opening and closing in all cases to the plaintiff. The court held that there was no reason for departing from the rule which had been found to be of great practical convenience, and overruled the exceptions, thus sustaining the plaintiff's right in such a case to open and close.] [* It seems to have been considered, in some of the American states, that in actions like slander, where the defendant admits the

which govern in proceedings at common law. Thus, in the *probate of a will*, as the real question is, whether there is a valid will or not, the executor is considered as holding the affirmative; and therefore he opens and closes the case, in whatever state or condition it may be, and whether the question of sanity is or is not raised.[1]

§ 78. To this general rule, that the burden of proof is on the party holding the affirmative, there are some *exceptions*, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff *grounds his right of action upon a negative allegation*, and where, of course, the establishment of this negative is an essential element in his case;[2] as, for example, in an action for having prosecuted the plaintiff maliciously and without probable cause. Here, the want of probable cause must be made out by the plaintiff, by some affirmative proof, though the proposition be negative in its terms.[3] So, in an action by husband and wife, on a promissory note made to the wife after marriage, if the defendant denies that she is the meritorious cause of action, the burden of proving this negative is on him.[4] So, in a prosecution for a penalty given by statute, if the statute, in describing the offence, contains negative matter, the count must contain such negative allegation, and it must be supported by *primâ facie* proof. Such is the case in prosecutions for penalties given by statutes, for coursing deer in enclosed grounds, not having

speaking of the words, and offers evidence in justification, or even in mitigation of damages, that he is entitled to open the case. Gaul *v.* Fleming, 10 Ind. 25. But that proposition is certainly not maintainable, since the plaintiff is still entitled to give evidence of facts showing special malice, in aggravation of damages, and to open the case generally upon the question of damages. The English form of expression upon this point, will go far to indicate the precise inquiry upon which the right should turn. The inquiry there is, which party has the right "to begin"? And that will determine where the right to close rests. The party first required to give proof has the opening and the general close; the other party being required to give all his evidence, both in reply to plaintiff's case and support of his own, at one time, leaving the general reply to the other party.]

[1] Buckminster *v.* Perry, 4 Mass. 593; Brooks *v.* Barrett, 7 Pick. 94; Comstock *v.* Hadlyme, 8 Conn. 254; Ware *v.* Ware, 8 Greenl. 42; Hubbard *v.* Hubbard, 6 Mass. 397. [Crowninshield *v.* Crowninshield, 2 Gray, 524, 528.]

[2] 1 Chitty on Pl. 206; Spiers *v.* Parker, 1 T. R. 141; Rex *v.* Pratten, 6 T. R. 559; Holmes *v.* Love, 3 B. & C. 242; Lane *v.* Crombie, 12 Pick. 177; Harvey *v.* Towers, 15 Jur. 544; 4 Eng. Law & Eq. Rep. 531. [*Mr. Taylor, Ev. § 339, states the rule to be, that where the affirmative is supported by a disputable presumption of law, the party supporting the negative must call witnesses, in the first instance, to overcome this presumption.]

[3] Purcell *v.* Macnamara, 1 Campb. 199; 9 East, 361, s. c.; Ulmer *v.* Leland, 1 Greenl. 134; Gibson *v.* Waterhouse, 4 Greenl. 226.

[4] Philliskirk *v.* Pluckwell, 2 M. & S. 395; per Bayley, J.

the consent of the owner;[1] or, for cutting trees on lands not the party's own, or taking other property, not having the consent of the owner;[2] or for selling, as a peddler, goods not of the produce or manufacture of the country;[3] or, for neglecting to prove a will, without just excuse made and accepted by the Judge of Probate therefor.[4] In these, and the like cases, it is obvious, that plenary proof on the part of the affirmant can hardly be expected; and, therefore, it is considered sufficient if he offer such evidence as, in the absence of counter testimony, would afford ground for presuming that the allegation is true. Thus, in an action on an agreement to pay £100, if the plaintiff would not send herrings for one year to the London market, and, in particular, to the house of J. & A. Millar, proof that he sent none to that house was held sufficient to entitle him to recover, in the absence of opposing testimony.[5] And generally, where a party seeks, from extrinsic circumstances to give effect to an instrument which, on its face, it would not have, it is incumbent on him to prove those circumstances, though involving the proof of a negative; for in the absence of extrinsic proof, the instrument must have its natural operation, and no other. Therefore, where real estate was devised for life with power of appointment by will, and the devisee made his will, devising *all his lands*, but without mention of or reference to the power, it was held no execution of the power, unless it should appear that he had no other lands; and that the burden of showing this negative was upon the party claiming under the will as an appointment.[6]

§ 79. But where the subject-matter of a negative averment lies *peculiarly within the knowledge* of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it, without the least inconvenience; whereas,

[1] Rex *v.* Rogers, 2 Campb. 654; Rex *v.* Jarvis, 1 East, 643, note.

[2] Little *v.* Thompson, 2 Greenl. 128; Rex *v.* Hazy *et al.*, 2 C. & P. 458.

[3] Commonwealth *v.* Samuel, 2 Pick. 103.

[4] Smith *v.* Moore, 6 Greenl. 274. See other examples in Commonwealth *v.* Maxwell, 2 Pick. 139; 1 East, P. C. 166, § 15; Williams *v.* Hingham and Quincy Turnpike Co. 4 Pick. 341; Rex *v.* Stone, 1 East, 637; Rex *v.* Burditt, 4 B. & Ald. 95, 140; Rex *v.* Turner, 5 M. & S. 206; Woodbury *v.* Frink, 14 Ill. 279.

[5] Calder *v.* Rutherford, 3 B. & B. 302; 7 Moore, 158, s. c.

[6] Doe *v.* Johnson, 7 Man. & Gr. 1047.

if proof of the negative were required, the inconvenience would be very great.[1]

§ 80. So, where the negative allegation involves a charge of *criminal neglect of duty*, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property; the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence, and quiet possession, is in favor of the party charged. Thus, in an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of the Exchequer, in violation of his duty, the prosecutor was required to prove the negative. So, where one in office was charged with not having taken the sacrament within a year; and where a seaman was charged with having quitted the ship, without the leave in writing required by statute; and where a shipper was charged with having shipped goods dangerously combustible on board the plaintiff's ship, without giving notice of their nature to any officer on board, whereby the ship was burned and lost; in each of these cases, the party alleging the negative was

[1] Rex *v.* Turner, 5 M. & S. 206; Smith *v.* Jeffries, 9 Price, 257; Sheldon *v.* Clark, 1 Johns. 513; United States *v.* Hayward, 2 Gall. 485; Gening *v.* The State, 1 McCord, 573; Commonwealth *v.* Kimball, 7 Met. 304; Harrison's case, Paley on Conv. 45, n.; Apothecaries' Co. *v.* Bentley, Ry. & Mood. 159; Haskill *v.* The Commonwealth, 3 B. Monr. 342; The State *v.* Morrison, 3 Dev. 299; The State *v.* Crowell, 12 Shepl. 171; Shearer *v.* The State, 7 Blackf. 99. By a statute of *Massachusetts*, 1844, ch. 102, the burden of proving a license for the sale of liquors is expressly devolved on the person selling, in all prosecutions for selling liquors without a license. [See also Commonwealth *v.* Thurlow, 24 Pick. 374, 381, which was an indictment against the defendant for presuming to be a retailer of spirituous liquors without a license therefor. In this case the court did not decide the general question, saying that "cases may be affected by special circumstances, giving rise to distinctions applicable to them to be considered as they arise," but held under that indictment that the government must produce *primâ facie* evidence that the defendant was not licensed. See *post*, vol. 3, § 24 and note. In Commonwealth *v.* Kimball, 7 Met. 304, the court held, in a similar indictment, that the docket and minutes of the county commissioners before their records are made up, are competent evidence, and if no license to the defendant appears on such docket or minutes (the county commissioners being the sole authority to grant licenses), it is *primâ facie* evidence that the defendant was not licensed.

It has been decided that the provisions of the Massachusetts Act of 1844, ch. 102, do not apply to indictments under the law of 1855, ch. 405, which enacts that all buildings, &c., used for the illegal sale or keeping of intoxicating liquors, shall be deemed common nuisances; — an Act of the same year (Acts 1855, ch. 215), making any sale or keeping for sale, within the state, of intoxicating liquors unless in the original packages, &c., without authority, an unlawful and criminal act. This was decided in Commonwealth *v.* Lahey, S. J. C. Berkshire, Sept. T. 1857, not yet reported; — which was an indictment under the Act of 1855, ch. 405, for maintaining a common nuisance in keeping a building used for the illegal sale of intoxicating liquors. The court below ruled that the government need not show that the defendant was not licensed, but if the defendant relied on a license to sell in his defence, he should show that fact. The Supreme Judicial Court sustained the exceptions to this ruling. See note of the decision in this case in 20 Law Reporter (Oct. 1857), 352].

required to prove it.[1] So, where the defence to an action on a policy of insurance was, that the plaintiff improperly concealed from the underwriter certain facts and information which he then already knew and had received, it was held that the defendant was bound to give *some* evidence of the non-communication.[2] So, where the goods of the plaintiff are seized and taken out of his possession, though for an alleged forfeiture under the revenue laws, the seizure is presumed unlawful until proved otherwise.[3]

§ 81. So, where *infancy* is alleged;[4] or, where one born in lawful wedlock is alleged to be *illegitimate*, the parents not being separated by a sentence of divorce;[5] or, where *insanity* is alleged;[6] or, a person once living is alleged to be *dead*, the presumption of life not being yet worn out by lapse of time;[7] or, where nonfeasance or negligence is alleged, in an action on contract;[8] or, where the

[1] United States *v.* Hayward, 2 Gall. 498; Hartwell *v.* Root, 19 Johns. 345; Bull. N. P. [298]; Rex *v.* Hawkins, 10 East, 211; Frontine *v.* Frost, 3 B. & P. 302; Williams *v.* E. India Co. 3 East, 192. See also Commonwealth *v.* Stow, 1 Mass. 54; Evans *v.* Birch, 3 Campb. 10. [So in an action against an officer for neglecting to attach property as the property of the plaintiff's debtor, the burden of proving that the property was so far the debtor's as to be liable to attachment as his, is upon the plaintiff throughout, although the defendant claims the title to himself under a purchase from the debtor. Phelps *v.* Cutler, 4 Gray, 139.]

[2] Elkin *v.* Janson, 13 M. & W. 655.

[3] Aitcheson *v.* Maddock, Peake's Cas. 162. An exception to this rule is admitted in Chancery, in the case of attorney and client; it being a rule there, that if the attorney, retaining the connection, contracts with his client, he is subject to the burden of proving that no advantage has been taken of the situation of the latter. 1 Story, Eq. Jur. § 311; Gibson *v.* Jeyes, 6 Ves. 278; Cane *v.* Ld. Allen, 2 Dow, 289, 294, 299. [So in trespass brought by the owner of land against a railroad corporation, where the plaintiff has shown his title to the land, the entry by the defendants and the construction of their road upon it, the defendants must justify by showing that this land is covered by the authorized location of their road. Hazen *v.* Boston & Maine R. R. 2 Gray, 574, 579. Where such land is shown or admitted to be so covered by the location, the burden does not rest on the corporation or its servants, to show that acts done on such land, as cutting down trees, were done for the purposes of the road. Brainard *v.* Clapp, 10 Cush. 6. So every imprisonment of a man is, *primâ facie*, a trespass; and in an action to recover damages therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant. Metcalf, J., in Bassett *v.* Porter, 10 Cush. 420.]

[4] Borthwick *v.* Carruthers, 1 T. R. 648.

[5] Case of the Banbury Peerage, 2 Selw. N. P. (by Wheaton) 558; Morris *v.* Davies, 3 Car. & P. 513.

[6] Attorney-Gen. *v.* Parnther, 3 Bro. C. C. 441, 443, per Lord Thurlow; cited with approbation in White *v.* Wilson, 13 Ves. 87, 88; Hoge *v.* Fisher, 1 Pet. C. C. R. 163.

[7] Throgmorton *v.* Walton, 2 Roll. R. 461; Wilson *v.* Hodges, 2 East, 313; *supra*, § 41.

[8] Crowley *v.* Page, 7 C. P. 790; Smith *v.* Davies, Id. 307; Clarke *v.* Spence, 10 Watts, R. 335; Story on Bailm. §§ 454, 457, note (3d edit.); Brind *v.* Dale, 8 C. & P. 207. See further, as to the right to begin, and, of course, the burden of proof, Pontifex *v.* Jolly, 9 C. & P. 202; Harnett *v.* Johnson, Id. 206; Aston *v.* Perkes, Id. 231; Osborn *v.* Thompson, Id. 337; Bingham *v.* Stanley, Id. 374; Lambert *v.* Hale, Id. 506; Lees *v.* Hoffstadt, Id. 599; Chapman *v.* Emden, Id. 712; Doe *v.* Rowlands, Id. 734; Ridgway *v.* Ewbank, 2 M & Rob. 217; Hudson *v.* Brown, 8 C. & P. 774; Soward *v.* Leggatt, 7 C. & P. 613; Bowles *v.* Neale, Id. 262; Richardson *v.* Fell, 4 Dowl. 10; Silk *v.* Humphrey, 7 C. & P. 14.

want of a due stamp is alleged, there being faint traces of a stamp of some kind;[1] or, where a failure of consideration is set up by the plaintiff, in an action to recover the money paid;[2] or, where the action is founded on a deficiency in the quantity of land sold, and the defendant alleges, in a special plea, that there was no deficiency;[3] the burden of proof is on the party making the allegation, notwithstanding its negative character.

[§ 81*a*. In actions upon promissory notes or bills of exchange, if it be shown that they were stolen, or otherwise fraudulently put in circulation, the burden of proof is on the holder to show that he took them in good faith. Monroe *v.* Cooper, 5 Pick. 412; Worcester Co. Bank *v.* Dorchester, &c. Bank, 10 Cush. 488, 491; Wyer *v.* Dorchester, &c. Bank, 11 Cush. 52; Bissell *v.* Morgan, Ib. 198; Fabens *v.* Tirrell, 15 Law Reporter (May, 1852), 44; Perrin *v.* Noyes, 39 Maine, 384; Goodman *v.* Harvey, 4 Ad. & El. 870; Arbourn *v.* Anderson, 1 Ad. & El. N. R. 504. According to recent decisions, that burden is very light. Worcester Co. Bank *v.* Dorchester, &c. Bank; Wyer *v.* Dorchester, &c. Bank, *ubi supra*. But where the action is by the holder of a bank-bill, and the defendant proves it to have been stolen, the plaintiff is not bound to show how he came by the bill, to enable him to recover upon it, but the defendants, to defeat the plaintiff's right to recover upon it, must show that he received it under such circumstances as to prevent the maintenance of his action. Wyer *v.* Dorchester, &c. Bank, *ubi supra*; Solomons *v.* Bank of England, 13 East, 135, note; De la Chaumette *v.* Bank of England, 2 Barn. & Adolph. 385.

§ 81*b*. It would seem to be the true rule in criminal cases, though there are some decisions to the contrary, that the burden of proof never shifts, but that it is upon the government throughout; and that in all cases, before a conviction can be had, the jury must be satisfied, upon all the evidence, beyond a reasonable doubt, of the affirmative of the issue presented by the government, to wit, that the defendant is guilty in manner and form as charged in the indictment. The opinion of the court, by Bigelow, J., in the case of Commonwealth *v.* McKie, 1 Gray, 61–65, contains an acceptable and very able exposition of the general rule of law as to the burden of proof in criminal cases, but it is too extensive to be here inserted.

§ 81*c*. Although the above decision is carefully limited to that precise case, yet it would seem that its principle would cover all cases, including those in which the defendant relies on some distinct substantive ground of defence not necessarily connected with the transaction on which the indictment is founded, as insanity for instance. For in every case the issue which the government presents is the guilt of the defendant, and to prove this the jury must be satisfied not only that the defendant committed the act constituting the *corpus delicti*, but also that at the time of the commission thereof, he had intelligence and capacity enough to have a criminal intent and purpose; because, "if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." By Shaw, C. J., in Commonwealth *v.* Rogers, 7 Met. 501; see Commonwealth *v.* Hawkins, 3 Gray, 465; 1 Bennett & Heard's Lead. Crim. Cases, 87, note to Commonwealth *v.* Rogers, and p. 347,

[1] Doe *v.* Coombes, 3 Ad. & El. N. S. 687.

[2] Treat *v.* Orono, 13 Shepl. 217.

[3] McCrea *v.* Marshall, 1 Louis. An. R. 29.

note to Commonwealth *v.* McKie. And if the burden is on the government thus to satisfy the jury, it is difficult to see why the rule of proof beyond a reasonable doubt does not apply; and why a reasonable doubt of the sanity of the defendant should not require the jury to acquit.

In the more recent case of Commonwealth *v.* Eddy, 7 Gray, 583, which was an indictment against the defendant for the murder of his wife, and in which the insanity of the defendant was pressed to the jury as a defence, the court instructed the jury in substance that the burden of proof was on the government throughout, and did not shift; although, so far as the sanity of the defendant was concerned, the burden was sustained by the legal presumption that all men are sane, which presumption must stand until rebutted by proof to the contrary, satisfactory to the jury.

CHAPTER IV.

OF THE BEST EVIDENCE.

[*§ 82. The best class or kind of evidence, in the power of the party, must be produced.

83 and 92. But proof that one acted, and was recognized as an officer, will be sufficient.

84. Evidence is primary and secondary. Distinction considered.

85. This distinction has reference to the substitution of oral for written evidence.

86. Where the law requires a transaction to be by writing, it cannot be proved by other evidence.

87. All contracts reduced to writing, when directly in issue, must be produced.

88. All writings material to the issue or the credit of witnesses must be produced.

89. But where the writing is collateral merely, its production is not required.

90. Writings merely suppletory, or not admissible for want of a stamp, do not exclude oral proof. All the impressions of same type, originals.

91. Records and public documents proved by examined copies.

93. General results from voluminous documents may be proved orally.

94. Inscriptions on monuments proved orally.

95. In examinations on *voir dire*, documents need not be produced.

96. The party's admission of the existence of a writing admissible, but not as to its nature.

96. The rule carried further in some cases. No restriction upon cross-examination.

97. Numerous apparent exceptions to the foregoing rule.]

§ 82. A FOURTH RULE, which governs in the production of evidence, is that which requires *the best evidence of which the case in its nature is susceptible*. This rule does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent that better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated.[1] The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence appli-

[1] Falsi præsumptio est contra eum, qui testibus probare conatur id quod instrumentis probare potest. Menoch. Consil. 422, n. 125.

cable to each particular fact, it is meant, that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The rule excludes only that evidence which itself indicates the existence of more original sources of information. But where there is no substitution of evidence but only a selection of weaker, instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed.[1] Thus, a title by deed must be proved by the production of the deed itself, if it is within the power of the party; for this is the best evidence of which the case is susceptible; and its non-production would raise a presumption, that it contained some matter of apparent defeasance. But, being produced, the execution of the deed itself may be proved by only one of the subscribing witnesses, though the other also is at hand. And even the previous examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor.[2] So, in proof or disproof of handwriting, it is not necessary to call the supposed writer himself.[3] And even where it is necessary to prove negatively, that an act was done without the consent, or against the will of another, it is not, in general, necessary to call the person whose will or consent is denied.[4]

§ 83. All rules of evidence, however, are adopted for practical purposes in the administration of justice; and must be so applied as to promote the ends for which they were designed. Thus, the rule under consideration is subject to *exceptions*, where the *general convenience* requires it. Proof, for example, that an individual has acted notoriously as a public officer, is *primâ facie* evidence of his official character, without producing his commission or appointment.[5]

[1] Phil. & Am. on Evid. 438; 1 Phil. Evid. 418; 1 Stark. Evid. 437; Glassford on Evid. 266–278; Tayloe *v.* Riggs, 1 Peters, 591, 596; United States *v.* Reyburn, 6 Peters, 352, 367; Minor *v.* Tillotson, 7 Peters, 100, 101; [*Shoenbergher *v.* Hackman, 37 Penn. St. 887].

[2] Wright *v.* Tatham, 1 Ad. & El. 3. [See *infra*, § 569–575.]

[3] Hughes' case, 2 East, P. C. 1002; McGuire's case, Ib.; Rex *v.* Benson, 2 Camph. 508.

[4] *Supra*, § 77; Rex *v.* Hazy & Collins, 2 C. & P. 458.

[5] United States *v.* Reyburn, 6 Peters, 352, 367; Rex *v.* Gordon, 2 Leach, Cr. C. 581, 585, 586; Rex *v.* Shelley, Id. 381, n.; Jacob *v.* United States, 1 Brockenb. 520; Milnor *v.* Tillotson, 7 Peters, 100, 101; Berryman *v.* Wise, 4 T. R. 366; Bank of U. States *v.* Dandridge, 12 Wheat. 70; Doe *v.* Brawn, 5 B. & A. 243; Cannell *v.* Curtis, 2 Bing. N. C. 228, 234; Rex *v.* Verelst, 3 Camph. 432; Rex *v.* Howard, 1 M. & Rob. 187; McGahey *v.* Alston, 2 M. & W. 206, 211; Regina *v.* Vickery, 12 Ad. & El. 478, N. S.; *infra*, § 92. But there must be some color of right to the office, or an acquiescence on the part of the public for such length of time as will

§ 84. This rule naturally leads to the division of evidence into PRIMARY and SECONDARY. *Primary evidence* is that which we have just mentioned as the best evidence, or that kind of proof which, under any possible circumstances, affords the greatest certainty of the fact in question; and it is illustrated by the case of a written document: the instrument itself being always regarded as the primary or best possible evidence of its existence and contents. If the execution of an instrument is to be proved, the primary evidence is the testimony of the subscribing witness, if there be one. Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is in general admitted.[1] All evidence falling short of this in its degree is termed *secondary*. The question, whether evidence is primary or secondary, has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party in the particular cause on trial may be placed. It is a distinction of law, and not of fact; referring only to the quality, and not to the strength of the proof. Evidence which carries on its face no indication that better remains behind is not secondary, but primary. And though all information must be traced to its source, if possible, yet if there are several distinct sources of information of the same fact, it is not ordinarily necessary to show that they have all been exhausted, before secondary evidence can be resorted to.[2]

authorize the presumption of at least a colorable election or appointment. Wilcox *v.* Smith, 5 Wend. 231, 234. This rule is applied only to public offices. Where the office is private, some proof must be offered of its existence, and of the appointment of the agent or incumbent. Short *v.* Lee, 1 Jac. & W. 464, 468. [Where a note was indorsed by a person as president of an incorporated insurance company, the indorsee may prove by parol that he acted as president, and need not produce the records of the company to show his election. Cabot *v.* Given, 45 Maine, 144.]

[1] Sebree *v.* Dorr, 9 Wheat. 558, 563; Hart *v.* Yunt, 1 Watts, 253.

[2] Cutbush *v.* Gilbert, 4 S. & R. 555; United States *v.* Gilbert, 2 Sumn. 19, 80, 81; Phil. & Am. on Evid. 440, 441; 1 Phil. Evid. 421. Whether the law recognizes any degrees in the various kinds of secondary evidence, and requires the party offering that which is deemed less certain and satisfactory first to show that nothing better is in his power, is a question which is not yet perfectly settled. On the one hand, the affirmative is urged as an equitable extension of the principle which postpones all secondary evidence, until the absence of the primary is accounted for; and it is said that the same reason which requires the production of a writing, if within the power of a party, also requires that, if the writing is lost, its contents shall be proved by a copy, if in existence, rather than by the memory of a witness who has read it; and that the secondary proof of a lost deed ought to be marshalled into, first, the counterpart; secondly, a copy; thirdly, the abstract, &c.; and, last of all, the memory of a witness. Ludlam, *ex dem.* Hunt, Lofft, R. 362. On the other hand, it is said that this argument for the extension of the rule confounds all distinction between the weight of evidence and its legal admissibility; that the rule is founded upon the nature of the evidence

§ 85. The cases which most frequently call for the application of the rule now under consideration, are those which relate to the

offered, and not upon its strength or weakness; and that, to carry it to the length of establishing degrees in secondary evidence, as fixed rules of law, would often tend to the subversion of justice, and always be productive of inconvenience. If, for example, proof of the existence of an abstract of a deed will exclude oral evidence of its contents, this proof may be withheld by the adverse party until the moment of trial, and the other side be defeated, or the cause be greatly delayed; and the same mischief may be repeated, through all the different degrees of the evidence. It is therefore insisted, that the rule of exclusion ought to be restricted to such evidence only, as, upon its face, discloses the existence of better proof; and that, where the evidence is not of this nature, it is to be received, notwithstanding it may be shown from other sources that the party might have offered that which was more satisfactory; leaving the weight of the evidence to be judged of by the jury, under all the circumstances of the case. See 4 Monthly Law Mag. 265–279. Among the cases cited in support of the affirmative side of the question, there is no one in which this particular point appears to have been expressly adjudged, though in several of them, as in Sir E. Seymour's case, 10 Mod. 8; Villiers *v.* Villiers, 2 Atk. 71; Rowlandson *v.* Wainwright, 1 Nev. & Per. 8; and others, it has been passingly adverted to as a familiar doctrine of the law. On the other hand, the existence of any degrees in secondary evidence was doubted by Patterson, J., in Rowlandson *v.* Wainwright; tacitly denied by the same judge, in Coyle *v.* Cole, 6 C. & P. 359, and by Parke, J., in Rex *v.* Fursey, C. & P. 81; and by the court, in Rex *v.* Hunt *et al.* 3 B. & Ald. 566; and expressly denied by Parke, J., in Brown *v.* Woodman, 6 C. & P. 206. See also Hall *v.* Ball, 3 Scott, N. R. 577. And in the more recent case of Doe d. Gilbert *v.* Ross, in the Exchequer, where proper notice to produce an original document had been given without success, it was *held*, that the party giving the notice was not afterwards restricted as to the nature of the secondary evidence he would produce of the contents of the document; and, therefore, having offered an attested copy of the deed in that case, which was inadmissible in itself for want of a stamp, it was *held*, that it was competent for him to abandon that mode of proof, and to resort to parol testimony, there being no degrees in secondary evidence; for when once the original is accounted for, any secondary evidence whatever may be resorted to by the party seeking to use the same. See Doe *v.* Ross, 8 Dowl. 389; 7 M. & W. 102, s. c.; Doe *v.* Jack, 1 Allen, 476, 483. The American doctrine, as deduced from various authorities, seems to be this; that if, from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but that, where the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also must prove that it was known to the other party in season to have been produced at the trial. Thus, where the record of a conviction was destroyed, oral proof of its existence was rejected, because the law required a transcript to be sent to the Court of Exchequer which was better evidence. Hilts *v.* Colvin, 14 Johns. 182. So, a grant of letters of administration was presumed after proof, from the records of various courts, of the administrator's recognition there, and his acts in that capacity. Battles *v.* Holley, 6 Greenl. 145. And where the record books were burnt and mutilated, or lost, the clerk's docket and the journals of the judges have been deemed the next best evidence of the contents of the record. Cook *v.* Wood, 1 McCord, 139; Lyons *v.* Gregory, 3 Hen. & Munf. 237; Lowry *v.* Cady, 4 Vermont, 504; Doe *v.* Greenlee, 3 Hawks, 281. In all these and the like cases, the nature of the fact to be proved plainly discloses the existence of some evidence in writing, of an official character, more satisfactory than mere oral proof; and therefore the production of such evidence is demanded. Such, also, is the view taken by Ch. B. Gilbert. See Gilb. Evid. by Lofft, p. 5. See also Collins *v.* Maule, 8 C. & P. 502; Everingham *v.* Roundell, 2 M. & Rob. 138; Harvey *v.* Thomas, 10 Watts, 63. But where there is no ground for legal presumption that better secondary evidence exists, any proof is received, which is not inadmissible by other rules of law; unless the objecting party can show that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud which the law itself presumes, when primary evidence is withheld. Thus, where a notarial copy was called for, as the best evidence of the contents of a lost note, the court held, that it was sufficient for the party to prove the note by the best evidence actually in his

substitution of oral for written evidence; and they may be arranged into three classes: including in the *first* class those instruments which the law requires should be in writing; — in the *second*, those contracts which the parties have put in writing; — and in the *third*, all other writings, the existence of which is disputed, and which are material to the issue.

§ 86. In the *first* place, oral evidence cannot be substituted for any *instrument which the law requires to be in writing;* such as records, public documents, official examinations, deeds of conveyance of lands, wills, other than nuncupative, promises to pay the debt of another, and other writings mentioned in the Statute of Frauds. In all these cases, the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, as long as the writing exists, and is

power; and that to require a notarial copy, would be to demand that of the existence of which there was no evidence, and which the law would not presume was in the power of the party, it not being necessary that a promissory note should be protested. Renner *v.* the Bank of Columbia, 9 Wheat. 582, 587; Denn *v.* McAllister, 2 Halst. 46, 53; United States *v.* Britton, 2 Mason, 464, 468. But where it was proved that a copy existed of a note, he was held bound to prove it by the copy. 2 Mason, 468. But if the party has voluntarily destroyed the instrument, he is not allowed to prove its contents by secondary evidence, until he has repelled every inference of a fraudulent design in its destruction. Blade *v.* Noland, 12 Wend. 173. So, where the subscribing witness to a deed is dead, and his handwriting cannot be proved, the next best evidence is proof of the handwriting of the grantor, and this is therefore required. Clark *v.* Courtney, 5 Peters, 319. But in *New York*, proof of the handwriting of the witness himself is next demanded. Jackson *v.* Waldron, 13 Wend. 178. See *infra*, § 575. But where a deed was lost, the party claiming under it was not held bound to call the subscribing witnesses, unless it could be shown that he previously knew who they were. Jackson *v.* Vail, 7 Wend. 125. So it was ruled by Lord Kenyon, in Keeling *v.* Ball, Peake's Evid. App. lxxviii. In Gillies *v.* Smither, 2 Stark R. 528, this point does not seem to have been considered; but the case turned on the state of the pleadings, and the want of any proof whatever, that the bond in question was ever executed by the intestate. [* This rule of evidence does not require proof of the loss of the primary evidence beyond possibility of mistake; but only to a moral certainty. Mr. Justice Campbell in United States *v.* Sutter, 21 How. U. S. 170, 175. The idea is suggested in a case in New York, Hubbard *v.* Russell, 24 Barb. 404, that two letters written at the same time to the same person, one being the exact counterpart of the other, may both be regarded as originals; and where one is sent, and the other retained, that the latter may be given in evidence without notice to produce the other. That might be true if the fact to be proved were merely the writing of the letters. But where, as is commonly the case, the point to be reached is the sending or receipt of the letter to or by another, a letter not sent could only be used as a copy. And if the letter sent was in fact a copy of that retained it would, by the fact of being used for that purpose, become the original. We attempted to illustrate this point in Durkee *v.* Vermont Central Railway, 29 Vt. Rep. 127, with reference to contracts created by telegraphic correspondence. It is there held, that where a telegraphic communication is relied on to establish a contract, it must be proved as other writings are, by the production of the *original*. If that is lost, it may be proved by a copy if there is one, and if there is not, by oral testimony respecting it. The original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph, is the message delivered to the operator. But where the person sending the message takes the initiative, so that the telegraph is to be regarded as his agent, the original is the message actually delivered at the end of the line.]

in the power of the party. And where oaths are required to be taken in open court, where a record of the oath is made, or before a particular officer, whose duty it is to certify it; or where an appointment to an additional office is required to be made and certified on the back of the party's former commission; the written evidence must be produced.[1] Even the admission of the fact, by a party, unless solemnly made, as a substitute for other proof,[2] does not supersede direct proof of matter of record by which it is sought to affect him; for the record, being produced, may be found irregular and void, and the party might be mistaken.[3] Where, however, the record or document appointed by law is not part of the fact to be proved, but is merely a collateral or subsequent memorial of the fact, such as the registry of marriages and births, and the like, it has not this exclusive character, but any other legal proof is admitted.[4]

§ 87. In the *second* place, oral proof cannot be substituted for the *written evidence of any contract which the parties have put in writing.* Here, the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the cases of negotiable securities; and in all cases of written contracts, the writing is tacitly agreed upon, by the parties themselves, as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction.[5] If, for example, an action is brought for use

[1] Rex *v.* Hube, Peake's Cas. 132; Bassett *v.* Marshall, 9 Mass 312; Tripp *v.* Garey, 7 Greenl. 266; 2 Stark. Evid. 570, 571; Dole *v.* Allen, 4 Greenl. 527. [In an action against the selectmen of a town for refusing to receive the vote of the plaintiff, an inhabitant of the town, parol evidence that the plaintiff's name was on the voting list used at the election is inadmissible without first giving notice to produce the list, such list being an official document. Harris *v.* Whitcomb, 4 Gray, 433.] [* There will be recognized no degrees in the same class of secondary evidence. Carpenter *v.* Dame, 10 Ind. 125. But see Harvey *v.* Thorpe, 28 Ala. 250.]

[2] See *supra*, § 27; *infra*, §§ 169, 170, 186, 204, 205.

[3] Scott *v.* Clare, 3 Campb. 236; Jenner *v.* Jolliffe, 6 Johns. 9; Welland Canal Co. *v.* Hathaway, 8 Wend. 480; 1 Leach, Cr. C. 349; 2 Id. 625, 635.

[4] Commonwealth *v.* Norcross, 9 Mass. 492; Ellis *v.* Ellis, 11 Mass. 92; Owings *v.* Wyant, 3 H. & McH. 393; 2 Stark. Evid. 571; Rex *v.* Allison, R. & R. 109; Read *v.* Passer, Peake's Cas. 231. [So, where a grantee at the time of receiving a deed of land, agreed by parol that the grantor might continue to exercise a right of way over the land, the evidence was held admissible, not because a right of way can be created by a parol grant, but to show that the grantor's subsequent possession of such easement commenced under a claim of right.' Ashley *v.* Ashley, 4 Gray, 199.]

[5] The principles on which a writing is deemed part of the essence of any transaction, and consequently the best or primary proof of it, are thus explained by Domat: "The force of written proof consists in this; men agree to preserve by writing the remembrance of past events, of which they wish to create a memorial, either with a view of laying down a rule for their own guidance, or in order to have, in the instrument, a lasting proof of the truth of what is written. Thus contracts are written, in order to preserve the me-

and occupation of real estate, and it appears by the plaintiff's own showing that there was a written contract of tenancy, he must produce it, or account for its absence; though, if he were to make out a *primâ facie* case, without any appearance of a written contract, the burden of producing it, or at least of proving its existence, would be devolved on the defendant.[1] But if the fact of the occupation of land is alone in issue without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question.[2] The same rule applies to every other species of written contract. Thus, where in a suit for the price of labor performed, it appears that the work was commenced under an agreement in writing, the agreement must be produced; and even if the claim be for extra work, the plaintiff must still produce the written agreement; for it may furnish evidence, not only that the work was over and beyond the original contract, but also of the rate at which it was to be paid for. So, in an indictment for feloniously setting fire to a house, to defraud the insurers, the policy itself is the appropriate evidence of the fact of insurance, and must be produced.[3] And the recorded resolution of a charitable society, under which the plaintiff earned the salary sued for, was on the same principle held indispensably necessary to be produced.[4] The fact, that in such cases the writing is in the possession of the adverse party, does not change its character; it is still the primary evidence of the contract; and its absence must be accounted for, by notice to the other party to

morial of what the contracting parties have prescribed for each other to do, and to make for themselves a fixed and immutable law, as to what has been agreed on. So, testaments are written, in order to preserve the remembrance of what the party, who has a right to dispose of his property, has ordained concerning it, and thereby lay down a rule for the guidance of his heirs and legatees. On the same principle are reduced into writing all sentences, judgments, edicts, ordonnances, and other matters, which either confer title, or have the force of law. The writing preserves, unchanged, the matters intrusted to it, and expresses the intention of the parties by their own testimony. The truth of written acts is established by the acts themselves, that is, by the inspection of the originals." See Domat's Civil Law, Liv. 3, tit. 6, § 2, as translated in 7 Monthly Law Mag. p. 73.

[1] Brewer *v.* Palmer, 3 Esp. 213; confirmed in Ramsbottom *v.* Tunbridge, 2 M. & S. 434; Rex *v.* Rawden, 8 B. & C. 708; Strother *v.* Barr, 5 Bing. 136, per Parke, J. [* Magnay *v.* Knight, 1 M. & Gr. 944.]

[2] Rex *v.* Inhabitants of Holy Trinity, 7 B. & C. 611; Doe *v.* Harvey, 8 Bing. 239, 241; Spiers *v.* Willison, 4 Cranch, 398; Dennet *v.* Crocker, 8 Greenl. 239, 244.

[3] Rex *v.* Doran, 1 Esp. 127; Rex *v.* Gilson, Russ. & Ry. 138.

[4] Whitford *v.* Tutin *et al.* 10 Bing. 395; Molton *v.* Harris, 2 Esp. 549.

produce it, or in some other legal mode, before secondary evidence of its contents can be received.[1]

§ 88. In the *third* place, oral evidence cannot be substituted for *any writing, the existence of which is disputed*, and which is *material either to the issue between the parties, or to the credit of witnesses*, and is not merely the memorandum of some other fact. For, by applying the rule to such cases, the court acquires a knowledge of the whole contents of the instrument, which may have a different effect from the statement of a part.[2] "I have always," said Lord Tenterden, "acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."[3] Thus, it is not allowed, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect; without having first shown the letter to the witness, and having asked him whether he wrote that letter, because, if it were otherwise, the cross-examining counsel might put the court in possession of only a part of the contents of a paper, when a knowledge of the whole was essential to a right judgment in the cause. If the witness acknowledges the writing of the letter, yet he cannot be questioned as to its contents, but the letter itself must be read.[4] And if a witness being examined in a foreign country, upon interrogatories sent out with a commission for that purpose, should in one of his answers state the contents of a letter which is not produced; that part of the deposition will be suppressed, notwithstanding, he being out of the jurisdiction, there may be no means of compelling him to produce the letter.[5]

§ 89. In cases, however, where the written communication or agreement between the parties is *collateral* to the question in issue,

[1] See further, Rex *v.* Rawden, 8 B. & C. 708; Sebree *v.* Dorr, 9 Wheat. 558; Bullock *v.* Koon, 9 Cowen, 30; Mather *v.* Goddard, 7 Conn. 304; Rank *v.* Shewey, 4 Watts, 218; Northrup *v.* Jackson, 13 Wend. 86; Vinal *v.* Burrill, 16 Pick. 401, 407, 408; Lanauze *v.* Palmer, 1 M. & M. 31.

[2] So held by all the judges in the Queen's case, 2 Brod. & Bing. 287. See also Phil. & Am. on Evid. 441; 1 Phil. Evid. 422.

[3] Vincent *v.* Cole, 1 M. & M. 258.

[4] The Queen's case, 2 B. & B. 287; *infra*, § 463.

[5] Steinkeller *v* Newton, 9 C. & P. 313.

it need not be produced; as, where the writing is a mere proposal, which has not been acted upon;[1] or, where a written memorandum was made of the terms of the contract, which was read in the presence of the parties, but never signed, or proposed to be signed;[2] or, where, during an employment under a written contract, a separate verbal order is given;[3] or, where the action is not directly upon the agreement, for non-performance of it, but is in tort, for the conversion or detention of the document itself;[4] or, where the action is for the plaintiff's share of money had and received by the defendant, under a written security for a debt due to them both.[5]

§ 90. But where the writing does not fall within either of the three classes already described, there is no ground for its excluding oral evidence. As, for example, if a written communication be *accompanied* by a verbal one, to the same effect, the latter may be received as independent evidence, though not to prove the contents of the writing, nor as a substitute for it. Thus, also, the payment of money may be proved by oral testimony, though a receipt be taken;[6] in trover, a verbal demand of the goods is admissible, though a demand in writing was made at the same time;[7] the admission of indebtment is provable by oral testimony, though a written promise to pay was simultaneously given, if the paper be inadmissible for want of a stamp.[8] Such, also, is the case of the examination and confession of a prisoner, taken down in writing by the magistrate, but not signed and certified pursuant to the statutes.[9] And any writing inadmissible for the want of a *stamp*, or other irregularity, may still be used by the witness who wrote it, or was present at the time, as a memorandum to

[1] Ingram *v.* Lea, 2 Campb. 521; Ramsbottom *v.* Tunbridge, 2 M. & S. 434; Stephens *v.* Pinney, 8 Taunt. 327; Doe *v.* Cartwright, 3 B. & A. 326; Wilson *v.* Bowie, 1 C. & P. 8; Hawkins *v.* Warre, 3 B. & C. 690.

[2] Truwhitt *v.* Lambert, 10 Ad. & El. 470.

[3] Reid *v.* Battie, M. & M. 413.

[4] Jolley *v.* Taylor, 1 Campb. 143; Scott *v.* Jones 8 Taunt. 865; How *v.* Hall, 14 East, 274; Bucher *v.* Jarratt, 3 B. & P. 143; Whitehead *v.* Scott, 1 M. & Rob. 2; Ross *v.* Bruce, 1 Day, 100; The People *v.* Holbrook, 13 Johns. 90; McLean *v.* Hertzog, 6 S. & R. 154.

[5] Bayne *v.* Stone, 4 Esp. 13. See Tucker *v.* Welsh, 17 Mass. 165; McFadden *v.* Kingsbury, 11 Wend. 667; Southwick *v.* Stephens, 10 Johns. 443. [Where a writing does not purport to contain the entire contract between parties, additional terms may be shown by parol. Webster *v.* Hodgkins, 5 Foster (N. H.), 128.]

[6] Rambert *v.* Cowen, 3 Esp. 213; Jacob *v.* Lindsay, 1 East, 460; Doe *v.* Cartwright, 3 B. & A. 326.

[7] Smith *v.* Young, 4 Campb. 439.

[8] Singleton *v.* Barrett, 2 Cr. & Jer. 368.

[9] Lambe's case, 2 Leach, 625; Rex *v.* Chappel, 1 M. & Rob. 395, 396, n.; 2 Phil. Evid. 81, 82; Roscoe's Crim. Evid. 46, 47.

refresh his own memory, from which alone he is supposed to testify, independently of the written paper.[1] In like manner, in prosecutions for political offences, such as treason, conspiracy, and sedition, the *inscription* on flags and banners paraded in public, and the contents of *resolutions* read at a public meeting, may be proved as of the nature of speeches, by oral testimony;[2] and in the case of *printed papers*, all the impressions are regarded as originals, and are evidence against the person who adopts the printing by taking away copies.[3]

§ 91. The rule rejecting secondary evidence is subject to some *exceptions;* grounded either on public convenience, or on the nature of the facts to be proved. Thus, the contents of any record of a judicial court, and of entries in any other *public books or registers*, may be proved by an *examined copy*. This exception extends to all records and entries of a public nature, in books required by law to be kept; and is admitted because of the inconvenience to the public which the removal of such documents might occasion, especially if they were wanted in two places at the same time; and also, because of the public character of the facts they contain, and the consequent facility of detection of any fraud or error in the copy.[4]

§ 92. For the same reasons, and from the strong presumption arising from the undisturbed exercise of a public office, that the appointment to it is valid, it is not, in general, necessary to prove the written *appointments of public officers*. All who are proved to have acted as such are presumed to have been duly appointed to the office, until the contrary appears;[5] and it is not material how the question arises, whether in a civil or criminal case, nor

[1] Dalison *v.* Stark, 4 Esp. 163; Jacob *v.* Lindsay, 1 East, 460; Maugham *v.* Hubbard, 8 B. & C. 14; Rex *v.* Tarrant, 6 C. & P. 182; Rex *v.* Pressly, Id. 183; Layer's case, 16 Howell's St. Tr. 223; *infra*, §§ 228, 436.

[2] Rex *v.* Hunt, 3 B. & A. 566; Sheridan & Kirwan's case, 31 Howell's St. Tr. 672.

[3] Rex *v.* Watson, 2 Stark. R. 129, 130.

[4] Bull. N. P. 226; 1 Stark. Evid. 189, 191. But this exception does not extend to an answer in chancery, where the party is indicted for perjury therein; for there the original must be produced, in order to identify the party, by proof of his handwriting. The same reason applies to depositions and affidavits. Rex *v.* Howard, 1 M. & Rob. 189. [A registry copy of a deed of land is not admissible in evidence against the grantee, without notice to him to produce the original, the original being presumed to be in his possession. Commonwealth *v.* Emery, 2 Gray, 80. Where the originals are not presumed to be in the possession of either party to the suit, office copies of deeds are admissible. Blanchard *v.* Young, 11 Cush. 345. See also Palmer *v.* Stevens, Ib. 147.]

[5] An officer *de facto* is one who exercises an office under color of right, by virtue of some appointment or election, or of such acquiescence of the public as will authorize the presumption, at least, of a colorable appointment or election; being distinguished, on the one hand, from a

whether the officer is or is not a party to the record;[1] unless, being plaintiff, he unnecessarily avers his title to the office, or the mode of his appointment; in which case, as has been already shown, the proof must support the entire allegation.[2] These and similar exceptions are also admitted, as not being within the reason of the rule, which calls for primary evidence, namely, the presumption of fraud, arising from its non-production.

§ 93. A further relaxation of the rule has been admitted, where the evidence is the result of *voluminous facts*, or of the inspection of *many books and papers*, the examination of which could not conveniently take place in court.[3] Thus, if there be one invariable mode in which bills of exchange have been drawn between particular parties, this may be proved by the testimony of a witness conversant with their habit of business, and speaking generally of the fact, without producing the bills. But if the mode of dealing has not been uniform, the case does not fall within this exception, but is governed by the rule requiring the production of the writings.[4] So, also, a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, may be allowed to speak to the general balance, without

mere usurper of office, and on the other from an officer *de jure*. Wilcox *v.* Smith, 5 Wend. 231; Plymouth *v.* Painter, 17 Conn. 585; Burke *v.* Elliott, 4 Ired. 355. Proof that a person is reported to be and has acted as a public officer is *primâ facie* evidence, between third persons, of his official character. McCoy *v.* Curtice, 9 Wend. 17. And to this end evidence is admissible, not only to show that he exercised the office before or at the period in question, but also, limited to a reasonable time, that he exercised it afterwards. Doe *v.* Young, 8 Ad. & El. 63, N. S. And see *supra*, § 83. [Cabot *v.* Given, 45 Maine, 44.]

[1] Rex *v.* Gordon, 2 Leach's C. C. 581; Berryman *v.* Wise, 4 T. R. 366; McGahey *v.* Alston, 2 Mees. & Wels. 206, 211; Radford *v.* McIntosh, 3 T. R. 632; Cross *v.* Kaye, 6 T. R. 663; James *v.* Brawn, 5 B. & A. 243; Rex *v.* Jones, 2 Campb. 131; Rex *v.* Verelst, 3 Campb. 432. A commissioner appointed to take affidavits is a public officer, within this exception. Rex *v.* Howard, 1 M. & Rob. 187. See *supra*, § 83; United States *v.* Reyburn, 6 Peters, 352, 367; Regina *v.* Newton, 1 Car. & Kir. 369; Doe *v.* Barnes, 10 Jur. 520; 8 Ad. & El. 1037, N. S.; Plumer *v.* Briscoe, 12 Jur. 351; 11 Ad. & El. 46, N. S.; Doe *v.* Young, 8 Ad. & El. 63, N. S.

[2] *Supra*, § 56; Cannell *v.* Curtis, 2 Bing. N. C. 228; Moises *v.* Thornton, 8 T. R. 303; The People *v.* Hopson, 1 Denio, 574. In an action by the sheriff for his poundage, proof that he has acted as sheriff has been held sufficient *primâ facie* evidence that he is so, without proof of his appointment. Bunbury *v.* Matthews, 1 Car. & Kir. 380. But in New York it has been held otherwise. The People *v.* Hopson, *supra*.

[3] Phil. & Am. on Evid. 445; 1 Phil. Evid. 433, 434. The rules of pleading have, for a similar reason, been made to yield to public convenience in the administration of justice; and a general allegation is ordinarily allowed, "when the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls shall be encumbered with the length thereof." Mints *v.* Bethil, Cro. Eliz. 749; Stephens on Pleading, 359, 360. Courts of Equity admit the same exception in regard to parties to bills, where they are numerous, on the like grounds of convenience. Story on Eq. Pl. 94, 95, *et seq.*

[4] Spencer *v.* Billing, 3 Campb. 310.

producing the accounts.[1] And where the question is upon the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner.[2]

§ 94. Under this head may be mentioned the case of *inscriptions* on walls and fixed tables, *mural monuments*, *gravestones*, *surveyors' marks* on boundary trees, &c., which, as they cannot conveniently be produced in court, may be proved by secondary evidence.[3]

§ 95. Another exception is made, in the examination of a witness on the *voir dire*, and in *preliminary* inquiries of the same nature. If, upon such examination, the witness discloses the existence of a written instrument affecting his competency, he may also be interrogated as to its contents. To a case of this kind, the general rule requiring the production of the instrument, or notice to produce it, does not apply; for the objecting party may have been ignorant of its existence, until it was disclosed by the witness; nor could he be supposed to know that such a witness would be produced. So, for the like reason, if the witness, on the *voir dire*, admits any other fact going to render him incompetent, the effect of which has been subsequently removed by a written document, or even a record, he may speak to the contents of such writing, without producing it; the rule being that where the objection arises on the *voir dire*, it may be removed on the *voir dire*.[4] If, however, the witness produces the writing, it must be read, being the best evidence.[5]

[1] Roberts *v.* Doxon, Peake's Cas. 83. But not as to particular facts appearing on the books, or deducible from the entries. Dupuy *v.* Truman, 2 Y. & C. 341.

[2] Meyer *v.* Sefton, 2 Stark. R. 274. [When books and documents introduced in evidence at the trial are multifarious, and voluminous, and of such a character as to render it difficult for the jury to comprehend material facts, without schedules containing abstracts thereof, it is within the discretion of the presiding judge to admit such schedules, verified by the testimony of the person by whom they were prepared, allowing the adverse party an opportunity to examine them before the case is submitted to the jury. Boston & W. R. R. Corp. *v.* Dana, 1 Gray, 83, 104. See also Holbrook *v.* Jackson, 7 Cush. 136.]

[3] Doe *v.* Coyle, 6 C. & P. 360; Rex *v.* Fursey, Id. 81. But if they can conveniently be brought into court, their actual production is required. Thus, where it was proposed to show the contents of a printed notice, hung up in the office of the party, who was a carrier, parol evidence of its contents was rejected, it not being affixed to the freehold. Jones *v.* Tarlton, 1 D. P. C. (N. S.) 625.

[4] Phil. & Am. on Evid. 149; 1 Phil. Evid. 154, 155; Butchers' Co. *v.* Jones, 1 Esp. 160; Botham *v.* Swingler, Id. 164; Rex *v.* Gisburn, 15 East, 57; Carlisle *v.* Eady, 1 C. & P. 234, note; Miller *v.* Mariners' Church, 7 Greenl. 51; Sewell *v.* Stubbs, 1 C. & P. 73.

[5] Butler *v.* Carver, 2 Stark. R. 434. A distinction has been taken between cases, where the competency appears from the examination of the witness, and those where it is already apparent from the record, without his examination; and it has been held, that the latter case falls within the rule, and not within the exception, and that the writing which restores the

§ 96. It may be proper, in this place, to consider the question, whether a *verbal admission of the contents of a writing*, by the party himself, will supersede the necessity of giving notice to produce it; or, in other words, whether such admission, being made against the party's own interest, can be used as primary evidence of the contents of the writing, against him and those claiming under him. Upon this question, there appears some discrepancy in the authorities at *Nisi Prius*.[1] But it is to be observed, that there is a material difference between proving the execution of an attested instrument, when produced, and proving the party's admission, that by a written instrument, which is not produced, a certain act was done. In the former case, the law is well settled, as we shall hereafter show, that when an attested instrument is in court, and its execution is to be proved against a hostile party, an admission on his part, unless made with a view to the trial of that cause, is not sufficient. This rule is founded on reasons peculiar to the class of cases to which it is applied. A distinction is also to be observed between a *confessio juris* and a *confessio facti*. If the admission is of the former nature, it falls within the rule already considered, and is not received;[2] for the party may not know the legal effect of the instrument, and his admission of its nature and effect may be exceedingly erroneous. But where the existence, and not the formal execution, of a writing is the subject of inquiry, or where the writing is collateral to the principal facts, and it is on these facts that the claim is founded, the better opinion seems to be, that the confession of the party, precisely identified, is admissible as primary evidence of the facts recited in the writing; though it is less satisfactory than the writing itself.[3] Very great weight ought not to be attached to evidence of what a party has been supposed to have said; as it frequently happens, not only

competency must be produced. See *acc.* Goodhay *v.* Hendry, 1 M. & M. 319, per Best, C. J., and Id. 321, n., per Tindall, C. J. But see Carlisle *v.* Eady, 1 C. & P. 234, per Parke, J.; Wandless *v.* Cawthorne, 1 M. & M. 321, n., per Parke, J., *contra*. See 1 Phil. Evid. 154, 155.

[1] Phil. & Am. on Evid. 363, 364; 1 Phil. Evid. 346, 347. See the Monthly Law Magazine, vol. 5, p. 175–187, where this point is distinctly treated. [* See Taylor's Evidence, §§ 381–383.]

[2] *Supra*, § 86; Moore *v.* Hitchcock, 4 Wend. 262, 298, 299; Paine *v.* Tucker, 8 Shepl. 138. [In an action on a written contract, which is put in evidence, the plaintiff cannot introduce the oral declarations of the defendant as to his supposed liability; since if the declarations varied the terms of the written contract, they were not competent testimony; if they did not, they were immaterial. Goodell *v.* Smith, 9 Cush. 592.]

[3] Howard *v.* Smith, 3 Scott, N. R. 574; Smith *v.* Palmer, 6 Cush. 515; [Slatterie *v.* Pooley, 6 Mees. & Wels. 664. See *infra*, § 205.]

that the witness has misunderstood what the party said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement, completely at variance with what the party actually did say.[1] Upon this distinction the adjudged cases seem chiefly to turn. Thus, where in an action by the assignees of a bankrupt, for infringing a patent-right standing in his name, the defendant proposed to prove the oral declaration of the bankrupt, that by certain deeds an interest in the patent-right had been conveyed by him to a stranger, the evidence was properly rejected; for it involved an opinion of the party upon the legal effect of the deeds.[2] On the other hand, it has been held, that the fact of the tenancy of an estate, or that one person, at a certain time, occupied it as the tenant of a certain other person, may be proved by oral testimony. But if the terms of the contract are in controversy, and they are contained in a writing, the instrument itself must be produced.[3]

[*§ 96*a*. Notwithstanding the decision in *Slatterie* v. *Pooley*,[4] that the admission of a party is always receivable against him, although it relate to the contents of a deed, or other written instrument, and even though its contents be directly in issue in the case, the proposition seems not to have met with universal acquiescence. The Irish courts dissent from it.[5] And the New York courts adopt a different view.[6] And there is no restriction to inquiries, upon cross-examination, in regard to writings, and facts evidenced by writings; and the rule extends to the party who is a witness in support of his own case; and he may be asked, with a view to discredit him, if he did not in a similar suit in an inferior court, give evidence before the jury in support of

[1] Per Parke, J., in Earle *v.* Picken, 5 C. & P. 542, note. See also 1 Stark. Evid. 35, 36; 2 Stark. Evid. 17; *infra*, §§ 200, 203; Ph. & Am. on Evid. 391, 392; 1 Phil. Evid. 372.

[2] Bloxam *v.* Elsee, 1 C. & P. 558; Ry. & M. 187, s. c. See, to the same point, Rex *v.* Hube, Peake's Cas. 132; Thomas *v.* Ansley, 6 Esp. 80; Scott *v.* Clare, 3 Campb. 236; Rex *v.* Carcinion, 8 East, 77; Harrison *v.* More, Phil. & Am. on Evid. 365, n.; 1 Phil. Evid. 347, n.; Rex *v.* Inhabitants of Castle Morton, 3 B. & A. 588.

[3] Brewer *v.* Palmer, 3 Esp. 213; Rex *v.* Inhabitants of Holy Trinity, 7 B. & C. 611; 1 Man. & Ry. 444, s. c.; Strother *v.* Barr, 5 Bing. 136; Ramsbottom *v.* Tunbridge, 2 M. & S. 434.

[4] | *6 M. & W. 664.

[5] Lawless *v.* Queale, 8 Ir. Law, 382; Lord Gosford *v.* Robb, Id. 217; Parsons *v.* Purcell, 12 Id. 90.

[6] Jenner *v.* Joliffe, 6 Johns. 9; Hasbrouck *v.* Baker, 10 Id. 248; Welland Canal *v.* Hathaway, 8 Wendell, 480. But it was decided in a recent case in New York, Stephens *v.* Vroman, 16 N. Y. App. 381, reversing the judgment of the Supreme Court, that it is not competent to give in evidence the declarations of the opposite party, that he had heard statements inconsistent with the testimony of his own witnesses. Such evidence is none the less hearsay because repeated by the party.] |

his defence, and whether a verdict was not rendered against him, without producing any record in the action.[1] And the doctrine of *Slatterie* v. *Pooley* is approved in Massachusetts in recent cases.[2]]

§ 97. There is a class of cases, which seem to be *exceptions* to this rule, and to favor the doctrine, that oral declarations of a party to an instrument, as to its contents or effect, may be shown as a substitute for direct proof by the writing itself. But these cases stand on a different principle, namely, that where the admission *involves the material fact in pais, as well as a matter of law*, the latter shall not operate to exclude evidence of the fact from the jury. It is merely placed in the same predicament with mixed questions of law and fact, which are always left to the jury, under the advice and instructions of the court.[3] Thus, where the plaintiff, in ejectment, had verbally declared that he had "sold the lease," under which he claimed title, to a stranger, evidence of this declaration was admitted against him.[4] It involved the fact of the making of an instrument called an assignment of the lease, and of the delivery of it to the assignee, as well as the legal effect of the writing. So, also, similar proof has been received, that the party was "possessed of a leasehold,"[5] — "held a note,"[6] — "had dissolved a partnership," — which was created by deed,[7] — and, that the indorser of a dishonored bill of exchange admitted, that it had been "duly protested."[8] What the party has stated in his answer in Chancery, is admissible on other grounds, namely, that it is a solemn declaration under oath in a judicial proceeding, and that the legal effect of the instrument is stated under the advice of counsel learned in the law. So, also, where both the existence and the legal effect of one deed are recited in another, the solemnity of the act, and the usual aid of counsel, take the case out of the reason of the general rule, and justify the admission of such recital, as satisfactory evidence of the legal effect of the instrument, as well as conclusive proof of its execution.[9] There are other cases,

[1] [* Henman *v.* Lester, 12 C. B. N. S. 776; S. C. 9 Jur. N. S. 601.

[2] Loomis *v.* Wadhams, 8 Gray, 557; Smith *v.* Palmer, 6 Cush. 520.]

[3] United States *v.* Battiste, 2 Sumn. 240. And see Newton *v.* Belcher, 12 Ad. & El. 921, N. S.

[4] Doe d. Lowden *v.* Watson, 2 Stark. R. 230.

[5] Digby *v.* Steele, 3 Campb. 115.

[6] Sewell *v.* Stubbs, 1 C. & P. 73.

[7] Doe d. Waithman *v.* Miles, 1 Stark. R. 181; 4 Campb. 375.

[8] Gibbons *v.* Coggon, 2 Campb. 188. Whether an admission of the counterfeit character of a bank-note, which the party had passed, is sufficient evidence of the fact, without producing the note, *quære*; and See Commonwealth *v.* Bigelow, 8 Met. 235.

[9] Ashmore *v.* Hardy, 7 C. & P. 501; Digby *v.* Steele, 3 Campb. 115; Burleigh

which may seem, at first view, to constitute exceptions to the present rule, but in which the declarations of the party were admissible, either as contemporaneous with the act done, and expounding its character, thus being part of the *res gestæ;* or, as establishing a collateral fact, independent of the written instrument. Of this sort was the declaration of a bankrupt, upon his return to his house, that he had been absent in order to avoid a writ issued against him;[1] the oral acknowledgment of a debt, for which an unstamped note had been given;[2] and the oral admission of the party, that he was in fact a member of a society created by deed, and had done certain acts in that capacity.[3]

v. Stibbs, 5 T. R. 465; West *v.* Davis, 7 East, 363; Paul *v.* Meek, 2 Y. & J. 116; Breton *v.* Cope, Peake's Cas. 30. [As to answers in Chancery, see *infra*, § 260, and 3 Greenl. Evid. §§ 280, 290; as to recitals in deeds, see *supra*, § 23, note.]

[1] Newman *v.* Stretch, 1 M. & M. 338.
[2] Singleton *v.* Barrett, 2 C. & J., 368.
[3] Alderson *v.* Clay, 1 Stark. R. 405; Harvey *v.* Kay, 9 B. & C. 356.

CHAPTER V.

OF HEARSAY.

§ 118. In the American courts the rule is extended to all private entries of the party in the ordinary course of his business.
119. The same rule existed in the Roman Civil Law, and in France and Scotland.
120. It seems not requisite to the admission of entries by the party, as part of the *res gestæ*, that he be dead.
121. Indorsements of part payment upon securities is evidence of the same character.
122. If made before debt barred, they will prevent the operation of the statute of limitations.
123. Enumeration of the several grounds for admitting the oral declarations of persons as substantive evidence.
124. Principal grounds for rejecting hearsay evidence.
125. The rule applies, although the statement were made upon oath, and be the best proof attainable.
126. Even the declarations of a subscribing witness are not admissible to discredit his own attestation.]

§ 98. The first degree of moral evidence, and that which is most satisfactory to the mind, is afforded by our own senses; this being direct evidence, of the highest nature. Where this cannot be had, as is generally the case in the proof of facts by oral testimony, the law requires the next best evidence, namely, the testimony of those who can speak from their own personal knowledge. It is not requisite that the witness should have personal knowledge of the main fact in controversy; for this may not be provable by direct testimony, but only by inference from other facts shown to exist. But it is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be. For it is found indispensable, as a test of truth, and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of a cross-examination, that it may appear what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. But testimony from the relation of third persons, even where the informant is known, cannot be subjected to this test; nor is it often possible to ascertain through whom, or how many persons, the narrative has been transmitted, from the original witness of the fact. It is this which constitutes that sort of second-hand evidence termed "hearsay."

§ 99. The term *hearsay* is used with reference to that which is written, as well as to that which is spoken; and, in its legal sense,

it denotes that kind of evidence, which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person.[1] Hearsay evidence, as thus described, is uniformly held incompetent to establish any *specific fact*, which, in its nature, is susceptible of being proved by witnesses, who can speak from their own knowledge. That this species of testimony supposes something better, which might be adduced in the particular case, is not the sole ground of its exclusion. Its extrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practised under its cover, combine to support the rule, that hearsay evidence is totally inadmissible.[2]

§ 100. Before we proceed any farther in the discussion of this branch of evidence, it will be proper to *distinguish* more clearly between *hearsay evidence* and that which is deemed *original*. For it does not follow, because the writing or words in question are those of a third person, not under oath, that therefore they are to be considered as hearsay. On the contrary, it happens in many cases, that the very fact in controversy is, whether such things were written or spoken, and not whether they were true; and in other cases, such language or statements, whether written or spoken, may be the natural or inseparable concomitants of the principal fact in controversy.[3] In such cases, it is obvious, that the writings or words are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue.

§ 101. Thus, where the question is, whether the party acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original and material evidence. This is often illustrated in actions for malicious prosecution:[4] and also in cases of agency and of trusts. So, also, *letters* and *conversation* addressed to a person, whose sanity is the fact in the question, being connected in evidence with some act done by him, are original evidence to show whether he was insane or not.[5]

[1] 1 Phil. Evid. 185 [Sussex Peerage case, 11 Cl. & Fin. 85, 113; Stapylton *v.* Clough, 22 Eng. Law and Eq. R. 276].

[2] Per Marshall, C. J., in Mima Queen *v.* Hepburn, 7 Cranch, 290, 295, 296; Davis *v.* Wood, 1 Wheat. 6, 8; Rex *v.* Eriswell, 3 T. R. 707.

[3] Bartlett *v.* Delprat, 4 Mass. 708; Du Bost *v.* Beresford, 2 Campb. 511.

[4] Taylor *v.* Willans, 2 B. & Ad. 845. So, to reduce the damages, in an action for libel. Colman *v.* Southwick, 9 Johns. 45.

[5] Wheeler *v.* Alderson, 3 Hagg. Eccl. R. 574, 608; Wright *v.* Tatham, 1 Ad. & El. 3, 8; 7 Ad. & El. 313, s. c.; 4 Bing. N. c. 489, s. c. Whether letters addressed to the person, whose sanity is in issue, are

The *replies* given to inquiries made at the residence of an absent witness, or at the dwelling-house of a bankrupt, denying that he was at home, are also original evidence.[1] In these, and the like cases, it is not necessary to call the persons to whom the inquiries were addressed, since their testimony could add nothing to the credibility of the fact of the denial, which is the only fact that is material. This doctrine applies to all other communications, wherever the fact that such communication was made, and not its truth or falsity, is the point in controversy.[2] Upon the same principle it is considered, that evidence of *general reputation*, *reputed ownership*, *public rumor*, *general notoriety*, and the like, though composed of the speech of third persons not under oath, is original evidence and not hearsay; the subject of inquiry being the concurrence of many voices to the same fact.[3]

admissible evidence to prove how he was treated by those who knew him, without showing any reply on his part, or any other act connected with the letters or their contents, was a question much discussed in Wright *v.* Tatham. Their admissibility was strongly urged as evidence of the manner in which the person was in fact treated by those who knew him; but it was replied, that the effect of the letters, alone considered, was only to show what were the *opinions* of the writers; and that mere opinions, upon a distinct fact, were in general inadmissible; but, whenever admissible, they must be proved, like other facts, by the witness himself under oath. The letters in this case were admitted by Gurney, B., who held the assizes; and upon error in the Exchequer Chamber, four of the learned judges deemed them rightly admitted, and three thought otherwise; but the point was not decided, a *venire de novo* being awarded on another ground. See 2 Ad. & El. 3; and 7 Ad. & El. 329. Upon the new trial before the same judge, the letters were again received; and for this cause, on motion, a new trial was granted by Lord Denman, C. J., and Littledale and Coleridge, Judges. The cause was then again tried before Coleridge, J., who rejected the letter; and exceptions being taken, a writ of error was again brought in the Exchequer Chamber; where the six learned judges present, being divided equally upon the question, the judgment of the King's Bench was affirmed (see 7 Ad. & El. 313, 408), and this judgment was afterwards affirmed in the House of Lords; see 4 Bing. N. C. 489); a large majority of the learned judges concurring in opinion, that letters addressed to the party were not admissible in evidence, unless connected, by proof, with some act of his own in regard to the letters themselves, or their contents.

[1] Crosby *v.* Percy, 1 Taunt. 364; Morgan *v.* Morgan, 9 Bing. 359; Sumner *v.* Williams, 5 Mass. 444; Pelletreau *v.* Jackson, 11 Wend. 110, 123, 124; Key *v.* Shaw, 8 Bing. 320; Phelps *v.* Foot, 1 Conn. 387.

[2] Whitehead *v.* Scott, 1 M. & Rob. 2; Shott *v.* Streatfield, Id. 8; 1 Ph. Evid. 188.

[3] Foulkes *v.* Sellway, 3 Esp. 236; Jones *v.* Perry, 2 Esp. 482; Rex *v.* Watson, 2 Stark. R. 116; Bull. N. P. 296, 297. And see Hard *v.* Brown, 3 Washb. 87. Evidence of reputed ownership is seldom admissible, except in cases of bankruptcy, by virtue of the statute of 21 Jac. I, c. 19, § 11; Gurr *v.* Rutton, Holt's N. P. Cas. 327; Oliver *v.* Bartlett, 1 Brod. & Bing. 269. Upon the question, whether a libellous painting was made to represent a certain individual, Lord Ellenborough permitted the declarations of the spectators, while looking at the picture in the exhibition-room, to be given in evidence. Du Bost *v.* Beresford, 2 Campb. 512. [The fact that a debtor was reputed insolvent at the time of an alleged fraudulent preference of a creditor, is competent evidence tending to show that his preferred creditor had reasonable cause to believe him insolvent. Lee *v.* Kilburn, 3 Gray, 594. And the fact that he was in good repute as to property may likewise be proved, to show that such a creditor had not reasonable cause to believe him insolvent. Bartlett *v.* Decreet, 4 Gray, 113; Heywood *v.* Reed, Ib. 574. In both cases the testimony is admissible on the ground that the

[* § 101*a*. Under this head, it has been held that where one claimed to have procured a pistol to defend himself against the attack of another, upon the ground of certain information received from others, such information becomes an original fact, proper to be proved or disproved in the case.[1] So in an action for fraudulently representing another worthy of credit, witnesses conversant with the facts of the transaction in question may be allowed to depose that at the time they also regarded the person trustworthy. So it may be shown that such person was at that time generally so reputed among tradesmen with whom he dealt.[2]]

§ 102. Wherever the *bodily or mental feelings* of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence.[3] And whether they were real or feigned is for the jury to determine. Thus, in actions for criminal conversation, it being material to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence.[4] But to guard against the abuse of this rule, it has been held, that before the letters of the wife can be received, it must be proved that they were written prior to any misconduct on her part, and when there existed no ground for imputing collusion.[5] If written after an attempt of the defendant to accomplish the crime, the letters are inadmissible.[6] Nor are the dates of the wife's letters to the husband received as sufficient evidence of the time when they were written, in order to rebut a charge of cruelty on his part; because of the danger of collusion.[7] So, also,

belief of men, as to matters of which they have not personal knowledge, is reasonably supposed to be affected by the opinions of others who are about them. See also Carpenter *v.* Leonard, 3 Allen, 32; and Whitcher *v.* Shuttuck, Ib. 319.]

[1] [* People *v.* Shea, 8 Cal. 538.

[2] Sheen *v.* Bumpstead, 10 Jur. N. S. 242; Exch. Cham.; S. C. 2 H. & C. 193.]

[3] [Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Any thing in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a *present* existing pain or malady. Bacon *v.* Charlton, 7 Cush. 581, 586.]

[4] Trelawney *v.* Coleman, 2 Stark. R. 191; 1 Barn. & Ald. 90, S. C.; Willis *v.* Barnard, 8 Bing. 376; Elsam *v.* Faucett, 2 Esp. 562; Winter *v.* Wroot, 1 M. & Rob. 404; Gilchrist *v.* Bale, 8 Watts, 355; Thompson *v.* Freeman, Skin. 402.

[5] Edwards *v.* Crock, 4 Esp. 39; Trelawney *v.* Coleman, 1 Barn. & Ald. 90; 1 Phil. Evid. 190.

[6] Wilton *v.* Webster, 7 Car. & P. 198.

[7] Houliston *v.* Smyth, 2 Car. & P. 22;

the representation by a *sick person*, of the nature, symptoms, and effects of the *malady*, under which he is laboring at the time, are received as original evidence. If made to a medical attendant, they are of greater weight as evidence; but, if made to any other person, they are not on that account rejected.[1] In prosecutions for *rape*, too, where the party injured is a witness, it is material to show that she made complaint of the injury while it was yet recent. Proof of such complaint, therefore, is original evidence; but the statement of details and circumstances is excluded, it being no legal proof of their truth.[2]

§ 103. To this head may be referred much of the evidence sometimes termed "hearsay," which is admitted in cases of *pedigree*. The principal question, in these cases, is that of the parentage, or descent of the individual; and in order to ascertain this fact, it is material to know how he was acknowledged and treated by those who were interested in him, or sustained towards him any relations of blood or affinity. It was long unsettled, whether any and what kind of relation must have subsisted between the person speaking and the person whose pedigree was in question; and there are reported cases, in which the declarations of servants, and even of neighbors and friends, have been admitted. But it is now settled, that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants of the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is, therefore, restricted to the declarations of deceased persons, who were related by blood or marriage to the person, and, therefore, interested in the succession in question.[3]

Trelawney *v.* Coleman, 1 Barn. & Ald. 90. [And where in an action against a husband for the board of his wife, the plaintiff had introduced testimony tending to show a certain state of mind on the part of the wife, her declarations to third persons on that subject, expressive of her mental feelings, are admissible in favor of the husband. Jacobs *v.* Whitcomb, 10 Cush. 255.]

[1] Aveson *v.* Lord Kinnaird, 6 East, 188; 1 Ph. Evid. 191; Grey *v.* Young, 4 McCord, 38; Gilchrist *v.* Bale, 8 Watts, 355. [In an action for an injury caused by a defect in the highway, groans or exclamations uttered by the plaintiff at any time, expressing *present* pain or agony, and referring by word or gesture to the seat of the pain, are competent testimony for the plaintiff. Bacon *v.* Charlton, 7 Cush. 581, 586. State *v.* Howard, 32 Vt. 380; Kent *v.* Lincoln, Ib. 591.]

[2] 1 East, P. C. 444, 445; 1 Hale, P. C. 633; 1 Russell on Crimes, 565; Rex *v.* Clarke, 2 Stark. R. 241; Laughlin *v.* The State, 18 Ohio, 99. In a prosecution for conspiring to assemble a large meeting, for the purpose of exciting terror in the community, the complaints of terror, made by persons professing to be alarmed, were permitted to be proved by a witness, who heard them, without calling the persons themselves. Regina *v.* Vincent *et al.* 9 C. & P. 275. See Bacon *v.* Charlton, 7 Cush. 581.

[3] Vowles *v.* Young, 13 Ves. 140, 147; Goodright *v.* Moss, Cowp. 591, 594, as

And *general repute in the family*, proved by the testimony of a surviving member of it, has been considered as falling within the rule.[1]

§ 104. The term *pedigree*, however, embraces not only descent and relationship, but also the facts of *birth*, *marriage*, and *death*, and the times when these events happened. These facts, therefore, may be proved in the manner above mentioned, in all cases where they occur incidentally, and in relation to pedigree. Thus, an entry by a deceased parent, or other relative, made in a Bible, family missal, or any other book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relative, is regarded as a declaration of such parent or relative, in a matter of pedigree.[2] So also, the correspondence

expounded by Lord Eldon, in Whitelocke *v.* Baker, 13 Ves. 514; Johnson *v.* Lawson, 2 Bing. 86; Monkton *v.* Attorney-General, 3 Russ. & My. 147, 156; Crease *v.* Barrett, 1 Cromp. Mees. & Ros. 919, 928; Casey *v.* O'Shaunessy, 7 Jur. 1140; Gregory *v.* Baugh 4 Rand. 607; Jewell *v.* Jewell, 1 How. s. c. Rep. 231; 17 Peters, 213, s. c.; Kaywood *v.* Barnett, 3 Dev. & Bat. 91; Jackson *v.* Browner, 18 Johns. 37; Chapman *v.* Chapman, 2 Conn. 347; Waldron *v.* Tuttle, 4 N. Hamp. 371. The declarations of a mother, in disparagement of the legitimacy of her child, have been received in a question of succession. Hargrave *v.* Hargrave, 2 C. & K. 701. [Mooers *v.* Bunker, 9 Foster (N. H.), 420; Emerson *v.* White, Ib. 482; Kelley *v.* McGuire, 15 Ark. 555.]

[1] Doe *v.* Griffin, 15 East, 29. There is no valid objection to such evidence, because it is hearsay upon hearsay, provided all the declarations are within the family. Thus, the declarations of a deceased lady, as to what had been stated to her by her husband in his lifetime, were admitted. Doe *v.* Randall, 2 M. & P. 20; Monkton *v.* Attorney-General, 2 Russ. & My. 165; Bull. N. P. 295; Elliott *v.* Piersoll, 1 Peters, 328, 337. It is for the judge to decide, whether the declarants were "members of the family so as to render their evidence admissible;" and for the jury to settle the fact to which their declarations relate. Doe *v.* Davis, 11 Jur. 607; 10 Ad. & El. 314, N. S. [See also Copes *v.* Pearce, 7 Gill, 247; Clements *v.* Hunt, 1 Jones, Law (N. C.), 400.] In regard to the value and weight to be given to this kind of evidence, the following observations of Lord Langdale, M. R., are entitled to great consideration. "In cases," said he, "where the whole evidence is traditionary, when it consists entirely of family reputation, or of statements of declarations made by persons who died long ago, it must be taken with such allowances, and also with such suspicions, as ought reasonably to be attached to it. When family reputation, or declarations of kindred made in a family, are the subject of evidence, and the reputation is of long standing, or the declarations are of old date, the memory as to the source of the reputation, or as to the persons who made the declarations, can rarely be characterized by perfect accuracy. What is true may become blended with, and scarcely distinguishable from something that is erroneous; the detection of error in any part of the statement necessarily throws doubt upon the whole statement, and yet all that is material to the cause may be perfectly true; and if the whole be rejected as false, because error in some part is proved, the greatest injustice may be done. All testimony is subject to such errors, and testimony of this kind is more particularly so; and however difficult it may be to discover the truth, in cases where there can be no demonstration, and where every conclusion which may be drawn is subject to some doubt or uncertainty, or to some opposing probabilities, the courts are bound to adopt the conclusion which appears to rest on the most solid foundation." See Johnson *v.* Todd, 5 Beav. 599, 600.

[2] The Berkley Peerage case, 4 Campb. 401, 418; Doe *v.* Bray, 8 B. & C. 813; Monkton *v.* The Attorney-General, 2 Russ. & My. 147; Jackson *v.* Cooley, 8 Johns. 128, 131, per Thompson, J.; Douglas *v.* Saunderson, 2 Dall. 116; The Slane Peerage case, 5 Clark & Fin. 24; Carskadden *v.* Poorman, 10 Watts, 82; The Sussex Peerage case, 11 Clark & Fin. 85; Wat-

of deceased members of the family, recitals in family deeds, such as marriage settlements, descriptions in wills, and other solemn acts, are original evidence in all cases, where the oral declarations of the parties are admissible.[1] In regard to recitals of pedigree in bills and answers in Chancery, a distinction has been taken between those facts which are not in dispute and those which are in controversy; the former being admitted, and the latter excluded.[2] Recitals in deeds, other than family deeds, are also admitted, when corroborated by long and peaceable possession according to the deed.[3]

[*§ 104*a*. It seems to be requisite, in regard to the admissibility of evidence of reputation to prove a marriage, that the persons from whom the information is derived should be shown to have deceased, or that the reputation should be known to the witness to have been general among the connections in the family, and that there should have been no controversy in regard to it. For after the existence of *lis mota* it is not competent to give evidence of such reputation; and it will not be allowed to give such evidence upon proof that such suit was fraudulently instituted for the purpose of excluding the testimony. But the existence of a former suit between the same parties will not exclude such reputation,

son *v.* Brewster, 1 Barr, 381. And in a recent case this doctrine has been thought to warrant the admission of declarations, made by a deceased person, as to where his family came from, where he came from, and of what place his father was designated. Shields *v.* Boucher, 1 DeGex & Smale, 40. [* So also the common reputation in the family is sufficient evidence of the death of a person. Anderson *v.* Parker, 6 Cal. 197. See also Redfield on Wills, Part 2, § 1. So also in regard to the time of one's death. Morrill *v.* Foster, 33 N. H. 379.]

[1] Bull. N. P. 233; Neal *v.* Wilding, 2 Str. 1151, per Wright, J.; Doe *v.* E. of Pembroke, 11 East, 503; Whitelocke *v.* Baker, 13 Ves. 514; Elliott *v.* Piersoll, 1 Pet. 328; 1 Ph. Evid. 216, 217, and Peerage cases there cited. In two recent cases, the recitals in the deeds were held admissible only against the parties to the deeds; but in neither of those cases was the party proved to have been related to those whose pedigree was recited. In Fort *v.* Clarke, 1 Russ. 601, the grantors recited the death of the sons of John Cormick, tenants in tail male, and *declared themselves* heirs of the bodies of his daughters, who were devisees in remainder; and in Slaney *v.* Wade, 1 Mylne & Craig, 338, the grantor was a mere trustee of the estate, not related to the parties. See also Jackson *v.* Cooley, 8 Johns. 128; Jackson *v.* Russell, 4 Wend. 543; Keller *v.* Nutz, 5 S. & R. 251. If the recital in a will is made after the fact recited is in controversy, the will is not admissible as evidence of that fact. The Sussex Peerage case, 11 Clark & Fin. 85.

[2] Phil. & Am. on Evid. 231, 232, and the authorities there cited. *Ex parte* affidavits, made several years before, to prove pedigree by official requirement, and prior to any *lis mota*, are admissible. Hurst *v.* Jones, Wall, Jr. 373, App. 3. As to the effect of a *lis mota* upon the admissibility of declarations and reputation, see *infra*, § 131–134.

[3] Stokes *v.* Daws, 4 Mason, 268. [* Common practice, in regard to one's name, is not objectionable on the ground of hearsay. Willis *v.* Quimby, 11 Foster 485.]

unless the same point were brought into controversy, which it is now sought to establish.[1]]

§ 105. *Inscriptions on tombstones, and other funeral monuments, engravings on rings, inscriptions on family portraits, charts or pedigree*, and the like, are also admissible, as original evidence of the same facts. Those which are proved to have been made by, or under the direction of a deceased relative, are admitted as his declarations. But if they have been publicly exhibited, and were well known to the family, the publicity of them supplies the defect of proof, in not showing that they were declarations of deceased members of the family; and they are admitted on the ground of tacit and common assent. It is presumed, that the relatives of the family would not permit an inscription without foundation to remain; and that a person would not wear a ring with an error on it.[2] Mural and other funeral inscriptions are provable by *copies*, or other secondary evidence, as has been already shown.[3] Their value, as evidence, depends much on the authority under which they were set up, and the distance of time between their erection and the events they commemorate.[4]

§ 106. Under this head may be mentioned *family conduct*, such as the tacit recognition of relationship, and the disposition and devolution of property, as admissible evidence, from which the opinion and belief of the family may be inferred, resting ultimately on the same basis as evidence of family tradition. Thus it was remarked by Mansfield, C. J., in the Berkley Peerage case,[5] that, "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate." And Mr. Justice Ashhurst, in another case, remarked that the circumstance of the son's taking the name of the person with whom his mother, at the time of his birth, lived in a state

[1] [* Butler *v.* Mountgarrett, 7 Ho. Lds. case, 633; Shedden *v.* Patrick, 2 Sw. & Tr. 170.]

[2] Per Lord Erskine, in Vowles *v.* Young, 13 Ves. 144; Monkton *v.* The Attorney-General, 2 Rus. & Mylne, 147; Kidney *v.* Cockburn, Id. 167. The Camoys Peerage, 6 Cl. & Fin. 789. An ancient pedigree, purporting to have been collected from *history*, as well as from other sources, was held admissible, at least to show the relationship of persons described by the framer as living, and therefore to be presumed as known to him. Davies *v.* Lowndes, 7 Scott, N. R. 141. Armorial bearings, proved to have existed while the heralds had the power to punish usurpations, possessed an official weight and credit. But this authority is thought to have ceased with the last herald's visitation, in 1686. See 1 Phil. Evid. 224. At present, they amount to no more than family declarations. [* See Shrewsbury Peerage, 7 Ho. Lds. Cas. 1.]

[3] *Supra*, § 94. [See also Eastman *v.* Martin, 19 N. H. 152.]

[4] Some remarkable mistakes of fact in such inscriptions are mentioned in 1 Phil. Evid. 222.

[5] 4 Campb. 416.

of adultery, which name he and his descendants ever afterwards retained, "was a very strong family recognition of his illegitimacy."[1] So, the declarations of a person, since deceased, that he was going to visit his relatives at such a place, have been held admissible to show that the family had relatives there.[2]

§ 107. It is frequently said, that *general reputation* is admissible to prove the fact of the *marriage* of the parties alluded to, even in ordinary cases, where pedigree is not in question. In one case, indeed, such evidence was, after verdict, held sufficient, *primâ facie*, to warrant the jury in finding the fact of marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof.[3] But the evidence produced in the other cases, cited in support of this position cannot properly be called hearsay evidence, but was strictly and truly original evidence of facts, from which the marriage might well be inferred; such as evidence of the parties being received into society as man and wife, and being visited by respectable families in the neighborhood, and of their attending church and public places together as such, and otherwise demeaning themselves in public, and addressing each other as persons actually married.[4]

§ 108. There are *other declarations*, which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along with the principal fact; and their admissibility

[1] Goodright *v.* Saul, 4 T. R. 356.

[2] Rishton *v.* Nesbitt, 2 M. & Rob. 252. [* These declarations embrace what is said by husband or wife, as to the connections in the family of the other, but not those made by members of the family of one as to the family of the other. And letters may be produced to show how the wife was addressed by members of her own family. Shrewsbury Peerage case, 7 Ho. Ld's Cas. 1.]

[3] Evans *v.* Morgan, 2 C. & J. 453.

[4] 1 Phil. Evid. 234, 235; Hervey *v.* Hervey, 2 W. Bl. 877; Birt *v.* Barlow, Doug. 171, 174; Read *v.* Passer, 1 Esp. 213; Leader *v.* Barry, Id. 353; Doe *v.* Fleming, 4 Bing. 266; Smith *v.* Smith, 1 Phillim. 294; Hammick *v.* Bronson, 5 Day, 290, 293; *In re* Taylor, 9 Paige, 611 [2 Greenl. Evid. (7th ed.) § 461–462].

is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.[1] The principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character.[2] Thus, in the trial of Lord

[1] Per Park, J., in Rawson *v.* Haigh, 2 Bing. 101; Ridley *v.* Gyde, 9 Bing. 349, 352; Pool *v.* Bridges, 4 Pick. 379; Allen *v.* Duncan, 11 Pick. 309 [Haynes *v.* Rutter, 24 Pick. 242; Gray *v.* Goodrich, 7 Johns. 95; Bank of Woodstock *v.* Clark, 25 Vt. 308; Mitchum *v.* State, 11 Geo. 615; Tomkies *v.* Reynolds, 15 Ala. 109; Cornelius *v.* The State, 7 Eng. 782.

On the trial of an action brought by a principal against an agent who had charge of certain business of the principal for many years, to recover money received by the defendant from clandestine sales of property of the plaintiff, and money of the plaintiff fraudulently taken by the defendant, evidence that the defendant at the time of entering the plaintiff's service was insolvent, and that he had since received only a limited salary and some small additional compensation, and that subsequent to the time of his alleged misdoings, and during the period specified in the writ, he was the owner of a large property, far exceeding the aggregate of all his salary and receipts while in the plaintiff's service, is admissible as having some tendency to prove, if the jury are satisfied by other evidence, that money had been taken from the plaintiff by some one in his employ, that the defendant is the guilty person; such facts being in nature of *res gestæ* accompanying the very acts and transactions of the defendant under investigation, and tending to give them character and significance. And the declarations of the defendant 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. Boston & W. R. R. Corp. *v.* Dana, 1 Gray, 83, 101, 103 [* Hackett *v.* King, 8 Allen, 144]. See also Commonwealth *v.* Montgomery, 11 Met. 534. The declaration of a person who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go up-stairs from her room to another room, is admissible in evidence after her death, as a part of the *res gestæ*. Commonwealth *v.* McPike, 3 Cush. 181.]

[2] Declarations, to become part of the *res gestæ*, "must have been made at the time of the act done, which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them, as obviously to constitute one transaction." Per Hosmer, C. J., in Enos *v.* Tuttle, 3 Conn. R. 250. And see *In re* Taylor, 9 Paige, 611; Carter *v.* Buchannon, 3 Kelley, R. 513; Blood *v.* Rideout, 13 Met. 237; Boyden *v.* Burke, 14 How. s. c. 575. [* Declarations to be admissible must be contemporaneous with the act. Fauer *v.* Turner, 1 Clarke (Iowa), 53; and they must tend to characterize the act; Elkins *v.* Hamilton, 20 Vt. Rep. 627; but if not consistent with the obvious character of the act, they will not control it. State *v.* Shellidy, 8 Clarke (Iowa), 477.] But declarations explanatory of a previous fact, *e. g.* how the party's hands became bloody, are inadmissible. Scraggs *v.* The State, 8 Smed. & Marsh. 722. So, where a party, on removing an ancient fence, put down a stone in one of the post-holes, and the next day declared that he placed it there as a boundary; it was held that this declaration, not constituting part of the act done, was inadmissible in evidence in his favor. Noyes *v.* Ward, 19 Conn. 250. See Corinth *v.* Lincoln, 34 Maine, 310. In an action by a bailor against the bailee, for loss by his negligence, the declarations of the bailee, contemporaneous with the loss, are admissible in his favor, to show the nature of the loss. Story on Bailm. § 339, cites Tompkins *v.* Saltmarsh, 14 S. & R. 275; Beardslee *v.* Richardson, 11 Wend. 25; Doorman *v.* Jenkins, 2 Ad. & El. 80. So, in a suit for enticing away a servant, his declarations at the time of leaving his master are admissible, as part of the *res gestæ*, to show the motive of his departure. Hadley *v.* Carter, 8 N. Hamp. 40. [In Lund *v.* Tyngsborough, 9 Cush. 36, which was an action for injuries received through a defect in a highway, during the trial at

George Gordon for treason, the cry of the mob, who accompanied the prisoner on his enterprise, was received in evidence, as forming part of the *res gestæ*, and showing the character of the principal fact.[1] So also, where a person enters into land in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin,[2] or the like; or changes his actual residence, or domicile, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself; or, in fine, does any other act, material to be understood; his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof like any other material facts.[3] So, upon an inquiry as to the state of mind, sentiments, or dispositions of a person at any particular period, his declarations and conversations are admissible.[4] They are parts of the *res gestæ*.[5]

Nisi Prius, a witness was permitted to say in reply to the question, "At the time when he (the doctor who died before the trial) was called, and while engaged in such examination, what did he say concerning such injury, its nature and extent?" that "I heard him say that it was a very serious injury — that it was more injured than though the bone was broken," &c. It did not appear how long it was after the accident happened when these declarations were made. The full bench decided that the evidence was wrongly admitted, and in giving the opinion of the court, Fletcher, J., states at some length the rules of law applicable to the admissibility of this class of testimony [* which the profession will find a valuable summary of the law upon the point].

[1] 21 Howell's St. Tr. 542. [In an indictment for keeping a house of ill fame, evidence of conversations held by men immediately upon coming out of the house, and upon the sidewalk in front thereof, but not in presence of the defendant, nor of any of the inmates, as to what had taken place in the house, has been held to be inadmissible as part of the *res gestæ* and tending to show the character of the visitors in the house. Commonwealth *v.* Harwood, 4 Gray, 41.]

[2] Co. Litt. 49, b, 245, b; Robinson *v.* Swett, 3 Greenl. 316; 3 Bl. Comm. 174, 175.

[3] Bateman *v.* Bailey, 5 T. R. 512, and the observations of Mr. Evans upon it in 2 Poth. Obl. App. No. xvi. § 11; Rawson *v.* Haigh, 2 Bing. 99; Newman *v.* Stretch, 1 M. & M. 338; Ridley *v.* Gyde, 9 Bing. 349, 352; Smith *v.* Cramer, 1 Bing. N. C. 585; Gorham *v.* Canton, 6 Greenl. 266; Fellowes *v.* Williamson, 1 M. & M. 306; Vacher *v.* Cocks, Id. 353; 1 B. & Ad. 135; Thorndike *v.* City of Boston, 1 Met. 242; Carroll *v.* The State, 3 Humph. 315; Kilburn *v.* Bennet, 3 Met. 199; Salem *v.* Lynn, 13 Met. 541; Porter *v.* Ferguson, 4 Flor. R. 104.

[4] Barthelemy *v.* The People, &c. 2 Hill, N. Y. R. 248, 257; Wetmore *v.* Mell, 1 Ohio, N. S. 26 [*supra*, § 102].

[5] [It is only when the thing done is equivocal, and it is necessary to render its meaning clear, and expressive of a motive or object, that it is competent to prove declarations accompanying it, as falling within the class of *res gestæ*. By Bigelow, J., in Nutting *v.* Page, 4 Gray, 584. Thus the reasons stated by the master-workman, when building a dam, for making it lower in the middle than at either end, are not competent evidence against his employer that it was so made; nor are the instructions given by the owner of the dam while rebuilding it, to mark the height of the old dam and to erect the new one of the same height. Nutting *v.* Page, *ut supra*. See also Carleton *v.* Patterson, 9 Foster (N. H.) 580. The conduct and exclamations of passengers on a railroad at the time of an accident, though not in the presence of the party receiving an injury, are admissible as part of the *res gestæ*, to justify the conduct of the party injured. Galena, &c. R. R. Co. *v.* Fay, 16 Ill. 558. A letter which is part of the *res gestæ*, is admissible in

[*§ 108*a*. So it has been recently held, in England, that it is competent for the plaintiff, for the purpose of proving upon whose credit the goods sued for were sold, to put in evidence a letter written by himself, at the time the bargain was made, to his agent, desiring him to inquire as to the credit of the defendant, of a person to whom the person receiving the goods had referred him for that purpose, and stating therein that the defendant was the buyer. And it was further considered, that the jury might look at the whole letter, and although, in itself, it was not evidence of the truth of the facts affirmed, it might be considered as corroborative of the plaintiff's version of the transaction.[1]

§ 109. In regard to the declarations of persons in possession of land, explanatory of the character of their possession, there has been some difference of opinion; but it is now well settled, that *declarations in disparagement of the title of the declarant* are admissible, as original evidence. Possession is *primâ facie* evidence of seisin in fee-simple; and the declaration of the possessor, that he is tenant to another, it is said, makes most strongly against his own interest, and therefore is admissible.[2] But no reason is perceived, why every declaration accompanying the act of possession, whether in disparagement of the claimant's title, or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gestæ;* leaving its effect to be governed by other rules of evidence.[3]

evidence, although the writer of it might be a witness. Roach *v.* Learned, 37 Maine, 110. In a question of settlement the pauper's declarations when in the act of removing, are admissible. Richmond *v.* Thomaston, 38 Maine, 232; Cornville *v.* Brighton, 39 Ib. 333. The acts and sayings of a constable at the time of a levy, are admissible as part of the *res gestæ*, in an action against the sureties on his bond for neglecting to make a return thereof. Dobbs *v.* Justices, 17 Geo. 624.]

[1] [*Milne *v.* Leisler, 7 H. & N. 786; s. c. 8 Jur. N. S. 121; Eastman *v.* Bennett, 6 Wis. 232, where the same principle is maintained.]

[2] Peaceable *v.* Watson, 4 Taunt. 16, 17, per Mansfield, C. J.; West Cambridge *v.* Lexington, 2 Pick. 536, per Putnam, J.; Little *v.* Libby, 2 Greenl. 242; Doe *v.* Pettett, 5 B. & Ald. 223; Carne *v.* Nicholl, 1 Bing. N. C. 430; per Lyndhurst, C. B., in Chambers *v.* Bernasconi, 1 Cromp. & Jer. 457; Smith *v.* Martin, 17 Conn. R. 399; *infra*, § 189.

[3] Davies *v.* Pierce, 2 T. R. 53; Doe *v.* Rickarby, 5 Esp. 4; Doe *v.* Payne, 1 Stark. R. 69; 2 Poth. on Obl. 254, App. No. xvi. § 11; Rankin *v.* Tenbrook, 6 Watts, 388, 390, per Huston, J.; Doe *v.* Pettett, 5 B. & Ald. 223; Reed *v.* Dickey, 1 Watts, 152; Walker *v.* Broadstock, 1 Esp. 458; Doe *v.* Austin, 9 Bing. 41; Doe *v.* Jones, 1 Campb. 367; Jackson *v.* Bard, 4 Johns. 230, 234; Weidman *v.* Kohr, 4 S. & R. 174; Gibblehouse *v.* Strong, 3 Rawle, R. 437; Norton *v.* Pettibone, 7 Conn. R. 319; Snelgrove *v.* Martin, 2 McCord, 241, 243; Doe d. Majoribanks *v.* Green, 1 Gow. R. 227; Carne *v.* Nicoll, 1 Bing. N. C. 430; Davis *v.* Campbell, 1 Iredell, R. 482; Crane *v.* Marshall, 4 Shepl. 27; Adams *v.* French, 2 N. Hamp. R. 287; Treat *v.* Strickland, 10 Shepl. 234; Blake *v.* White, 13 N. Hamp. R. 267; Doe *v.* Langfield, 16 M. & W. 497; Baron de Bode's case, 8 Ad. & El. 243, 244, N. S.; Abney *v.* Kingsland, 10 Ala. R. 355; Daggett *v.* Shaw, 5 Met. 223; [Bartlett *v.* Emerson, 7 Gray, 174; Ware *v.* Brookhouse, Ib. 454;

§ 110. It is to be observed, that where declarations, offered in evidence, are merely *narrative of a past occurrence*, they cannot be received as proof of the existence of such occurrence. They must be *concomitant* with the principal act, and so connected with it as to be regarded as the mere result and consequence of the co-existing motives, in order to form a proper criterion for directing the judgment, which is to be formed upon the whole conduct.[1] On this ground, it has been holden, that letters written during absence from home are admissible as original evidence, explanatory of the motive of departure and absence, the departure and absence being regarded as one continuing act.[2]

§ 111. The same principles apply to the acts and declarations of one of a company of *conspirators*, in regard to the common design as affecting his fellows. Here a foundation must first be laid, by proof, sufficient in the opinion of the judge, to establish, *primâ facie*, the fact of conspiracy between the parties, or proper to be laid before the jury, as tending to establish such fact. The

Flagg *v.* Mason, 8 Gray, 556]; [* Wood *v.* Foster, 8 Allen, 24]. Stark *v.* Boswell, 6 Hill, N. Y. Rep. 405; Pike *v.* Hayes, 14 N. Hamp. 19; Smith *v.* Powers, 15 N. Hamp. 546, 563; [Marcy *v.* Stone, 8 Cush. 4; Stearns *v.* Hendersass, 9 Ib. 497; Plimpton *v.* Chamberlain, 4 Gray, 320; Hyde *v.* Middlesex Co. 2 Gray, 267; Potts *v.* Everhart, 26 Penn. St. R. 493; St. Clair *v.* Shale, 20 Ib. 105; Doe *v.* Campbell, 1 Ired. 482; Brewer *v.* Brewer, 19 Ala. 481. A declaration by a tenant, dead at the time of the trial, that he was not entitled to common of pasture in respect to his farm, is not admissible against his reversioner. Papendick *v.* Bridgwater, 30 Eng. Law & Eq. 293]. Accordingly, it has been held, that a statement made by a person not suspected of theft and before any search made, accounting for his possession of property which he is afterwards charged with having stolen, is admissible in his favor. Rex *v.* Abraham, 2 Car. & K. 550. But see Smith *v.* Martin, 17 Conn. R. 399. Where a party after a post-nuptial settlement mortgaged the same premises, it was held that, as his declarations could bind him only while the interest remained in him, his declarations, as to the consideration paid by the subsequent purchaser, were not admissible against the claimants under the settlement, for this would enable him to cut down his own previous acts. Doe *v.* Webber, 3 Nev. & Man. 586. [* And it has recently been held in England, Reg. *v.* Birmingham, 5 L. T. N. S. 309, that the oral declaration of a deceased occupant of premises, that he occupied the same as tenant at a rent of £20 per annum, was admissible to prove not only the fact of the tenancy, but the amount of the rent.]

[1] 2 Poth. on Obl. by Evans, pp. 248, 249, App. No. xvi. § 11. Ambrose *v.* Clendon, Cas. temp Hardw. 267; Doe *v.* Webber, 1 Ad. & El. 733. In Ridley *v.* Gyde, 9 Bing. 349, where the point was to establish an act of bankruptcy, a conversation of the bankrupt on the 20th of November, being a resumption and continuation of one which had been begun, but broken off on the 25th of October preceding, was admitted in evidence. See also Boyden *v.* Moore, 11 Pick. 362; Walton *v.* Green, 1 C. & P. 521; Reed *v.* Dick, 8 Watts, 479; O'Kelly *v.* O'Kelly, 8 Met. 436; Styles *v.* Western Railroad Corp. Id. 44 [Battles *v.* Batchelder, 39 Maine, 19].

[2] Rawson *v.* Haigh, 2 Bing. 99, 104; Marsh *v.* Davis, 24 Verm. 363; New Milford *v.* Sherman, 21 Conn. 101. [The reasons given by a wife, on the *day after* her return to her father's house for leaving her husband, are not a part of the *res gestæ*, as connected with and part of the act of leaving her husband's house, and so are not admissible in evidence in an action brought by the father against the husband for necessaries supplied the wife; those made at the time of the return being admissible. Johnson *v.* Sherwin, 3 Gray, 374.]

connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, 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. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act, which had before been done by the others, and a party to every act, which may afterwards be done by any of the others, in furtherance of such common design.[1] Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence, before sufficient proof is given of the conspiracy; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this rests in the discretion of the judge, and is not permitted, except under particular and urgent circumstances; lest the jury should be misled to infer the fact itself of the conspiracy from the declarations of strangers. And here, also, care must be taken that the acts and declarations, thus admitted, be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects. If they took place at a subsequent period, and are, therefore, merely narrative of past occurrences, they are, as we have just seen, to be rejected.[2] The term *acts*, includes written correspondence, and other papers relative to the main design; but whether it includes unpublished writings upon abstract questions, though of a kindred nature, has been doubted.[3] Where conversations are proved, the effect of the evidence will depend on other circumstances, such as the fact and degree of the prisoner's attention to it, and his assent or disapproval.[4]

[1] Rex *v.* Watson, 32 Howell's St. Tr. 7, per Bayley, J.; Rex *v.* Brandreth, Id. 857, 858; Rex *v.* Hardy, 24 Howell's St. Tr 451, 452, 453, 475; American Fur Co. *v.* The United States, 2 Peters, 358, 365; Crowninshield's case, 10 Pick. 497; Rex *v.* Hunt, 3 B. & Ald. 566; 1 East, P. C. 97, § 38; Nichols *v.* Dowding, 1 Stark. R. 81.

[2] Rex *v.* Hardy, *supra*. The declarations of one co-trespasser, where several are jointly sued, may be given in evidence against himself, at whatever time it was made; but, if it was not part of the *res gestæ*, its effect is to be restricted to the party making it. Yet, in Wright *v.* Court, 2 C. & P. 232, which was an action for false imprisonment, the declaration of a co-defendant, showing personal malice, though made in the absence of the others, and several weeks after the fact, was admitted by Garrow, B., without such restriction. Where no common object or motive is imputed, as in actions for negligence, the declaration or admission of one defendant is not admitted against any but himself. Daniels *v.* Potter, 1 M. & M. 501.

[3] Foster's Rep. 198; Rex *v.* Watson, 2 Stark. R. 116, 141–147.

[4] Rex *v.* Hardy, 24 Howell's St. Tr. 703, per Eyre, C. J.

§ 112. This doctrine extends to all cases of *partnership*. Wherever any number of persons associate themselves in the joint prosecution of a common enterprise or design, conferring on the collective body the attribute of individuality by mutual compact, as in commercial partnerships, and similar cases, the act or declaration of each member, in furtherance of the common object of the association, is the act of all. By the very act of association, each one is constituted the agent of all.[1] While the being thus created exists, it speaks and acts only by the several members; and of course, when that existence ceases by the dissolution of the firm, the act of an individual member ceases to have that effect; binding himself alone, except so far as by the articles of association or of dissolution it may have been otherwise agreed.[2] An admission, however, by one partner, made after the dissolution, in regard to business of the firm, previously transacted, has been held to be binding on the firm.[3]

[1] Sandilands *v.* Marsh, 2 B. & Ald. 673, 678, 679; Wood *v.* Braddick, 1 Taunt. 104, and Petherick *v.* Turner *et al.* there cited; Rex *v.* Hardwick, 11 East, 578, 589; Van Reimsdyk *v.* Kane, 1 Gall. 630, 635; Nichols *v.* Dowding, 1 Stark. R. 81; Hodempyl *v.* Vingerhoed, Chitty on Bills, 618, note (2); Coit *v.* Tracy, 8 Conn. R. 268. [In an action against two as alleged copartners, evidence of statements and declarations which would be admissible only upon the assumption of the existence of the copartnership, is incompetent to prove such copartnership. Dutton *v.* Woodman, 9 Cush. 255; Allcott *v.* Strong, 9 Cush. 323. And evidence to show the continuance of a partnership after it has been dissolved, with notice to the parties, must be as satisfactory as that required to show its establishment. Allcott *v.* Strong, *ut supra*.]

[2] Bell *v.* Morrison, 1 Peters, 371; Burton *v.* Issitt, 5 B. & Ald. 267.

[3] This doctrine was extended by Lord Brougham, to the admission of payment to the partner after the dissolution. Pritchard *v.* Draper, 1 Russ. & M. 191, 199, 200. See Wood *v.* Braddick, 1 Taunt. 104; Whitcomb *v.* Whiting, 2 Doug. 652; approved in McIntire *v.* Oliver, 2 Hawkes, 209; Beitz *v.* Fuller, 1 McCord, 511; Cady *v.* Shepherd, 11 Pick. 400; Van Reimsdyk *v.* Kane, 1 Gall. 635, 636. See also Parker *v.* Merrill, 6 Greenl. 41; Martin *v.* Root, 17 Mass. 223, 227; Vinal *v.* Burrill, 16 Pick. 401; Lefavour *v.* Yandes, 2 Blackf. 240; Bridge *v.* Gray, 14 Pick. 55; Gay *v.* Bowen, 8 Met. 100; Mann *v.* Locke, 11 N. Hamp. R. 246, to the same point. [See also Loomis *v.* Loomis, 26 Vt. 198; Pierce *v.* Wood, 3 Foster, 519; Drumright *v.* Philpot, 16 Geo. 424. But where, after the dissolution of a copartnership, one partner assigned his interest in a partnership claim against the defendant to the other partner, in a suit on such claim brought in the name of both partners for the benefit of the assignee, the declarations of the assignor made after the assignment are not admissible in favor of the defendant. Gilligan *v.* Tebbetts, 33 Maine, 360.] In *New York*, a different doctrine is established. Walden *v.* Sherburne, 15 Johns. 409; Hopkins *v.* Banks, 7 Cowen, 650; Clark *v.* Gleason, 9 Cowen, 57; Baker *v.* Stackpole, Id. 420. So in *Louisiana*. Lambeth *v.* Vawter, 6 Rob. La. R. 127. See, also, in support of the text, Lacy *v.* McNeil, 4 Dowl. & Ry. 7. Whether the acknowledgment of a debt by a partner, after dissolution of the partnership, will be sufficient to take the case out of the statute of limitations, and revive the remedy against the others, has been very much controverted in this country; and the authorities to the point are conflicting. In England, it is now settled by Lord Tenterden's Act (9 Géo. 4, c. 14), that such acknowledgment, or new promise, independent of the fact of part payment, shall not have such effect, except against the party making it. This provision has been adopted in the laws of some of the United States. See *Massachusetts*, Rev. Sts. ch. 120, § 14–17; *Vermont*, Rev. Sts. ch. 58, §§ 23, 27. And it has since been holden

§ 113. A kindred principle governs in regard to the *declarations of agents*. The principal constitutes the agent his representative, in

in England, where a debt was originally contracted with a partnership, and more than six years afterwards, but within six years before action brought, the partnership having been dissolved, one partner made a partial payment in respect of the debt, — that this barred the operation of the statute of limitations; although the jury found that he made the payment by concert with the plaintiffs, in the jaws of bankruptcy, and in fraud of his late partners. Goddard *v.* Ingram, 3 Ad. & El. 839, N. S. The American cases seem to have turned mainly on the question, whether the admission of the existing indebtment amounted to the making of a new contract, or not. The courts which have viewed it as virtually a new contract, have held, that the acknowledgment of the debt by one partner, after the dissolution of partnership, was not admissible against his copartner. This side of the question was argued by Mr. Justice Story, with his accustomed ability, in delivering the judgment of the court in Bell *v.* Morrison, 1 Peters, 367, *et seq.*; where, after stating the point, he proceeded as follows: "In the case of Bland *v.* Haselrig, 2 Vent. 151, where the action was against four, upon a joint promise, and the plea of the statute of limitations was put in, and the jury found that one of the defendants did promise within six years, and that the others did not; three judges, against Ventris, J., held that the plaintiff could not have judgment against the defendant, who had made the promise. This case has been explained upon the ground, that the verdict did not conform to the pleadings, and establish a joint promise. It is very doubtful, upon a critical examination of the report, whether the opinion of the court, or of any of the judges, proceeded solely upon such ground. In Whitcomb *v.* Whiting, 2 Doug. 652, decided in 1781, in an action on a joint and several note brought against one of the makers, it was held, that proof of payment, by one of the others, of interest on the note and of part of the principal, within six years, took the case out of the statute, as against the defendant who was sued. Lord Mansfield said, 'payment by one is payment for all, the one acting virtually for all the rest; and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay, when the debt is admitted to be due.' This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes that one party, who has authority to discharge, has necessarily, also, authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists by analogy to charge the whole. Now, this very position constitutes the matter in controversy. It is true, that a payment by one does enure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt, pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them. When the statute has run against a joint debt, the reasonable presumption is, that it is no longer a subsisting debt; and, therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable, and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made. The doctrine of Whitcomb *v.* Whiting has been followed in England in subsequent cases, and was resorted to in a strong manner, in Jackson *v.* Fairbank, 2 H. Bl. 340, where the admission of a creditor to prove a debt, on a joint and several note under a bankruptcy, and to receive a dividend, was held sufficient to charge a solvent joint debtor, in a several action against him, in which he pleaded the statute, as an acknowledgment of a subsisting debt. It has not, however, been received without hesitation. In Clark *v.* Bradshaw, 3 Esp. 155, Lord Kenyon, at *Nisi Prius*, expressed some doubts upon it; and the cause went off on another ground. And in Bradram

the transaction of certain business; whatever, therefore, the agent does, in the lawful prosecution of that business, is the act of the

v. Wharton, 1 Barn. & Ald. 463, the case was very much shaken, if not overturned. Lord Ellenborough, upon that occasion used language, from which his dissatisfaction with the whole doctrine may be clearly inferred. 'This doctrine,' said he, 'of rebutting the statute of limitations, by an acknowledgment other than that of the party himself, began with the case of Whitcomb *v.* Whiting. By that decision, where, however, there was an express acknowledgment, by an actual payment of a part of the debt by one of the parties, I am bound. But that case was full of hardships; for this inconvenience may follow from it. Suppose a person liable jointly with thirty or forty others, to a debt; he may have actually paid it, he may have had in his possession the document by which that payment was proved, but may have lost his receipt. Then, though this was one of the very cases which this statute was passed to protect, he may still be bound, and his liability be renewed, by a random acknowledgment made by some one of the thirty or forty others, who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party of the advantage given him by the statute, by means of an implied acknowledgment.' In the American courts, so far as our researches have extended, few cases have been litigated upon this question. In Smith *v.* Ludlow, 6 Johns. 268, the suit was brought against both partners, and one of them pleaded the statute. Upon the dissolution of the partnership, public notice was given that the other partner was authorized to adjust all accounts; and an account signed by him, after such advertisement, and within six years, was introduced. It was also proved, that the plaintiff called on the partner, who pleaded the statute, before the commencement of the suit, and requested a settlement, and that he then admitted an account, dated in 1797, to have been made out by him; that he thought the account had been settled by the other defendant, in whose hands the books of partnership were; and that he would see the other defendant on the subject, and communicate the result to the plaintiff. The court held that this was sufficient to take the case out of the statute; and said, that without any express authority, the confession of one partner, after the dissolution, will take a debt out of the statute. The acknowledgment will not, of itself, be evidence of an original debt; for that would enable one party to bind the other in new contracts. But the original debt being proved or admitted, the confession of one will bind the other, so as to prevent him from availing himself of the statute. This is evident, from the cases of Whitcomb *v.* Whiting, and Jackson *v.* Fairbank; and it results necessarily from the power given to adjust accounts. The court also thought the acknowledgment of the partner, setting up the statute, was sufficient of itself to sustain the action. This case has the peculiarity of an acknowledgment made by both partners, and a formal acknowledgment by the partner who was authorized to adjust the accounts after the dissolution of the partnership. There was not, therefore, a virtual, but an express and notorious agency, devolved on him, to settle the account. The correctness of the decision cannot, upon the general view taken by the court, be questioned. In Roosevelt *v.* Marks, 6 Johns. Ch. 266, 291, Mr. Chancellor Kent admitted the authority of Whitcomb *v.* Whiting, but denied that of Jackson *v.* Fairbank, for reasons which appear to us solid and satisfactory. Upon some other cases in New York, we shall have occasion hereafter to comment. In Hunt *v.* Bridgham, 2 Pick. 581, the Supreme Court of Massachusetts, upon the authority of the cases in Douglas, H. Blackstone, and Johnson, held, that a partial payment by the principal debtor on a note, took the case out of the statute of limitations, as against a surety. The court do not proceed to any reasoning to establish the principle, considering it as the result of the authorities. Shelton *v.* Cocke, 3 Munford, 191, is to the same effect; and contains a mere annunciation of the rule, without any discussion of its principle. Simpson *v.* Morrison, 2 Bay, 533, proceeded upon a broader ground, and assumes the doctrine of the case in 1 Taunt. 104, hereinafter noticed, to be correct. Whatever may be the just influence of such recognitions of the principles of the English cases, in other states, as the doctrine is not so settled in Kentucky, we must resort to such recognition only as furnishing illustrations to assist our reasoning, and decide the case now as if it had never been decided before. By the general law of partnership, the act of each partner, during the continuance of the partnership, and within the scope of its

principal, whom he represents. And, "where the acts of the agent will bind the principal, there his representations, declarations, and

objects, binds all the others. It is considered the act of each, and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contracts in the partnership business; but he cannot bind it by any contracts beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms, it operates as a revocation of all power to create new contracts; and the right of partners as such, can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified, and restrained, by the express delegation of the whole authority to one of the partners. The question is not, however, as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt; we mean, admitted by the whole partnership or unbarred by the statute; but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another, that is, whether the acknowledgment or promise is to be deemed a mere continuation of the original promise, or a new contract, springing out of, and supported by, the original consideration. We think it is the latter, both upon principle and authority; and if so, as after the dissolution no one partner can create a new contract, binding upon the others, his acknowledgment is inoperative and void, as to them. There is some confusion in the language of the books, resulting from a want of strict attention to the distinction here indicated. It is often said, that an acknowledgment revives the promise, when it is meant, that it revives the debt or cause of action. The revival of a debt supposes that it has once been extinct and gone; that there has been a period in which it had lost its legal use and validity. The act which revives it is what essentially constitutes its new being, and is inseparable from it. It stands not by its original force, but by the new promise, which imparts vitality to it. Proof of the latter is indispensable, to raise the assumpsit, on which an action can be maintained. It was this view of the matter which first created a doubt, whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome; and it is now held, that the original consideration is sufficient, if recognized to uphold the new promise, although the statute cuts it off, as a support for the old. What, indeed, would seem to be decisive on this subject is, that the new promise, if qualified or conditional, restrains the rights of the party to its own terms; and if he cannot recover by those terms, he cannot recover at all. If a person promise to pay, upon condition that the other do an act, performance must be shown, before any title accrues. If the declaration lays a promise by or to an intestate, proof of the acknowledgment of the debt by or to his personal representative will not maintain the writ. Why not, since it establishes the continued existence of the debt? The plain reason is, that the promise is a new one, by or to the administrator himself, upon the original consideration; and not a revival of the original promise. So, if a man promises to pay a preëxisting debt, barred by the statute, when he is able, or at a future day, his ability must be shown, or the time must be passed before the action can be maintained. Why? Because it rests on the new promise, and its terms must be complied with. We do not here speak of the form of alleging the promise in the declaration; upon which, perhaps, there has been a diversity of opinion and judgment; but of the fact itself, whether the promise ought to be laid in one way or another, as an absolute, or as a conditional promise; which may depend on the rules of pleading. This very point came before the twelve judges, in the case of Heyling *v.* Hastings, 1 Ld. Raym. 389, 421, in the time of Lord Holt. There, one of the points was, 'whether the acknowledgment of a debt within six years would amount to a new promise, to bring it out of the statute; and they were all of opinion that it would not, but that it was evidence of a promise.' Here, then, the judges manifestly contemplated the acknowledgment, not as a continuation of the old promise, but as evidence of a new promise; and that it is the new promise which takes the case out of the statute. Now, what is a new promise but a new contract; a contract to pay, upon a preëxisting consideration, which does not of itself bind the party to pay independently of the contract? So, in Boydell *v.* Drummond, 2 Camph. 157, Lord Ellenborough, with his characteristic precision, said: 'If a man acknowledges the existence of

admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*." [1]

a debt, barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived.' And it may be affirmed, that the general current of the English, as well as the American authorities, conforms to this view of the operation of an acknowledgment. In Jones *v.* Moore, 5 Binney, 573, Mr. Chief Justice Tilghman went into an elaborate examination of this very point; and came to the conclusion, from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a new promise; and he added, 'I cannot comprehend the meaning of reviving the old debt in any other manner, than by a new promise.' There is a class of cases, not yet adverted to, which materially illustrates the right and powers of partners, after the dissolution of the partnership, and bears directly on the point under consideration. In Hackley *v.* Patrick, 3 Johns. 536, it was said by the court, that 'after a dissolution of the partnership, the power of one party to bind the others wholly ceases. There is no reason why this acknowledgment of an account should bind his copartners, any more than his giving a promissory note, in the name of the firm, or any other act.' And it was therefore held, that the plaintiff must produce further evidence of the existence of an antecedent debt, before he could recover; even though the acknowledgment was by a partner authorized to settle all the accounts of the firm. This doctrine was again recognized by the same court, in Walden *v.* Sherburne, 15 Johns. 409, 424, although it was admitted, that in Wood *v.* Braddick, 1 Taunt. 104, a different decision had been had in England. If this doctrine be well founded, as we think it is, it furnishes a strong ground to question the efficacy of an acknowledgment to bind the partnership for any purpose. If it does not establish the existence of a debt against the partnership, why should it be evidence against it at all? If evidence, *aliunde*, of facts within the reach of the statute, as the existence of a debt, be necessary before the acknowledgment binds, is not this letting in all the mischiefs against which the statute intended to guard the parties; viz., the introduction of stale and dormant demands, of long standing, and of uncertain proof? If the acknowledgment, *per se*, does not bind the other partners, where is the propriety of admitting proof of an antecedent debt, extinguished by the statute as to them, to be revived without their consent? It seems difficult to find a satisfactory reason why an acknowledgment should raise a new promise, when the consideration, upon which alone it rests, as a legal obligation, is not coupled with it in such a shape as to bind the parties; that the parties are not bound by the admission of the *debt*, as a debt, but are bound by the acknowledgment of the debt, as a promise, upon extrinsic proof. The doctrine in 1 Taunt. 104, stands upon a clear, if it be a legal, ground; that, as to the things past, the partnership continues, and always must continue, notwithstanding the dissolution. That, however, is a matter which we are not prepared to admit, and constitutes the very ground now in controversy. The light in which we are disposed to consider this question is, that after a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. It is wholly immaterial, what is the consideration which is to raise such cause of action; whether it be a supposed preëxisting debt of the partnership, or any auxiliary consideration, which might prove beneficial to them. Unless adopted by them, they are not bound by it. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to create a new cause of action; to revive a debt which is extinct; and thus to give an action, which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is, then, in its essence, the creation of a new right, and not the enforcement of an old one. We think, that the power to create such a right does not exist after a dissolution of the partnership in any partner."

It is to be observed, that in this opinion the court were not unanimous; and that the learned judge declares that the majority were "principally, though not exclusively, influenced by the course of decisions in Kentucky," where the action arose. A similar view of the question has been taken by the courts of *Pennsylvania*, both before and since the decision of Bell *v.* Morrison; Levy *v.* Cadet, 17 Serg. & Raw. 127; Searight *v.* Craighead, 1 Penn.

[1] Story on Agency, § 134–137.

They are of the nature of original evidence, and not of hearsay; the representation or statement of the agent, in such cases, being the ultimate fact to be proved, and not an admission of some other fact.[1] But, it must be remembered, that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all; and therefore, it is not neces-

135; and it has been followed by the Courts of *Indiana*. Yandes *v.* Lefavour, 2 Blackf. 371. Other judges have viewed such admissions not as going to create a new contract, but as mere acknowledgments of the continued existence of a debt previously created, thereby repelling the presumption of payment, resulting from lapse of time, and thus taking the case out of the operation of the statute of limitations. To this effect are White *v.* Hale, 3 Pick. 291; Martin *v.* Root, 17 Mass. 222, 227; Cady *v.* Shepherd, 11 Pick. 400; Vinal *v.* Burrill, 16 Pick. 401; Bridge *v.* Gray, 14 Pick. 61; Patterson *v.* Choate, 7 Wend. 441; Hopkins *v.* Banks, 7 Cowen, 650; Austin *v.* Bostwick, 9 Conn. 496; Greenleaf *v.* Quincy, 3 Fairf. 11; McIntire *v.* Oliver, 2 Hawks, 209; Ward *v.* Howell, 5 Har. & Johns. 60; Fisher *v.* Tucker, 1 McCord, Ch. R. 175; Wheelock *v.* Doolittle, 3 Wash. Vt. R. 440. In some of the cases a distinction is strongly taken between admissions which go to establish the original existence of the debt, and those which only show that it has never been paid, but still remains in its original force; and it is held, that before the admission of a partner, made after the dissolution, can be received, the debt must first be proved, *aliunde*. See Owings *v.* Low, 5 Gill. & Johns. 134, 144; Smith *v.* Ludlow, 6 Johns. 267; Patterson *v.* Choate, 7 Wend. 441, 445; Ward *v.* Howell, Fisher *v.* Tucker, Hopkins *v.* Banks, Vinal *v.* Burrill, *ubi supra;* Shelton *v.* Cocke, 3 Munf. 197. In Austin *v.* Bostwick, the partner making the admission had become insolvent; but this was held to make no difference, as to the admissibility of his declaration. A distinction has always been taken between admissions by a partner after the dissolution, but before the statute of limitations has attached to the debt, and those made afterwards; the former being held receivable, and the latter not. Fisher *v.* Tucker, 1 McCord, Ch. R. 175. And see Scales *v.* Jacob, 3 Bing. 638; Gardner *v.* McMahon, 3 Ad. & El. 566, N. S. See further on the general doctrine, *post*, § 174, note. In all cases, where the admission, whether of a partner or other joint contractor, is received against his companions, it must have been made in good faith. Coit *v.* Tracy, 8 Conn. 268. See also Chardon *v.* Oliphant, 2 Const. R. 685; cited in Collyer on Partn. 236, n. (2d Am. ed.). It may not be useless to observe, that Bell *v.* Morrison was cited and distinguished, partly as founded on the local law of Kentucky, in Parker *v.* Merrill, 6 Greenl. 47, 48; and in Greenleaf *v.* Quincy, 3 Fairf. 11; and that it was not cited in the cases of Patterson *v.* Choate, Austin *v.* Bostwick, Cady *v.* Shepherd, Vinal *v.* Burrill, and Yandes *v.* Lefavour, though these were decided subsequent to its publication. [* Partners, after the dissolution of the partnership, and aside from any agency in settling the business, are perhaps fairly to be regarded in the light of ordinary joint contractors; and if both are parties to the action, the declarations of both, in regard to the common indebtedness, are admissible. But where only one, or any number less than the whole, are parties, the mere declarations and admissions of a co-contractor, not a party, and unaccompanied by any act in furtherance of the common duty or obligation, are not ordinarily held admissible evidence against the others, but the cases are conflicting upon this point. Where payments were made by a co-contractor, it was held sufficient to remove the bar of the statute of limitations, even when such payments were made by the principal debtor, and the suit was against the surety alone Joslyn *v.* Smith, 13 Vt. Rep. 353.]

[1] 1 Phil. Evid. 381.

sary to call the agent himself to prove it;[1] but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it;[2] and it follows, that where his right to act in the particular matter in question has ceased, the principal can no longer be affected by his declarations, they being mere hearsay.[3] [* Then the declaration of the driver of a car, after the car had stopped, assigning the reason why he did not stop the car, and thus prevent the injury to plaintiff, while crossing the street, that he could not stop the car because the brakes were out of order, being made after the injury was inflicted and the transaction terminated, is not admissible against the company in whose employ such driver was, it being mere hearsay.[4]]

[1] Doe *v.* Hawkins, 2 Ad. & El. 212, N. S.; Saumiere *v.* Wode, 3 Harrison, R. 299.

[2] Garth *v.* Howard, 8 Bing. 451; Fairlie *v.* Hastings, 10 Ves. 123, 127; The Mechanics Bank of Alexandria *v.* The Bank of Columbia, 5 Wheat. 336, 337; Langhorn *v.* Allnutt, 4 Taunt. 519, per Gibbs, J.; Hannay *v.* Stewart, 6 Watts, 487, 489; Stockton *v.* Demuth, 8 Watts, 39; Story on Agency, 126, 129, note (2); Woods *v.* Banks, 14 N. Hamp. 101; Cooley *v.* Norton, 4 Cush. 93. In a case of libel for damages, occasioned by collision of ships, it was held that the admission of the master of the ship proceeded against might well be articulated in the libel. The Manchester, 1 W. Rob. 62. But it does not appear, in the report, whether the admission was made at the time of the occurrence or not. [The declarations of the master concerning the contract of the steamer, are admissible in a suit against the owners. The Enterprise, 2 Curtis, C. C. 317.] The question has been discussed, whether there is any substantial distinction between a written entry and an oral declaration by an agent, of the fact of his having received a particular rent for his employer. The case was one of a sub-agent, employed by a steward to collect rents, and the declaration offered in evidence was, "M. N. paid me the half-year's rent, and here it is." Its admissibility was argued, both as a declaration against interest, and also as made in the course of discharging a duty; and the court inclined to admit it, but took time for advisement. Fursdon *v.* Clogg, 10 M. & W. 572; *infra*, § 119. See also Regina *v.* Hall, 8 C. & P. 358; Allen *v.* Denstone, Id. 760; Lawrence *v.* Thatcher, 6 C. & P. 669; Bank of Munroe *v.* Field, 2 Hill, R. 445; Doe *v.* Hawkins, 2 Ad. & El. 212, N. S. Whether the declaration or admission of the agent made in regard to a transaction already past, but while his agency for similar objects still continues, will bind the principal, does not appear to have been expressly decided; but the weight of authority is in the negative. See the observations of Tindal, C. J., in Garth *v.* Howard, *supra*. See also Mortimer *v.* McCallan, 6 M. & W. 58, 69, 73; Haven *v.* Brown, 7 Greenl. 421, 424; Thalhimer *v.* Brinkerhoff, 4 Wend. 394; City Bank of Baltimore *v.* Bateman, 7 Har. & Johns. 104; Stewartson *v.* Watts, 8 Watts, 392; Betham *v.* Benson, Gow. R. 45, 48, n.; Baring *v.* Clark, 19 Pick. 220; Parker *v.* Green, 8 Met. 142, 143; Plumer *v.* Briscoe, 12 Jur. 351; 11 Ad. & El. 46, N. S. [Burnham *v.* Ellis, 39 Maine, 319]. Where the fraudulent representations of the vendor are set up in defence of an action for the price of land, the defence may be maintained by proof of such representations by the vendor's agent who effected the sale; but it is not competent to inquire as to his motives or inducements for making them. Hammatt *v.* Emerson, 14 Shepl. 308.

[3] Reynolds *v.* Rowley, 3 Rob. Louis. R. 201; Stiles *v.* The Western Railroad Co. 8 Met. 44. [The declarations of a son while employed in performing a contract for his services, made by him as agent for his father, are not admissible in evidence to prove the terms of the contract. Corbin *v.* Adams, 6 Cush. 93. See Printup *v.* Mitchell, 17 Geo. 558; Covington, &c. R. R. Co. *v.* Ingles, 15 B. Mon. 637; Tuttle *v.* Brown, 4 Gray, 457, 460.]

[4] [* Luby *v.* The Hudson River Railroad Co., 17 New York Ct. App. 131. But in Insurance Company *v.* Woodruff,

§ 114. It is to be observed, that the rule admitting the declarations of the agent is founded upon the legal identity of the agent and the principal; and therefore they bind only so far as there is authority to make them.[1] Where this authority is derived by implication from authority to do a certain act, the declarations of the agent, to be admissible, must be part of the *res gestæ*.[2] An authority to make an admission is not necessarily to be implied from an authority previously given in respect to the thing to which the admission relates.[3] Thus it has been held,[4] that the declarations of the bailee of a bond, intrusted to him by the defendant, were not admissible in proof of the execution of the bond by the bailor, nor of any other agreements between the plaintiff and defendant respecting the subject. The *res gestæ* consisted in the fact of the bailment, and its nature; and on these points only were the declarations of the agent identified with those of the principal. As to any other facts in the knowledge of the agent, he must be called to testify, like any other witness.[5]

[* § 114*a*. Considerable nicety of discrimination will be found in some of the cases, in regard to the extent to which public corporate companies, engaged in the transportation of freight and passengers, are responsible for the declarations and admissions of their agents and employees, through whose instrumentality their whole business is transacted. In general, such companies are not responsible for the declarations or admissions of any of their servants beyond the immediate sphere of their agency, and during the transaction of

2 Dutcher, 541, it was held, two judges dissenting, that the declarations and admissions of the company's agent, authorized to receive premiums and deliver policies, respecting the delivery of a policy, are admissible, and bind the company in an action upon the policy, although made after the loss. But this case is certainly not maintainable upon general principles.]

[1] [Thus where the cashier of a bank, being inquired of by the surety upon a note, said, that the note had been paid, and thereupon the surety released property which he held to indemnify himself for any liability on the note, when in fact the note had not been paid, it was held that these statements of the cashier were not within his authority, and were inadmissible against the bank. Bank *v.* Steward, 37 Maine, 519. See also Runk *v.* Ten Eyck, 4 Zabr. 756.]

[2] [By being part of the *res gestæ*, is meant that such declarations are evidence only where they relate to the identical contract that is the matter in controversy. Dorne *v.* Southwork Man. Co. 11 Cush. 205; Fogg *v.* Child, 13 Barb. 246.]

[3] Phil. & Am. on Evid. 402. As to the evidence of authority inferred from circumstances, see Story on Agency, § 87–106, 259, 260.

[4] Fairlie *v.* Hastings, 10 Ves. 123.

[5] Masters *v.* Abraham, 1 Esp. 375 (Day's ed.), and note (1); Story on Agency, § 135–143; Johnston *v.* Ward, 6 Esp. 47. [But the declarations of a professed agent, however publicly made, and although accompanied by acts, as by an actual signature of the name of the principal, are not competent evidence in favor of third persons to prove the authority of the agent, when questioned by the principal. Mussey *v.* Beecher, 3 Cush. 517; Brigham *v.* Peters, 1 Gray, 145; Trustees, &c. *v.* Bledsoe, 5 Ind. 133.]

the business in which they are employed. Thus the declarations of the conductor of a railway train, as to the mode in which an accident occurred, made after its occurrence;[1] or those of an engineer, made under similar circumstances,[2] are not admissible. But it has sometimes been held, in such cases, that the admissions of the president of the company, or of its general agent, might be received without regard to their forming part of any particular act of agency; it being assumed that all his declarations about the business of the company came within the range of his agency,[3] but this seems questionable. But in an action against a railway company, for the loss of baggage, the declarations of the baggage-master, conductor, or station agent, as to the manner of the loss, made in answer to inquiries on behalf of the owner, the next morning after the loss, were held admissible, and as coming within the scope of the agency and during its continuance.[4]]

§ 115. It is upon the same ground that certain *entries, made by third persons*, are treated as original evidence. Entries by third persons are divisible into two classes: *first*, those which are made in the discharge of official duty, and in the course of professional employment; and, *secondly*, mere private entries. Of these latter we shall hereafter speak. In regard to the former class, the entry, to be admissible, must be one which it was the person's duty to make, or which belonged to the transaction as part thereof, or which was its usual and proper concomitant.[5] It must speak only to that which it was his duty or business to do; and not to extraneous and foreign circumstances.[6] The party making it must also have had competent knowledge of the fact, or it must have been part of his duty to have known it; there must have been no particular motive to enter that transaction falsely, more than any

[1] [* Griffin *v.* Montgomery, &c., R. R. Co., 26 Geo. R. 111.

[2] Robinson *v.* Fitchburgh R. R. Co., 7 Gray, 92.

[3] Charleston, &c. R. R. Co. *v.* Blake, 12 Rich. Law, 631.

[4] Morse *v.* Conn. River R. R. Co., 6 Gray, 450.]

[5] The doctrine on the subject of contemporaneous entries is briefly but lucidly expounded by Mr. Justice Parke, in Doe d. Patteshall *v.* Turford, 3 B. & Ad. 890. See also Poole *v.* Dicas, 1 Bing. N. C. 654; Pickering *v.* Bp. of Ely, 2 Y. & C. 249; Regina *v.* Worth, 4 Ad. & El. N. S. 132. [The book of minutes of a railroad company are admissible to prove what took place at a meeting of the stockholders of the company. Black *v.* Lamb, 1 Beasley, 108.]

[6] Chambers *v.* Bernasconi, 1 C. & J. 451; 1 Tyrwh. 355, S. C.; 1 Cr. Mees. & R. 317, S. C. In error. This limitation has not been applied to private entries against the interest of the party. Thus, where the payee of a note against A., B., & C., indorsed a partial payment as received from B., adding that the whole sum was originally advanced to A. only; in an action by B. against A., to recover

other; and the entry must have been made at or about the time of the transaction recorded. In such cases, the entry itself is admitted as original evidence, being part of the *res gestæ*. The general interest of the party, in making the entry, to show that he has done his official duty, has nothing to do with the question of its admissibility;[1] nor is it material whether he was or was not competent to testify personally in the case.[2] If he is living, and competent to testify, it is deemed necessary to produce him.[3] But if he is called as a witness to the fact, the entry of it is not thereby excluded. It is still an independent and original circumstance, to be weighed with others; whether it goes to corroborate or to impeach the testimony of the witness who made it. If the party who made the entry is dead, or, being called, has no recollection of the transaction, but testifies to his uniform practice to make all his entries truly, and at the time of each transaction, and has no doubt of the accuracy of the one in question; the entry, unimpeached, is considered sufficient, as original evidence, and not hearsay, to establish the fact in question.[4]

§ 116. One of the earliest reported cases, illustrative of this subject, was an action of *assumpsit*, for beer sold and delivered, the plaintiff being a brewer. The evidence given to charge the defendant was, that, in the usual course of the plaintiff's business, the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered during the day, which he entered in a book kept for that purpose, to which the draymen

the money thus paid for his use, the indorsement made by the payee, who was dead, was held admissible to prove not only the payment of the money, but the other fact as to the advancement to A. Davies *v.* Humphreys, 6 Mees. & Welsb. 153; Marks *v.* Lahee, 3 Bing. N. C. 408. And in a subsequent case it was held, that where an entry is admitted as being against the interest of the party making it, it carries with it the whole statement; but that if the entry is made merely in the course of a man's duty, then it does not go beyond those matters which it was his duty to enter. Percival *v.* Nanson, 7 Eng. Law & Eq. Rep. 538; 21 Law J. Rep. Exch. 1, N. S.; 7 Exch. Rep. 1, S. C.

[1] Per Tindal, C. J., in Poole *v.* Dicas, 1 Bing. N. C. 654; Dixon *v.* Cooper, 3 Wils. 40; Benjamin *v.* Porteous, 2 H. Bl. 590; Williams *v.* Geaves, 8 C. & P. 592; Augusta *v.* Windsor, 1 Appleton, R. 317. And see Doe *v.* Wittcomb, 15 Jur. 778. [* But if the entry was not in the course of the duty of the person, and not against his interest, it is not receivable. Webster *v.* Webster, 1 F. & F. 401.]

[2] Gleadow *v.* Atkin, 1 Cromp. & Mees. 423, 424; 3 Tyrw. 302, 303, S. C.; Short *v.* Lee, 2 Jac. & Walk. 489.

[3] Nichols *v.* Webb, 8 Wheat. 326; Welch *v.* Barrett, 15 Mass. 380; Wilbur *v.* Selden, 6 Cowen, 162; Farmers Bank *v.* Whitehill, 16 S. & R. 89, 90; Stokes *v.* Stokes, 6 Martin, N. S. 351; Herring *v.* Levy, 4 Martin, N. S. 383; Brewster *v.* Doan, 2 Hill, N. Y. Rep. 537; Davis *v.* Fuller, 12 Verm. 178.

[4] Bank of Monroe *v.* Culver, 2 Hill, 531; New Haven County Bank *v.* Mitchell, 15 Conn. R. 206; Bank of Tennessee *v.* Cowen, 7 Humph. 70. See *infra*, §§ 436, 437, note (4). [The protest of a notary-public, authenticated in the usual

set their hands; and this entry, with proof of the drayman's handwriting, and of his death, was held sufficient to maintain the action.[1] In another case,[2] before Lord Kenyon, which was an action of trover for a watch, where the question was, whether the defendant had delivered it to a third person, as the plaintiff had directed; an entry of the fact by the defendant himself in his shop-book, kept for that purpose, with proof that such was the usual mode, was held admissible in evidence. One of the shopmen had sworn to the delivery, and his entry was offered to corroborate his testimony; but it was admitted as competent original evidence in the cause. So, in another case, where the question was upon the precise day of a person's birth, the account-book of the surgeon who attended his mother on that occasion, and in which his professional services and fees were charged, was held admissible, in proof of the day of the birth.[3] So where the question was, whether a notice to quit had been served upon the tenant, the indorsement of service upon a copy of the notice by the attorney who served it, it being shown to be the course of business in his office to preserve copies of such notices, and to indorse the service thereon, was held admissible in proof of the fact of service.[4] Upon the

way by his signature and official seal, found among his papers after his death, is good *secondary* evidence. Porter *v.* Judson, 1 Gray, 175.] But upon a question of the infancy of a Jew, where the time of his circumcision, which by custom is on the eighth day after his birth, was proposed to be shown by an entry of the fact, made by a deceased Rabbi, whose duty it was to perform the office and to make the entry; the entry was held not receivable. Davis *v.* Lloyd, 1 Car. & Kir. 275. Perhaps because it was not made against the pecuniary interest of the Rabbi. See *infra*, § 147. [* The question involved in the preceding section is considerably discussed by a learned writer, and the cases carefully reviewed in a leading article, 3 Law Reg., N. S. 641.]

[1] Price *v.* Lord Torrington, 1 Salk. 285; 2 Ld. Raym. 873, S. C.; 1 Smith's Leading Cases, 139. But the courts are not disposed to carry the doctrine of this case any farther. 11 M. & W. 775, 776. Therefore, where the coals sold at a mine were reported daily by one of the workmen to the foreman, who, not being able to write, employed another person to enter the sales in a book; it was held, the foreman and the workman who reported the sale, both being dead, that the book was not admissible in evidence, in an action for the price of the coals. Brain *v.* Preece, 11 M. & W. 773; [* Lewis *v.* Kramer, 3 Md. 265.]

[2] Digby *v.* Stedman, 1 Esp. 328.

[3] Higham *v.* Ridgway, 10 East, 109. See also 2 Smith's Leading Cases, 183–197, note, and the comments of Bayley, B., and of Vaughan, B., on this case, in Gleadow *v.* Atkin, 1 Cromp. & Mees. 410, 423, 424, 427, and of Professor Parke, in the London Legal Observer for June, 1832, p. 229. It will be seen, in that case, that the fact of the surgeon's performance of the service charged was abundantly proved by other testimony in the cause; and that nothing remained but to prove the precise time of performance; a fact in which the surgeon had no sort of interest. But if it were not so, it is not perceived what difference it could have made, the principle of admissibility being the contemporaneous character of the entry, as part of the *res gestæ*. See also Herbert *v.* Tuckal, T. Raym. 84; Augusta *v.* Windsor, 1 Appleton, R. 317.

[4] Doe *v.* Turford, 3 Barn. & Ad. 890; Champneys *v.* Peck, 1 Stark. R. 326; Rex *v.* Cope, 7 C. & P. 720. [Where such an indorsement of service had been admitted to prove the fact of service of notice, the

same ground of the contemporaneous character of an entry made in the ordinary course of business, the books of the messenger of a bank, and of a notary-public, to prove a demand of payment from the maker, and notice to the indorser of a promissory note, have also been held admissible.[1] The letter-book of a merchant, party in the cause, is also admitted as *primâ facie* evidence of the contents of a letter addressed by him to the other party, after notice to such party to produce the original; it being the habit of merchants to keep such a book.[2] And, generally, contemporaneous entries, made by third persons, in their own books, in the ordinary course of business, the matter being within the peculiar knowledge of the party making the entry, and there being no apparent and particular motive to pervert the fact, are received as original evidence;[3] though the person who made the entry has no recollection of the fact at the time of testifying: provided he swears that he should not have made it, if it were not true.[4] The same principle has also been applied to receipts, and other acts contemporaneous with the payment, or fact attested.[5]

§ 117. The admission of the party's own *shop-books*, in proof of

person who made the service and the indorsement being dead, parol declarations of his, contradicting the indorsement, were held inadmissible. Stapylton *v.* Clough, 22 Eng. Law & Eq. R. 275.]

[1] Nichols *v.* Webb, 8 Wheat. 326; Welch *v.* Barrett, 15 Mass. R. 380; Poole *v.* Dicas, 1 Bing. N. C. 649; Halliday *v.* Martinett, 20 Johns. 168; Butler *v.* Wright, 2 Wend. 369; Hart *v.* Williams, Id. 513; Nichols *v.* Goldsmith, 7 Wend. 160; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; Sheldon *v.* Benham, 4 Hill, N. Y. R. 123. [In an action against an infant for money paid by the plaintiff to a third person at the infant's request, for articles furnished the infant by such third person, the defence of infancy being set up, the books of account and the testimony of such third person are admissible to show that the articles furnished the infant were necessaries. Swift *v.* Bennett, 10 Cush. 436, 439.]

[2] Pritt *v.* Fairclough, 3 Campb. 305; Hagedorn *v.* Reid, Id. 377. The letter-book is also evidence that the letters copied into it have been sent. But it is not evidence of any other letters in it, than those which the adverse party has been required to produce. Sturge *v.* Buchanan, 2 P. & D. 573; 10 Ad. & El. 598, S. C.

[3] Doe *v.* Turford, 3 B. & Ad. 890, per Parke, J.; Doe *v.* Robson, 15 East, 32; Goss *v.* Watlington, 3 Br. & B. 132; Middleton *v.* Melton, 10 B. & Cr. 317; Marks *v.* Lahee, 3 Bing. N. C. 408, 420, per Parke, J.; Poole *v.* Dicas, 1 Bing. N. C. 649, 653, 654; Dow *v.* Sawyer, 16 Shepl. 117. In Doe *v.* Vowles, 1 M. & Rob. 216, the tradesman's bill, which was rejected, was not contemporaneous with the fact done. Haddow *v.* Parry, 3 Taunt. 303; Whitnash *v.* George, 8 B. & Cr. 556; Barker *v.* Ray, 2 Russ. 63, 76; Patton *v.* Craig, 7 S. & R. 116, 126; Farmers Bank *v.* Whitehill, 16 S. & R. 89; Nourse *v.* McCay, 2 Rawle, 70; Clark *v.* Magruder, 2 H. & J. 77; Richardson *v.* Cary, 2 Rand. 87; Clark *v.* Wilmot, 1 Y. & Col. N. S. 53.

[4] Bunker *v.* Shed, 8 Met. 150.

[5] Sherman *v.* Crosby, 11 Johns. 70; Holladay *v.* Littlepage, 2 Munf. 316; Prather *v.* Johnson, 3 H. & J. 487; Sherman *v.* Atkins, 4 Pick. 283; Carroll *v.* Tyler, 2 H. & G. 54; Cluggage *v.* Swan, 4 Binn. 150, 154. But the letter of a third person, acknowledging the receipt of merchandise of the plaintiff, was rejected, in an action against the party, who had recommended him as trustworthy, in Longenecker *v.* Hyde, 6 Binn. 1.; and the receipts of living persons were rejected in Warner *v.* Price, 3 Wend. 397; Cutbush *v.* Gilbert, 4 S. & R. 551; Spargo *v.* Brown, 9 B. & C. 935. See *infra*, § 120.

the delivery of goods therein charged, the entries having been made by his clerk, stands upon the same principle which we are now considering. The books must have been kept for the purpose; and the entries must have been made contemporaneous with the delivery of the goods, and by the person whose duty it was, for the time being, to make them. In such cases the books are held admissible, as evidence of the delivery of the goods therein charged, where the nature of the subject is such as not to render better evidence attainable.[1]

§ 118. In the *United States*, this principle has been carried farther, and extended to *entries made by the party himself*, in his own shop-books.[2] Though this evidence has sometimes been said to be

[1] Pitman *v.* Maddox, 2 Salk. 690; Ld. Raym. 732, s. c.; Lefebure *v.* Worden, 2 Ves. 54, 55; Glynn *v.* The Bank of England, Id. 40; Sterret *v.* Bull, 1 Binn. 234. See also Tait on Evid. p. 276. An interval of one day, between the transaction and the entry of it in the book, has been deemed a valid objection to the admissibility of the book in evidence. Walter *v.* Bollman, 8 Watts, 544. But the law fixes no precise rule as to the moment when the entry ought to be made. It is enough if it be made "at or near the time of the transaction." Curren *v.* Crawford, 4 S. & R. 3, 5. Therefore, where the goods were delivered by a servant during the day, and the entries were made by the master at night, or on the following morning, from the memorandums made by the servant, it was held sufficient. Ingraham *v.* Bockius 9 S. & R. 285. But such entries, made later than the succeeding day, have been rejected. Cook *v.* Ashmead, 2 Miles, R. 268. Where daily memoranda were kept by workmen, but the entries were made by the employer sometimes on the day, sometimes every two or three days, and one or two at longer intervals, they were admitted. Morris *v.* Briggs, 3 Cush. 342. [See also Barker *v.* Haskell, 9 Cush. 218; Hall *v.* Glidden, 39 Maine, 445. But see Kent *v.* Garvin, 1 Gray, 148.] Whether entries transcribed from a slate, or card, into the book, are to be deemed original entries, is not universally agreed. In *Massachusetts*, they are admitted. Faxon *v.* Hollis, 13 Mass. 427; [Smith *v.* Sanford 12 Pick. 139; Barker *v.* Haskell, 9 Cush. 218.] In *Pennsylvania*, they were rejected, in Ogden *v.* Miller, 1 Browne, 147; but have since been admitted, where they were transcribed forthwith into the book; Ingraham *v.* Bockius, 9 S. & R. 285; Patton *v.* Ryan, 4 Rawle, 408; Jones *v.* Long, 3 Watts, 325; and not later, in the case of a mechanic's charges for his work, than the evening of the second day. Hartly *v.* Brooks, 6 Whart. 189. But where several intermediate days elapsed before they were thus transcribed, the entries have been rejected. Forsythe *v.* Norcross, 5 Watts, 432. But see Koch *v.* Howell, 6 Watts & Serg. 350. [Such entries are not written contracts, but the private memoranda of the party, becoming, with the aid of his suppletory oath, under an exception to the general rules, competent evidence of sale and delivery. Although competent and strong evidence as affecting the party offering them, yet they are not conclusive, but may be explained, and, as it would seem, may be shown to have been erroneous. Thus, in an action for goods sold and delivered, if the plaintiff, to prove his case, produces his books of account, in which the goods are charged to a third person; he may then be permitted to show by parol, that the goods were not sold to such third person, but were sold to the defendant, and were charged to such person at the defendant's request. James *v.* Spaulding, 4 Gray, 451.] [* It seems to have been questioned whether the docket, or book of accounts, kept by an attorney is competent evidence, in itself, of his right to recover for his services. Hale's Ex'rs *v.* Ard's Ex'rs, 12 Wright, Penn. St. ——; Briggs *v.* Georgia, 15 Vt. Rep. 61. And the party's cash-book of entries of money paid and received is not admissible as evidence of a particular payment. Maine *v.* Harper, 4 Allen, 115.]

[2] In the following states the admission of the party's own books, and his own entries, has been either expressly permitted, or recognized and regulated by statute; namely, *Vermont* (1 Tolman's Dig. 185); *Connecticut* (Rev. Code, 1849, tit. 1, § 216);

admitted contrary to the rules of the common law, yet in general its admission will be found in perfect harmony with those rules, the entry being admitted only where it was evidently contemporaneous with the fact, and part of the *res gestæ*. Being the act of the party himself, it is received with greater caution; but still it may be seen and weighed by the jury.[1]

Delaware (St. 25 Geo. II., Rev. Code, 1829, p. 89); *Maryland*, as to sums under ten pounds in a year (1 Dorsey's Laws of Maryland, 73, 203); *Virginia* (Stat. 1819, 1 Rev. Code, ch. 128, §§ 7, 8, 9); *North Carolina* (Stat. 1756, ch. 57, § 2, 1 Rev. Code, 1836, ch. 15); *South Carolina* (St. 1721, Sept. 20. See Statutes at Large, vol. 3, p. 799, Cooper's edit. 1 Bay, 43); *Tennessee* (Statutes of Tennessee, by Carruthers and Nicholson, p. 131). In *Louisiana* and in *Maryland* (except as above), entries made by the party himself are not admitted. Civil Code of Louisiana, Arts. 2244, 2245; Johnson *v.* Breedlove, 2 Martin, N. S. 508; Herring *v.* Levy, 4 Martin, N. S. 383; Cavelier *v.* Collins, 3 Martin, 188; Martinstein *v.* Creditors, 8 Rob. 6; Owings *v.* Henderson, 5 Gill & Johns. 124, 142. In all the other states they are admitted at common law, under various degrees of restriction. See Coggswell *v.* Dolliver, 2 Mass. 217; Poultney *v.* Ross, 1 Dall. 239; Lynch *v.* McHugo, 1 Bay, 33; Foster *v.* Sinkler, Id. 40; Slade *v.* Teasdale, 2 Bay, 173; Lamb *v.* Hart, Id. 362; Thomas *v.* Dyott, 1 Nott & McC. 186; Burnham *v.* Adams, 5 Verm. 313; Story on Confl. of Laws, 526, 527.

[1] The rules of the several states in regard to the admission of this evidence are not perfectly uniform; but in what is about to be stated, it is believed that they concur. Before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the court, and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded. If they appear manifestly erased and altered, in a material part, they will not be admitted until the alteration is explained. Churchman *v.* Smith, 6 Whart. 106. The form of keeping them, whether it be that of a journal or ledger, does not affect their admissibility, however it may go to their credit to the jury. Coggswell *v.* Dolliver, 2 Mass. 217; Prince *v.* Smith, 4 Mass. 455, 457; Faxon *v.* Hollis, 13 Mass. 427; Rodman *v.* Hoops, 1 Dall. 85; Lynch *v.* McHugo, 1 Bay, 33; Foster *v.* Sinkler, Id. 40; Slade *v.* Teasdale, 2 Bay, 173; Thomas *v.* Dyott, 1 Nott & McC. 186; Wilson *v.* Wilson, 1 Halst. 95; Swing *v.* Sparks, 2 Halst. 59; Jones *v.* DeKay, Pennington, R. 695; Cole *v.* Anderson, 3 Halst. 68; Mathes *v.* Robinson, 8 Met. 269. [Nor can the entries be invalidated by proof that several years previous to the date of the entries the party making the entries had kept two books of original entries, in which he charged the same articles at different prices. Gardner *v.* Way, 8 Gray, 189.] If the books appear free from fraudulent practices, and proper to be laid before the jury, the party himself is then required to make oath, in open court, that they are the books in which the accounts of his ordinary business transactions are usually kept; Frye *v.* Barker, 2 Pick. 65; Taylor *v.* Tucker, 1 Kelly, R. 233; and that the goods therein charged were actually sold and delivered to, and the services actually performed for the defendant. Dwinel *v.* Pottle, 1 Redingt. 167. [And where goods are delivered by one partner and the entries are made by another, each partner may testify to his part of the transaction, and the entries may then be admitted. Harwood *v.* Mulry, 8 Gray, 250.] An affidavit to an account, or bill of particulars, is not admissible. Wagoner *v.* Richmond, Wright, R. 173; unless made so by statute. Whether, if the party is abroad, or is unable to attend, the court will take his oath under a commission, is not pertectly clear. The opinion of Parker, C. J., in 2 Pick. 67, was against it; and so is Nicholson *v.* Withers, 2 McCord, 428; but in Spence *v.* Saunders, 1 Bay, 119, even his affidavit was deemed sufficient, upon a writ of inquiry, the defendant having suffered judgment by default. See also Douglas *v.* Hart, 4 McCord, 257; Furman *v.* Peay, 2 Bail. 394. He must also swear that the articles therein charged were actually delivered, and the labor and services actually performed; that the entries were made at or about the time of the transactions, and are the original entries thereof; and that the sums charged and claimed have not been paid. 3 Dane's Abr. ch. 81, art. 4, §§ 1, 2; Coggswell *v.* Dolliver, 2 Mass. 217; Ives *v.* Niles, 5 Watts, 324. If the party is dead, his books, though rendered of much less weight as evidence, may still be offered by the executor or administra-

§ 119. But, if the American rule of admitting the party's own entries in evidence for him, under the limitations mentioned be-

tor, he making oath that they came to his hands as the genuine and only books of account of the deceased; that, to the best of his knowledge and belief, the entries are original and contemporaneous with the fact, and the debt unpaid; with proof of the party's handwriting. Bentley *v.* Hollenback, Wright, R. 169; McLellan *v.* Crofton, 6 Greenl. 307; Prince *v.* Smith, 4 Mass. 455; Odell *v.* Culbert, 9 W. & S. 66. If the party has since become insane, the book may still be admitted in evidence, on proof of the fact, and that the entries are in his handwriting, with the suppletory oath of his guardian. And whether the degree of insanity, in the particular case, is such as to justify the admission of the book, is to be determined by the judge, in his discretion. Holbrook *v.* Gay, 6 Cush. 215. The book itself must be the registry of business actually done, and not of orders, executory contracts, and things to be done subsequent to the entry. Fairchild *v.* Dennison, 4 Watts, 258; Wilson *v.* Wilson, 1 Halst. 95; Bradley *v.* Goodyear, 1 Day, 104, 106; Terrill *v.* Beecher, 9 Conn. 344, 348, 349; and the entry must have been made for the purpose of charging the debtor with the debt; a mere memorandum, for any other purpose not being sufficient. Thus, an invoice-book, and the memorandums in the margin of a blank check-book, showing the date and tenor of the checks drawn and cut from the book, have been rejected. Cooper *v.* Morrell, 4 Yates, 341; Wilson *v.* Goodin, Wright, Rep. 219. But the time-book of a day-laborer, though kept in a tabular form, is admissible; the entries being made for the apparent purpose of charging the person for whom the work was done. Mathes *v.* Robinson, 8 Met. 269. [In an action by a laborer against his employer, the time-book of the employer, kept in a tabular form, in which the days the plaintiff worked are set down, is not admissible in evidence with the defendant's suppletory oath, to show that the plaintiff did not work on certain days; it being a book of credits and not of charges, and it not being competent to show that the plaintiff did not work on certain days by the defendant's omission to give credit for work on those days. Morse *v.* Potter, 4 Gray, 292.] If the book contains marks, or there be other evidence showing that the items have been transferred to a journal or ledger, these books also must be produced. Prince *v.* Swett, 2 Mass. 569. The entries, also, must be made contemporaneously with the fact entered, as has been already stated in regard to entries made by a clerk. *Supra*, § 117, and note (1). Entries thus made are not however received in all cases as satisfactory proof of the charges; but only as proof of things, which, from their nature, are not generally susceptible of better evidence. Watts *v.* Howard, 7 Met. 478. They are satisfactory proof of goods sold and delivered from a shop, and of labor and services personally performed. Case *v.* Potter, 8 Johns. 211; Vosburg *v.* Thayer, 12 Johns. 261; Wilmer *v.* Israel, 1 Browne, 257; Ducoign *v.* Schreppel, 1 Yates, 347; Spence *v.* Saunders, 1 Bay, 119; Charlton *v.* Lawry, Martin, N. Car. Rep. 26; Mitchell *v.* Clark, Id. 25; Easby *v.* Aiken, Cooke, R. 388; and, in some states, of small sums of money. Coggswell *v.* Dolliver, 2 Mass. 217; Prince *v.* Smith, 4 Mass. 455; 3 Dane's Abr. ch. 81, art. 4, §§ 1, 2; Craven *v.* Shaird, 2 Halst. 345. [Meals furnished to an employer and his servants, from day to day, are a proper subject of book-charge. Tremain *v.* Edwards, 7 Cush. 414.] The amount, in *Massachusetts* and *Maine*, is restricted to forty shillings. Dunn *v.* Whitney, 1 Fairf. 9; Burns *v.* Fay, 14 Pick. 8; Union Bank *v.* Knapp, 3 Pick. 109. [Nor is the rule changed because an auditor, at the hearing before him, examined the book as a voucher for a greater sum. Turner *v.* Twing, 9 Cush. 512.] While in *North Carolina* it is extended to any article or articles, the amount whereof shall not exceed the sum of sixty dollars. Stat. 1837, chap. 15, §§ 1, 5. [In *New Jersey* they are inadmissible to prove money paid or money lent. Inslee *v.* Prall, 3 Zabr. 457.] But they have been refused admission to prove the fact of advertising in a newspaper; Richards *v.* Howard, 2 Nott & McC. 474; Thomas *v.* Dyott, 1 Nott & McC. 186; of a charge of dockage of a vessel; Wilmer *v.* Israel, 1 Browne, 257; commissions on the sale of a vessel; Winsor *v.* Dilloway, 4 Met. 221; [an item in an account "seven gold watches, $308;" Bustin *v.* Rogers, 11 Cush. 346; to whom credit was originally given, delivery being admitted; Keith *v.* Kibbe, 10 Cush. 36; the consideration of a promissory note; Rindge *v.* Breck, 10 Cush. 43; see also Earle *v.* Sawyer, 6 Cush. 142; three months' service in one item; Henshaw *v.* Davis, 5 Cush. 145; money lost by an agent's negligence;

low, were not in accordance with the principles of the common law, yet it is in conformity with those of other systems of jurisprudence. In the administration of the Roman law, the production of a merchant's or tradesman's book of accounts, regularly and fairly kept in the usual manner, has been deemed presumptive evidence (*semiplena probatio*[1]) of the justice of his claim; and, in

Chase *v.* Spencer, 1 Williams, 412: articles temporarily borrowed; Scott *v.* Brigham, 1b. 561: building a fence; Towle *v.* Blake, 37 Maine, 208: any matter collateral to the issue of debt and credit between the parties; Batchelder *v.* Sanborn, 2 Foster, 325:] labor of servants; Wright *v.* Sharp, 1 Browne, 344: goods delivered to a third person; Kerr *v.* Love, 1 Wash. 172; Tenbrook *v.* Johnson, Coxe, 288; Townley *v.* Woolley, 1d. 377: [Webster *v.* Clark, 10 Foster, 215:] or to the party, if under a previous contract for their delivery at different periods; Lonergan *v.* Whitehead, 10 Watts, 249: general damages, or value; Swing *v.* Sparks, 2 Halst. 59; Terrill *v.* Beecher, 9 Conn. 348, 349; settlement of accounts; Prest *v.* Mercereau, 4 Halst. 268: money paid and not applied to the purpose directed; Bradley *v.* Goodyear, 1 Day, 104: a special agreement; Pritchard *v.* McOwen, 1 Nott & McC. 131, note; Dunn *v.* Whitney, 1 Fairf. 9; Green *v.* Pratt, 11 Conn. 205: or a delivery of goods under such agreement; Nickle *v.* Baldwin, 4 Watts & Serg. 290: an article omitted by mistake in a prior settlement; Punderson *v.* Shaw, Kirby, 150: the use and occupation of real estate, and the like; Beach *v.* Mills, 5 Conn. 493. See also Newton *v.* Higgins, 2 Verm. 366; Dunn *v.* Whitney, 1 Fairf. 9. But after the order to deliver goods to a third person is proved by competent evidence *aliunde*, the delivery itself may be proved by the books and supplementory oath of the plaintiff, in any case where such delivery to the defendant in person might be so proved. Mitchell *v.* Belknap, 10 Shepl. 475. The charges, moreover, must be specific and particular; a general charge for professional services, or for work and labor by a mechanic, without any specification but that of time, cannot be supported by this kind of evidence. Lynch *v.* Petrie, 1 Nott & McC. 130; Hughes *v.* Hampton, 2 Const. Rep. 476. And regularly the prices ought to be specified; in which case the entry is *primâ facie* evidence of the value. Hagaman *v.* Case, 1 South. 370; Ducoign *v.* Schreppel, 1 Yeates, 337. But whatever be the nature of the subject, the transaction, to be susceptible of this kind of proof, must have been directly between the original debtor and the creditor; the book not being admissible to establish a collateral fact. Mifflin *v.* Bingham, 1 Dall. 276, per McKean, C. J.; Kerr *v.* Love, 1 Wash. 172; Deas *v.* Darby, 1 Nott & McC. 436; Poulteney *v.* Ross, 1 Dall. 238. Though books, such as have been described, are admitted to be given in evidence, with the suppletory oath of the party, yet his testimony is still to be weighed by the jury, like that of any other witness in the cause, and his reputation for truth is equally open to be questioned. Kitchen *v.* Tyson, 2 Murph. 314; Elder *v.* Warfield, 7 Har. & Johns. 391. In some states, the books thus admitted are only those of shopkeepers, mechanics, and tradesmen; those of other persons, such as planters, scriveners, schoolmasters, &c., being rejected. Geter *v.* Martin, 2 Bay, 173; Pelzer *v.* Cranston, 2 McC. 328; Boyd *v.* Ladson, 4 McC. 76. The subject of the admission of the party's own entries, with his suppletory oath, in the several American states, is very elaborately and fully treated in Mr. Wallace's note to the American edition of Smith's Leading Cases, vol. 1, p. 142. [Where a party's books are admitted, their credit cannot be impeached by proof of the bad moral character of the party. Tomlinson *v.* Borst, 30 Barb. 42.] [* It seems to be settled that if the party rely upon the credits in his adversary's book, he must take such admission in connection with counter debits. Biglow *v.* Sanders, 22 Barb. N. Y. 147. But according to the English practice he is not precluded from introducing evidence to impeach the items upon the debtor side of the account, while he claims the benefit of those upon the credit side. Rose *v.* Savory, 2 Bing. N. C. 145. See also Moorehouse *v.* Newton, 3 De G. & Sm. 307.]

[1] This degree of proof is thus defined by Mascardus: "Non est ignorandum, probationem semiplenam eam esse, per quam rei gestæ *fides aliqua* fit judici; non tamen tanta ut jure debeat in pronunciandâ sententia eam sequi." De Prob. vol. 1, Quæst. 11, n. 1, 4.

such cases, the suppletory oath of the party (*juramentum suppletivum*) was admitted to make up the *plena probatio* necessary to a decree in his favor.[1] By the law of *France*, too, the books of merchants and tradesmen, regularly kept and written from day to day, without any blank, when the tradesman has the reputation of probity, constitute a semi-proof, and with his suppletory oath are received as full proof to establish his demand.[2] The same doctrine is familiar in the law of *Scotland*, by which the books of merchants and others, kept with a certain reasonable degree of regularity, satisfactory to the court, may be received in evidence, the party being allowed to give his own oath "in supplement" of such imperfect proof. It seems, however, that a course of dealing, or other "pregnant circumstances," must in general be first shown by evidence *aliunde*, before the proof can be regarded as amounting to the degree of *semiplena probatio*, to be rendered complete by the oath of the party.[3]

§ 120. Returning now to the admission of entries made by clerks and third persons, it may be remarked that in most, if not all the reported cases, the clerk or person who made the entries was *dead;* and the entries were received upon proof of his handwriting. But it is conceived that the fact of his death is not material to the admissibility of this kind of evidence. There are two classes of

[1] "Juramentum (suppletivum) defertur ubicunque actor habet pro se — aliquas conjecturas, per quas judex inducatur ad suspicionem vel ad opinandum pro parte actoris." Mascardus, De Prob. vol. 3, Concl. 1230, n. 17. The civilians, however they may differ as to the degree of credit to be given to books of account, concur in opinion that they are entitled to consideration at the discretion of the judge. They furnish, at least, the *conjectura* mentioned by Mascardus; and their admission in evidence, with the suppletory oath of the party, is thus defended by Paul Voet, De Statutis, § 5, cap. 2, n. 9. "An ut credatur libris rationem, seu registris uti loquuntur, mercatorum et artificum, licet probationibus testium non juventur? Respondeo, quamvis exemplo pernitiosum esse videatur, quemque sibi privata testatione, sive adnotatione facere debitorem. Quia tamen hæc est mercatorum cura et opera, ut debiti et crediti rationes diligenter conficiant. Etiam in eorum foro et causis, ex æquo et bono est judicandum. Insuper non admisso aliquo litium accelerandarum remedio, commerciorum ordo et usus evertitur. Nequi enim omnes præsenti pecunia merces sibi comparant, neque cujusque rei venditioni testes adhiberi, qui pretia mercium noverint, aut expedit, aut congruum est. No iniquum videbitur illud statutum, quo domesticis talibus instrumentis additur fides, modo aliquibus adminiculis juventur." See also Hertius, De Collisione Legum, § 4, n. 68; Strykius, tom. 7, De Semiplena Probat. Disp. 1, cap. 4, § 5; Menochius, De Presump. lib. 2, Presump. 57, n. 20, and lib. 3, Presump. 63, n. 12.

[2] 1 Pothier on Obl., Part iv. ch. 1, art. 2, § 4. By the Code Napoleon, merchant's books are required to be kept in a particular manner therein prescribed, and none others are admitted in evidence. Code de Commerce, Liv. 1, tit. 2. art. 8–12.

[3] Tait on Evidence, p. 273–277. This degree of proof is there defined as "not merely a suspicion, — but such evidence as produces a reasonable belief, though not complete evidence." See also Glassford on Evid. p. 550; Bell's Digest of Laws of Scotland, pp. 378, 898.

admissible entries, between which there is a clear distinction, in regard to the principle on which they are received in evidence. The one class consists of entries made against the interest of the party making them; and these derive their admissibility from this circumstance alone. It is, therefore, not material when they were made. The testimony of the party who made them would be the best evidence of the fact; but, if he is dead, the entry of the fact made by him in the ordinary course of his business, and against his interest, is received as secondary evidence in a controversy between third persons.[1] The other class of entries consists of those which constitute parts of a chain or combination of transactions between the parties, the proof of one raising a presumption that another has taken place. Here, the value of the entry, as evidence, lies in this, that it was *contemporaneous with the principal fact done*, forming a link in the chain of events, and being *part of the res gestæ*. It is not merely the declaration of the party, but it is a verbal contemporaneous act, belonging, not necessarily, indeed, but ordinarily and naturally to the principal thing. It is on this ground, that this latter class of entries is admitted; and therefore it can make no difference, as to their admissibility, whether the party who made them be living or dead, nor whether he was, or was not, interested in making them; his interest going only to affect the credibility or weight of the evidence when received.[2]

§ 121. The evidence of indebtment, afforded by the *indorsement* of the payment of interest, or a *partial payment* of the principal, on the back of a bond or other security, seems to fall within the principle we are now considering, more naturally than any other; though it is generally classed with entries made against the interest of the party. The main fact to be proved in the cases, where this evidence has been admitted, was the continued exis-

[1] Warren *v.* Greenville, 2 Str. 1129; Middleton *v.* Melton, 10 B. & C. 317; Thompson *v.* Stevens, 2 Nott & McC. 493; Chase *v.* Smith, 5 Verm. 556; Spiers *v.* Morris, 9 Bing. 687; Alston *v.* Taylor, 1 Hayw. 381, 395.

[2] This distinction was taken and clearly expounded by Mr. Justice Parke in Doe d. Patteshall *v.* Turford, 3 B. & Ad. 890; cited and approved in Poole *v.* Dicas, 1 Bing. N. C. 654; [Stapylton *v.* Clough, 22 Eng. Law & Eq. R. 275.] See also *supra*, §§ 115, 116; Cluggage *v.* Swan, 4 Binn. 154; Sherman *v.* Crosby, 11 Johns. 70; Holladay *v.* Littlepage, 2 Munf. 316; Prather *v.* Johnson, 3 H. & J. 487; Sherman *v.* Akins, 4 Pick. 283; Carroll *v.* Tyler, 2 H. & G. 54; James *v.* Wharton, 3 McLean, 492. In several cases, however, letters and receipts of third persons living, and within the reach of process, have been rejected. Longenecker *v.* Hyde, 6 Binn. 1; Spargo *v.* Brown, 9 B. & C. 935; Warner *v.* Price, 3 Wend. 397; Cutbush *v.* Gilbert, 4 S. & R. 551; [Reynolds *v.* Manning, 15 Met. 510.]

tence of the debt, notwithstanding the lapse of time since its creation was such as either to raise the presumption of payment, or to bring the case within the operation of the statute of limitations. This fact was sought to be proved by the acknowledgment of the debt by the debtor himself; and this acknowledgment was proved, by his having actually paid part of the money due. It is the usual, ordinary, and well-known course of business, that partial payments are forthwith indorsed on the back of the security, the indorsement thus becoming part of the *res gestæ*. Wherever, therefore, an indorsement is shown to have been made at the time it bears date (which will be inferred from its face, in the absence of opposing circumstances),[1] the presumption naturally arising is, that the money mentioned in it was paid at that time. If the date is at a period after the demand became stale, or affected by the statute of limitations, the interest of the creditor to fabricate it would be so strong, as to countervail the presumption of payment, and require the aid of some other proof; and the case would be the same, if the indorsement bore a date within that period, the instrument itself being otherwise subject to the bar arising from lapse of time.[2] Hence the inquiry, which is usually made in such cases, namely, whether the indorsement, when made, was against the interest of the party making it, that is, of the creditor; which, in other language, is only inquiring whether it was made while his remedy was not yet impaired by lapse of time. The time when the indorsement was made is a fact to be settled by the jury; and to this end the writing must be laid before them. If there is no evidence to the contrary, the presumption is, that the indorsement was made at the time it purports to bear date; and the burden of proving the date to be false lies on the other party.[3] If the indorsement does not purport to be made contemporaneously with the receipt of the money, it is inadmissible, as part of the *res gestæ*.

§ 122. This doctrine has been very much considered in the discussions which have repeatedly been had upon the case of

[1] Smith *v.* Battens, 1 M. & Rob. 341. See also Nichols *v.* Webb, 8 Wheat. 326; 12 S. & R. 49, 87; 16 S. & R. 89, 91.

[2] Turner *v.* Crisp, 2 Stra. 827; Rose *v.* Bryant, 2 Camph. 321; Glynn *v.* The Bank of England, 2 Ves. 38, 43. See also Whitney *v.* Bigelow, 4 Pick. 110; Rosboom *v.* Billington, 17 Johns. 182; Gibson *v.* Peebles, 2 McCord, 418.

[3] Per Taunton, J., in Smith *v.* Battens, 1 M. & Rob. 343. See also Hunt *v.* Massey, 5 B. & Adolph. 902; Baker *v.* Milburn, 2 Mees. & W. 853; Sinclair *v.* Baggaley, 4 Mees. & W. 312; Anderson *v.* Weston, 6 Bing. N. C. 296.

Searle v. *Barrington*.[1] In that case, the bond was given in 1697, and was not sued until after the death of the obligee, upon whose estate administration was granted in 1723. The obligor died in 1710; the obligee probably survived him, but it did not appear how long. To repel the presumption of payment, arising from lapse of time, the plaintiff offered in evidence two indorsements, made upon the bond by the obligee himself, bearing date in 1699, and in 1707, and purporting that the interest due at those respective dates had been then paid by the obligor. And it appears that other evidence was also offered, showing the time when the indorsements were actually made.[2] The indorsements, thus proved to have been made at the times when they purported to have been made, were, upon solemn argument, held admissible evidence, both by the judges in the Exchequer Chamber and by the House of Lords. The grounds of these decisions are not stated in any of the reports; but it may be presumed that the reasoning on the side of the prevailing party was approved, namely, that the indorsement being made at the time it purported to bear date, and being according to the usual and ordinary course of business in such cases, and which it was not for the interest of the obligee at that time to make, was entitled to be considered by the jury; and that from it, in the absence of opposing proof, the fact of actual payment of the interest might be inferred. This doctrine has been recognized and confirmed by subsequent decisions.[3]

[1] There were two successive actions on the same bond between these parties. The first is reported in 2 Stra. 826, 8 Mod. 278, and 2 Ld. Raym. 1370; and was tried before Pratt, C. J., who refused to admit the indorsement, and nonsuited the plaintiff; but on a motion to set the nonsuit aside, the three other judges were of opinion, that the evidence ought to have been left to the jury, the indorsement in such cases being according to the usual course of business, and perhaps in this case made with the privity of the obligor; but on another ground the motion was denied. Afterwards another action was brought, which was tried before Lord Raymond, C. J., who admitted the evidence of the indorsement; but to which the defendant filed a bill of exceptions. This judgment was affirmed on error in the Exchequer Chamber, and again in the House of Lords. See 2 Stra. 827; 3 Bro. P. C. 593. The first case is most fully reported in 8 Mod. 278.

[2] This fact was stated by Bayley, B., as the result of his own research. See 1 Cromp. & Mees. 421. So it was understood to be, and so stated, by Lord Hardwicke, in 2 Ves. 43. It may have constituted the "other circumstantial evidence," mentioned in Mr. Brown's report, 3 Bro. P. C. 594; which he literally transcribed from the case, as drawn up by Messrs. Lutwyche and Fazakerley, of counsel for the original plaintiff, for argument in the House of Lords. See a folio volume of original printed briefs, marked "Cases in Parliament, 1728 to 1731," p. 529, in the Law Library of Harvard University, in which this case is stated more at large than in any book of Reports. By Stat. 9 Geo. IV. c. 14, it is enacted, that no indorsement of partial payment, made by or on behalf of the creditor, shall be deemed sufficient proof to take the case out of the statute of limitations. The same enactment is found in the laws of some of the United States.

[3] Bosworth *v.* Cotchett, Dom. Proc. May 6, 1824; Phil. & Am. on Evid. 348;

§ 123. Thus, we have seen that there are *four classes of declarations*, which, though usually treated under the head of hearsay, are in truth *original evidence;* the *first* class consisting of cases where the *fact*, that the declaration was made, and not its truth or falsity, is the point in question; the *second*, including expressions of bodily or mental feelings, where the existence or nature of such feelings is the subject of inquiry; the *third*, consisting of cases of pedigree, and including the declarations of those nearly related to the party whose pedigree is in question; and the *fourth*, embracing all other cases where the declaration offered in evidence may be regarded as part of the *res gestæ*. All these classes are involved in the principle of the last; and have been separately treated, merely for the sake of greater distinctness.

§ 124. Subject to these qualifications and seeming exceptions, the *general rule* of law *rejects all hearsay reports* of transactions, whether verbal or written, given by persons not produced as witnesses.[1] The principle of this rule is, that such evidence requires credit to be given to a statement, made by a person who is not subjected to the ordinary tests, enjoined by the law, for ascertaining the correctness and completeness of his testimony; namely, that oral testimony should be delivered in the presence of the court or a magistrate, under the moral and legal sanctions of an oath, and where the moral and intellectual character, the motives and deportment of the witness can be examined, and his capacity and opportunities for observation, and his memory, can be tested by a cross-examination. Such evidence, moreover, as to oral declarations, is very liable to be fallacious, and its value is, therefore, greatly lessened by the probability that the declaration was imperfectly heard, or was misunderstood, or is not accurately remembered, or has been perverted. It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury, in which something more than the testimony of one witness is necessary, in order to a con-

Gleadow *v.* Atkin, 1 Cromp. & Mees. 410; Anderson *v.* Weston, 6 Bing. N. C. 296; 2 Smith's Leading Cases, 197; Addams *v.* Seitzinger, 1 Watts & Serg. 243. [* But the admission of a payment at the time a note fell due, although signed by both parties and indorsed upon the note at a period within the statute of limitations will not have the effect to remove the bar, the effect being the same only as if made at the time the admitted payment was made. Hayes *v.* Morse, 8 Verm. R. 316.]

[1] "If," says Mr. Justice Buller, "the first speech were without oath, another oath, that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice." Bull. N. P. 294; [Lund *v.* Tyngsborough, 9 Cush. 36, 40.]

viction; for where the declaration or statement is sworn to have been made when no third person was present, or by a person who is since dead, it is hardly possible to punish the witness, even if his testimony is an entire fabrication.[1] To these reasons may be added considerations of public interest and convenience for rejecting hearsay evidence. The greatly increased expense, and the vexation which the adverse party must incur, in order to rebut or explain it, the vast consumption of public time thereby occasioned, the multiplication of collateral issues, for decision by the jury, and the danger of losing sight of the main question, and of the justice of the case, if this sort of proof were admitted, are considerations of too grave a character to be overlooked by the court or the legislature, in determining the question of changing the rule.[2]

§ 125. The rule applies, though the declaration offered in evidence was made upon oath, and in the course of a judicial proceeding, if the *litigating parties are not the same*. Thus, the deposition of a pauper, as to the place of his settlement, taken *ex parte* before a magistrate, was rejected, though the pauper himself had since absconded, and was not to be found.[3] The rule also applies, notwithstanding no better evidence is to be found, and though it is certain that, if the declaration offered is rejected, no other evidence can possibly be obtained; as, for example, if it purports to be the declaration of the only eye-witness of the transaction, and he is since dead.[4]

§ 126. An *exception* to this rule has been contended for in the admission of the *declarations of a deceased attesting witness* to a deed or will, in disparagement of the evidence afforded by his

[1] Phil. & Am. on Evid. 217; 1 Phil. Evid. 205, 206. See, as to the liability of words to misconstruction, the remarks of Mr. Justice Foster, in his Discourse on High Treason, ch. 1, § 7. The rule excluding hearsay is not of great antiquity. One of the earliest cases in which it was administered, was that of Sampson *v.* Yardley and Tothill, 2 Keb. 223, pl. 74, 19 Car. 2.

[2] Mima Queen *v.* Hepburn, 7 Cranch, 290, 296, per Marshall, C. J.

[3] Rex *v.* Nuneham Courtney, 1 East, 373; Rex *v.* Ferry Frystone, 2 East, 54; Rex *v.* Eriswell, 3 T. R. 707–725, per Lord Kenyon, C. J., and Grose, J., whose opinions are approved and adopted in Mima Queen *v.* Hepburn, 7 Cranch, 296.

[4] Phil. & Am. on Evid. 220, 221; 1 Phil. Evid. 209, 210. In Scotland the rule is otherwise; evidence on the relation of others being admitted, where the relator is since dead, and would, if living, have been a competent witness. And if the relation has been handed down to the witness at second-hand, and through several successive relators, each only stating what he received from an intermediate relator, it is still admissible, if the original and intermediate relators are all dead, and would have been competent witnesses if living. Tait on Evid. pp. 430, 431. But the reason for receiving hearsay evidence, in cases where, as is generally the case in Scotland, the judges determine upon the facts in dispute, as well as upon the law, is stated and vindicated by Sir James Mansfield, in the Berkley Peerage case, 4 Campb. 415.

signature. This exception has been asserted, on two grounds; *first*, that as the party, offering the deed, used the declaration of the witness, evidenced by his signature, to prove the execution, the other party might well be permitted to use any other declaration of the same witness, to disprove it; — and *secondly*, that such declaration was in the nature of a substitute for the loss of the benefit of a cross-examination of the attesting witness; by which, either the fact confessed would have been proved, or the witness might have been contradicted, and his credit impeached. Both these grounds were fully considered in a case in the exchequer, and were overruled by the court; the first, because the evidence of the handwriting, in the attestation, is not used as a declaration by the witness, but is offered merely to show the fact that he put his name there, in the manner in which attestations are usually placed to genuine signatures; and the second, chiefly because of the mischiefs which would ensue, if the general rule excluding hearsay were thus broken in upon. For the security of solemn instruments would thereby become much impaired, and the rights of parties under them would be liable to be affected at remote periods, by loose declarations of the attesting witnesses, which could neither be explained nor contradicted by the testimony of the witnesses themselves. In admitting such declarations, too, there would be no reciprocity; for though the party impeaching the instrument would thereby have an equivalent for the loss of his power of cross-examination of the living witness, the other party would have none for the loss of his power of re-examination.[1]

[1] Stobart *v.* Dryden, 1 Mees. & W. 615.

CHAPTER VI.

OF MATTERS OF PUBLIC AND GENERAL INTEREST.

§ 127. HAVING thus illustrated the nature of hearsay evidence, and shown the reasons on which it is generally excluded, we are now to consider the *cases in which this rule has been relaxed*, and hearsay admitted. The exceptions, thus allowed, will be found to embrace most of the points of inconvenience, resulting from a stern and universal application of the rule, and to remove the principal objections which have been urged against it. These exceptions may be conveniently divided into four classes: — *first*, those relating to matters of public and general interest; — *secondly*, those relating to ancient possessions; — *thirdly*, declarations against interest; — *fourthly*, dying declarations, and some others of a miscellaneous nature; and in this order it is proposed to consider them. It is, however, to be observed, that these exceptions are allowed only on the ground of the absence of better evidence, and from the nature and necessity of the case.

§ 128. And *first*, as to matters of *public and general interest*. The terms, *public* and *general*, are sometimes used as synonymous, meaning merely that which concerns a multitude of per-

sons.[1] But in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term, *public*, being strictly applied to that which concerns all the citizens, and every member of the State; and the term, *general*, being referred to a lesser, though still a large portion of the community. In matters of public interest, all persons must be presumed conversant, on the principle, that individuals are presumed to be conversant in their own affairs; and, as common rights are naturally talked of in the community, what is thus dropped in conversation may be presumed to be true.[2] It is the prevailing current of assertion that is resorted to as evidence, for it is to this that every member of the community is supposed to be privy, and to contribute his share. Evidence of common reputation is, therefore, received in regard to public facts (a claim of highway, or a right of ferry, for example), on ground somewhat similar to that on which public documents, not judicial, are admitted, namely, the interest which all have in their truth, and the consequent probability that they are true.[3] In these matters, in which all are concerned, reputation from any one appears to be receivable; but of course it is almost worthless, unless it comes from persons who are shown to have some means of knowledge, such as, in the case of a highway, by living in the neighborhood; but the want of such proof of their connection with the subject in question affects the value only, and not the admissibility of the evidence. On the contrary, where the fact in controversy is one in which all the members of the community have not an interest, but those only who live in a particular district, or adventure in a particular enterprise, or the like, hearsay from persons wholly unconnected with the place or business would not only be of no value, but altogether inadmissible.[4] [5]

[1] Weeks *v.* Sparke, 1 M. & S. 690, per Bayley, J.

[2] Morewood *v.* Wood, 14 East, 329, n., per Ld. Kenyon; Weeks *v.* Sparke, 1 M. & S. 686, per Ld. Ellenborough; The Berkley Peerage case, 4 Campb. 416, per Mansfield, C. J.

[3] 1 Stark. Evid. 195; Price *v.* Currell, 6 M. & W. 234. And see Noyes *v.* White, 19 Conn. 250.

[4] Crease *v.* Barrett, 1 Cromp. Mees. & Rose. 929, per Parke, B. By the Roman Law, reputation or common fame seems to have been admissible in evidence, in all cases; but it was not generally deemed sufficient proof, and, in some cases, not even *semiplena probatio*, unless corroborated; *nisi aliis adminiculis adjuvetur*. Mascardus, De Prob. vol. 1, Concl. 171, n. 1; Concl. 183, n. 2; Concl. 547, n. 149. It was held sufficient *plena probatio*, wherever, from the nature of the case, better

[5] [Persons living out of such district are not presumed to know such fact, and can-not therefore be affected by proof of it. Dunbar *v.* Mulry, 8 Gray, 163.]

§ 129. Thus, in an action of trespass *quare clausum fregit*, where the defendant pleaded in bar a prescriptive right of common in the *locus in quo*, and the plaintiff replied, prescribing the right of his messuage to use the same ground for tillage with corn, until the harvest was ended, traversing the defendant's prescription; it appearing that many persons beside the defendant had a right of common there, evidence of reputation, as to the plaintiff's right, was held admissible, provided it were derived from persons conversant with the neighborhood.[1] But where the question was, whether the city of Chester anciently formed part of the county Palatine, an ancient document, purporting to be a decree of certain law officers and dignitaries of the crown, not having authority as a court, was held inadmissible evidence on the ground of reputation, they having, from their situations, no peculiar knowledge of the fact.[2] And, on the other hand, where the question was, whether Nottingham Castle was within the hundred of Broxtowe, certain ancient orders, made by the justices at the quarter sessions for the county, in which the castle was described as being within that hundred, were held admissible evidence of reputation; the justices, though not proved to be residents within the county or hundred, being presumed, from the nature and character of their offices alone, to have sufficient acquaintance with the subject to which their declarations related.[3] Thus it appears that competent knowledge in the declarant is, in all cases, an essential prerequisite to the admission of his testimony; and that though all the citizens are presumed to have that knowledge, in some degree, where the matter is of public concernment, yet, in other matters, of interest to many persons, some particular evidence of such knowledge is required.

§ 130. It is to be observed, that the exception we are now con-

evidence was not attainable; *ubi à communiter accidentibus, probatio difficilis est, fama plenam solet probationem facere; ut in probatione filiationis.* But Mascardus deems it not sufficient, in cases of pedigree within the memory of man, which he limits to fifty-six years, unless aided by other evidence, — *tunc nempe non sufficeret publica vox et fama, sed una cum ipsa deberet tractatus et nominatio probari vel alia adminicula urgentia adhiberi.* Mascard. De Prob. vol. 1, Concl. 411, n. 1, 2, 6, 7.

[1] Weeks *v.* Sparke, 1 M. & S. 679, 688, per Le Blanc, J. The actual discussion of the subject in the neighborhood was a fact also relied on in the Roman law, in cases of proof by common fame. "Quando testis vult probare aliquem scivisse, non videtur sufficere, quod dicat ille scivit quia erat vicinus; sed debet addere, in vicinia hoc erat cognitum per famam, vel alio modo; et ideò iste, qui erat vicinus, potuit id scire." J. Menochius, De Præsump. tom. 2, lib. 6, Præs. 24, n. 17, p. 772.

[2] Rogers *v.* Wood, 2 Barn. & Ad. 245.

[3] Duke of Newcastle *v.* Broxtowe, 4 Barn. & Ad. 273.

sidering is admitted *only in the case of ancient rights*, and in respect to the declarations of *persons supposed to be dead*.[1] It is required by the nature of the rights in question; their origin being generally antecedent to the time of legal memory, and incapable of direct proof by living witnesses, both from this fact, and also from the undefined generality of their nature. It has been held, that where the nature of the case admits it, a foundation for the reception of hearsay evidence, in matters of public and general interest, should first be laid by proving acts of enjoyment within the period of living memory.[2] But this doctrine has since been overruled; and it is now held, that such proof is not an essential condition of the reception of evidence of reputation, but is only material, as it affects its value when received.[3] Where the nature of the subject does not admit of proof of acts of enjoyment, it is obvious that proof of reputation alone is sufficient. So, where a right or custom is established by documentary evidence, no proof is necessary of any particular instance of its exercise; for, if it were otherwise, and no instance were to happen within the memory of man, the right or custom would be totally destroyed.[4] In the case of a private right, however, where proof of particular instances of its exercise has first been given, evidence of reputation has sometimes been admitted in confirmation of the actual enjoyment; but it is never allowed against it.[5]

§ 131. Another important qualification of the exception we have been considering, by which evidence of reputation or common fame is admitted, is, that the declaration so received must have

[1] Moseley *v.* Davies, 11 Price, 162; Regina *v.* Milton, 1 Car. & Kir. 58; Davis *v.* Fuller, 12 Verm. R. 178.

[2] Per Buller, J., in Morewood *v.* Wood, 14 East, 330, note; per Le Blanc, J., in Weeks *v.* Sparke, 1 M. & S. 688, 689.

[3] Crease *v.* Barrett, 1 Cromp. Mees. & Rose. 919, 930. See also acc. Curson *v.* Lomax, 5 Esp. 90, per Ld. Ellenborough; Steele *v.* Prickett, 2 Stark. 463, 466, per Abbott, C. J.; Ratcliff *v.* Chapman, 4 Leon. 242, as explained by Grose, J., in Beebe *v.* Parker, 5 T. R. 32.

[4] Beebe *v.* Parker, 5 T. R. 26, 32; Doe *v.* Sisson, 12 East, 62; Steele *v.* Prickett, 2 Stark. R. 463, 466. A single act, undisturbed, has been held sufficient evidence of a custom, the court refusing to set aside a verdict finding a custom upon such evidence alone. Roe *v.* Jeffery, 2 M. & S. 92; Doe *v.* Mason, 3 Wils. 63.

[5] White *v.* Lisle, 4 Mad. R. 214, 225. See Morewood *v.* Wood, 14 East, 330, n., per Buller, J.; Weeks *v.* Sparke, 1 M. & S. 690, per Bayley, J.; Rogers *v.* Allen, 1 Campb. 309; Richards *v.* Bassett, 10 B. & C. 662, 663, per Littledale, J. A doctrine nearly similar is held by the civilians, in cases of ancient private rights. Thus Mascardus, after stating, upon the authority of many jurists, that *Dominium in antiquis probari per famam, traditum est,—veluti si fama sit, hunc domum fuisse Dantis Poetæ, vel alterius, qui decessit, jam sunt centum anni, et nemo vidit, qui viderit, quem refert, &c.*, subsequently qualifies this general proposition in these words:—*Primo limita principalem conclusionem, ut non procedat, nisi cum fame concurrant alia adminicula, saltem præsentis possessionis, &c.* Mascard. De Prob. vol. 2, Concl. 547, n. 1, 14.

been *made before any controversy arose*, touching the matter to which they relate; or, as it is usually expressed, *ante litem motam*. The ground on which such evidence is admitted at all is, that the declarations "are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."[1] But no man is presumed to be thus indifferent in regard to matters in actual controversy; for when the contest has begun, people generally take part on the one side or the other; their minds are in a ferment; and if they are disposed to speak the truth, facts are seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected.[2] This rule of evidence was familiar in the Roman law; but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to an earlier period of the controversy.[3] But in our law the term *lis* is taken in the classical and larger sense of *controversy;* and by *lis mota* is understood the commencement of the controversy, and not the commencement of the suit.[4] The commencement of the controversy has been further defined by Mr. Baron Alderson, in a case of pedigree, to be "the arising of that state of facts, on which the claim is founded, without any thing more."[5] [* And in the late case of *Butler* v. *Mountgarret*,[6] it was held, that a controversy in a family, though not at that moment the subject of a suit, constitutes sufficiently a *lis mota*, to render inadmissible a letter written on that subject by one member of the family and addressed to another.]

§ 132. The *lis mota*, in the sense of our law, carries with it the further idea of a *controversy upon the same particular subject in issue*. For, if the matter under discussion at the time of trial

[1] Per Ld. Eldon, in Whitelocke *v.* Baker, 13 Ves. 514; Rex *v.* Cotton, 3 Campb. 444, 446, per Dampier, J.

[2] The Berkley Peerage case, 4 Campb. 401, 409, 412, 413; Monkton *v.* The Attorney-General, 2 Russ. & My. 160, 161; Richards *v.* Bassett, 10 B. & C. 657.

[3] *Lis est, ut primum in jus, vel in judicium ventum est; antequam in judicium veniatur, controversia est, non lis.* Cujac. Opera Posth. tom. 5, col. 193, B. and col. 162, D. *Lis inchoata est ordinata per libellum, et satisdationem, licet non sit lis contestata.* Corpus Juris, Glossatum, tom. 1, col. 553, ad Dig. lib. iv. tit. 6, l. 12. *Lis mota censetur, etiamsi solus actor egerit.* Calv. Lex. Verb. Lis Mota.

[4] Per Mansfield, C. J., in the Berkley Peerage case, 4 Campb. 417; Monkton *v.* The Attorney-General, 2 Russ. & My. 161.

[5] Walker *v.* Countess of Beauchamp, 6 C. & P. 552, 561. But see Reilly *v.* Fitzgerald, 1 Drury (Ir.), R. 122, where this is questioned.

[6] [* 7 Ho. Lds. Cas. 633.]

was not in controversy at the time to which the declarations offered in evidence relate, they are admissible, notwithstanding a controversy did then exist upon some other branch of the same general subject. The value of general reputation, as evidence of the true state of facts, depends upon its being the concurrent belief of minds unbiased, and in a situation favorable to a knowledge of the truth; and referring to a period when this fountain of evidence was not rendered turbid by agitation. But the discussion of other topics, however similar in their general nature, at the time referred to, does not necessarily lead to the inference, that the particular point in issue was also controverted, and, therefore, is not deemed sufficient to exclude the sort of proof we are now considering. Thus, where, in a suit between a copyholder and the lord of the manor, the point in controversy was, whether the customary fine, payable upon the renewal of a life-lease, was to be assessed by the jury of the lord's court, or by the reasonable discretion of the lord himself; depositions taken for the plaintiff, in an ancient suit by a copyholder against a former lord of the manor, where the controversy was upon the copyholder's right to be admitted at all, and not upon the terms of admission, in which depositions the customary fine was mentioned as to be assessed by the lord or his steward, were held admissible evidence of what was then understood to be the undisputed custom.[1] In this case, it was observed by one of the learned judges, that "the distinction had been correctly taken, that where the *lis mota* was on the very point, the declarations of persons would not be evidence; because you cannot be sure, that in admitting the depositions of witnesses, selected and brought forward on a particular side of the question, who embark, to a certain degree, with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and consequently the objection does not apply."

§ 133. Declarations made after the controversy has originated, are excluded, even though proof is offered that the existence of the controversy was not known to the declarant. The question of his ignorance or knowledge of this fact is one which the courts

[1] Freeman *v.* Phillips, 4 M. & S. 486, 497; Elliott *v.* Piersol, 1 Peters, 328, 337.

will not try; partly because of the danger of an erroneous decision of the principal fact by the jury, from the raising of too many collateral issues, thereby introducing great confusion into the cause; and partly from the fruitlessness of the inquiry, it being from its very nature impossible, in most cases, to prove that the existence of the controversy was not known. The declarant, in these cases, is always absent, and generally dead. The light afforded by his declarations is at best extremely feeble, and far from being certain; and if introduced, with the proof on both sides, in regard to his knowledge of the controversy, it would induce darkness and confusion, perilling the decision without the probability of any compensating good to the parties. It is therefore excluded, as more likely to prove injurious than beneficial.[1] [* The admissibility of the declarations of members of the family terminates with the commencement of the controversy, and the question is not affected, by any knowledge or ignorance on the part of the declarant of the existence of the controversy; nor by proof that such proceedings were fraudulently commenced with a view to exclude the admissibility of such declaration.[2] And it is here said, that it is the commencement of the controversy, and not of the situation from which it springs, that is to be regarded as the commencement of the *lis mota*, and as terminating the admissibility of family declarations. But a declaration made expressly with a view to a probable future contest is admissible, *quantum valeat;* but not if made in a prior cause on the same subject matter, but to this effect the same precise point now in controversy must have been there involved.[2]]

§ 134. It has sometimes been laid down, as an exception to the rule excluding declarations made *post litem motam*, that declarations concerning *pedigree* will not be invalidated by the circumstance that they were made during family discussions, and for the

[1] The Berkley Peerage case, 4 Campb. 417, per Mansfield, C. J.; *supra*, § 124. This distinction, and the reasons of it, were recognized in the Roman law; but there the rule was to admit the declarations, though made *post litam motam*, if they were made at a place so very far remote from the scene of the controversy, as to remove all suspicion that the declarant had heard of its existence. Thus it is stated by *Mascardus:* — "Istud autem quod diximus, debere testes deponere ante litem motam, sic est accipiendum, ut verum sit, si ibidem, ubi res agitur, audierit; at si alibi, in loco qui longissimè distaret, sic intellexerit, etiam post litem motam testes de auditu admittuntur. Longinquitas enim loci in causa est, ut omnis suspicio abesse videatur quæ quidem suspicio adesse potest, quando testis de auditu post litem motam, ibidem, ubi res agitur, deponit." Mascard. De Probat. vol. 1, p. 401 [429], Concl. 410, n. 5, 6.

[2] [* Shedden *v.* Patrick, 2 Sw. & Tr. 170. See Jenkins *v.* Davies, 10 Queen's Bench Rep., N. S. 314.]

purpose of preventing future controversy; and the instance given, by way of illustration, is that of a solemn act of parents, under their hands, declaring the legitimacy of a child. But it is conceived, that evidence of this sort is admissible, not by way of exception to any rule, but because it is, in its own nature, original evidence; constituting part of the fact of the recognition of existing relations of consanguinity or affinity; and falling naturally under the head of the expression of existing sentiments and affections, or of declarations against the interest, and peculiarly within the knowledge of the party making them, or of verbal acts, part of the *res gestæ*.[1]

§ 135. Where evidence of reputation is admitted, in cases of public or general interest, it is not necessary that the witness should be able to *specify from whom he heard the declarations*. For that, in much the greater number of cases, would be impossible; as the names of persons long since dead, by whom declarations upon topics of common repute have at some time or other been made, are mostly forgotten.[2] And, if the declarant is known, and appears to have stood *in pari casu* with the party offering his declarations in evidence, so that he could not, if living, have been personally examined as a witness to the fact of which he speaks, this is no valid objection to the admissibility of his declarations. The reason is, the absence of opportunity and motive to consult his interest, at the time of speaking. Whatever secret wish or bias he may have had in the matter, there was, at that time, no excited interest called forth in his breast, or, at least, no means were afforded of promoting, nor danger incurred of injuring any interest of his own; nor could any such be the necessary result of his declarations. Whereas, on a trial, in itself and of necessity directly affecting his interest, there is a double objection to admitting his evidence, in the concurrence both of the temptation of interest, and the excitement of the *lis mota*.[3]

§ 136. Indeed the rejection of the evidence of reputation, in

[1] *Supra*, §§ 102–108, 131; Goodright *v.* Moss, Cowp. 591; Monkton *v.* The Attorney-General, 2 Russ. & My. 147, 160, 161, 164; Slaney *v.* Wade, 1 My. & Cr. 338; The Berkley Peerage case, 4 Camph. 418, per Mansfield, C. J.

[2] Moseley *v.* Davies, 11 Price, 162, 174, per Richards, C. B.; Harwood *v.* Sims, Wightw. 112.

[3] Moseley *v.* Davies, 11 Price, 179, per Graham, B.; Deacle *v.* Hancock, 13 Price, 236, 237; Nichols *v.* Parker, 14 East, 331, note; Harwood *v.* Sims, Wightw. 112; Freeman *v.* Phillips, 4 M. & S. 486, 491, cited and approved by Lyndhurst, C. B., in Davies *v.* Morgan, 1 C. & J., 593, 594; Monkton *v.* Attorney-General, 2 Russ. & My. 159, 160, per Ld. Ch. Brougham; Reed *v.* Jackson, 1 East, 355, 357; Chapman *v.* Cowlan, 13 East, 10.

cases of public or general interest, because it may have come from persons *in pari casu* with the party offering it, would be inconsistent with the qualification of the rule which has already been mentioned, namely, that the statement thus admitted must appear to have been made by persons having competent knowledge of the subject.[1] Without such knowledge, the testimony is worthless. In matters of public right, all persons are presumed to possess that degree of knowledge, which serves to give some weight to their declarations respecting them, because all have a common interest. But in subjects interesting to a comparatively small portion of the community, as a city or parish, a foundation for admitting evidence of reputation, or the declarations of ancient and deceased persons, must first be laid, by showing that, from their situation, they probably were conversant with the matter of which they were speaking.[2]

§ 137. The probable *want of competent knowledge* in the declarant is the reason generally assigned for rejecting evidence of reputation or common fame, in matters of mere *private right*. "Evidence of reputation, upon general points, is receivable," said Lord Kenyon, "because, all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs, or private prescriptions? How is it possible for strangers to know any thing of what concerns only private titles?"[3] The case of prescriptive rights has sometimes been mentioned as an exception; but it is believed that where evidence of reputation has been admitted in such cases, it will be found that the right was one in which many persons were equally interested. The weight of authority, as well as the

[1] *Supra*, §§ 128, 129.

[2] Weeks *v.* Sparke, 1 M. & S. 679, 686, 690; Doe d. Molesworth *v.* Sleeman, 1 New Pr. Cas. 170; Morewood *v.* Wood, 14 East, 327, note; Crease *v.* Barrett, 1 Cr. M. & Ros. 929; Duke of Newcastle *v.* Broxtowe, 4 B. & Ad. 273; Rogers *v.* Wood, 2 B. & Ad. 245. The Roman law, as stated by Masecardus, agrees with the doctrine in the text. "*Confines probantur per testes. Verum scias velim, testes in hac materia, qui vicini, et circum ibi habitant, esse magis idoneos quam alios. Si testes non sentiant commodum vel incommodum immediatum, possint pro sua communitate deponere. Licet hujusmodi testes sint de universitate, et deponant super confinibus suæ universitatis, probant, dummodum præcipuum ipsi commodum non sentiant, licet inferant commodum in universum.*" Mascard. De Probat. vol. 4, pp. 389, 390, Concl. 395, n. 1, 2, 9, 19.

[3] Morewood *v.* Wood, 14 East, 329, note, per Ld. Kenyon; 1 Stark. Evid. 30, 31; Clothier *v.* Chapman, 14 East, 331, note; Reed *v.* Jackson, 1 East, 357; Outram *v.* Morewood, 5 T. R. 121, 123; Weeks *v.* Sparke, 1 M. & S. 679.

reason of the rule, seem alike to forbid the admission of this kind of evidence, except in cases of a public or *quasi* public nature.[1]

§ 138. This principle may serve to explain and reconcile what is said in the books respecting the admissibility of *reputation*, in regard to *particular facts*. Upon general points, as we have seen, such evidence is receivable, because of the general interest which the community have in them; but particular facts of a private nature, not being notorious, may be misrepresented or misunderstood, and may have been connected with other facts, by which, if known, their effect might be limited or explained. Reputation as to the existence of such particular facts is, therefore, rejected. But, if the particular fact is proved *aliunde*, evidence of general reputation may be received to qualify and explain it. Thus, in a suit for tithes, where a parochial modus of sixpence per acre was set up, it was conceded that evidence of reputation of the payment of that sum for one piece of land would not be admissible; but it was held, that such evidence would be admissible to the fact that it had always been customary to pay that sum for all the lands in the parish.[2] And where the question on the record was whether a turnpike was within the limits of a certain town, evidence of general reputation was admitted to show that the bounds of the town extended as far as a certain close; but not that formerly there were houses, where none then stood; the latter being a

[1] Ellicott *v.* Pearl, 10 Peters, 412; Richards *v.* Bassett, 10 B. & C. 657, 662, 663, per Littledale, J.; *supra*, § 130. The following are cases of a *quasi* public nature; though they are usually, but, on the foregoing principles, erroneously, cited in favor of the admissibility of evidence of reputation in cases of mere private right. Bp. of Meath *v.* Ld. Belfield, Bull. N. P. 295, where the question was, who presented the former incumbent of a parish; a fact interesting to all the parishioners; Price *v.* Littlewood, 3 Campb. 288, where an old entry in the vestry-book, by the church-wardens, showing by what persons certain parts of the church were repaired, in consideration of their occupancy of pews, was admitted, to show title to a pew, in one under whom the plaintiff claimed; — Barnes *v.* Mawson, 1 M. & S. 77, which was a question of boundary between two large districts of a manor called the Old and New Lands; — Anscomb *v.* Shore, 1 Taunt. 261, where the right of common prescribed for was claimed by all the inhabitants of Hampton; — Blackett *v.* Lowes, 2 M. & S. 494, 500, where the question was as to the general usage of all the tenants of a manor, the defendant being one, to cut certain woods; — Brett *v.* Beales, 1 Mood. & Malk. 416, which was a claim of ancient tolls belonging to the Corporation of Cambridge; — White *v.* Lisle, 5 Madd. Ch. R. 214, 224, 225, where evidence of reputation, in regard to a *parochial modus*, was held admissible, because "a class or district of persons was concerned;" but denied in regard to a *farm modus*, because none but the occupant of the farm was concerned. In Davies *v.* Lewis, 2 Chitty, R. 535, the declarations offered in evidence were clearly admissible, as being those of tenants in possession, stating under whom they held. See *supra*, § 108.

[2] Harwood *v.* Sims, Wightw. 112, more fully reported and explained in Moseley *v.* Davies, 11 Price, 162, 169–172; Chatfield *v.* Fryer, 1 Price, 253; Wells *v.* Jesus College, 7 C. & P. 284; Leathes *v.* Newith, 4 Price, 355.

particular fact, in which the public had no interest.[1] So, where, upon an information against the sheriff of the county of Chester, for not executing a death-warrant, the question was whether the sheriff of the county or the sheriffs of the city were to execute sentence of death, traditionary evidence that the sheriffs of the county had always been exempted from the performance of that duty was rejected, it being a private question between two individuals; the public having an interest only that execution be done, and not in the person by whom it was performed.[2] The question of the admissibility of this sort of evidence seems, therefore, to turn upon the nature of the reputed fact, whether it was interesting to one party only, or to many. If it were of a public or general nature, it falls within the exception we are now considering, by which hearsay evidence, under the restrictions already mentioned, is admitted. But if it had no connection with the exercise of any public right, nor the discharge of any public duty, nor with any other matter of general interest, it falls within the general rule, by which hearsay evidence is excluded.[3]

§ 139. Hitherto we have mentioned oral declarations, as the medium of proving traditionary reputation in matters of public and general interest. *The principle*, however, upon which these are admitted, *applies to documentary and all other kinds of proof denominated hearsay.* If the matter in controversy is ancient, and not susceptible of better evidence, any proof in the nature of traditionary declarations is receivable, whether it be oral or written; subject to the qualifications we have stated. Thus, deeds, leases, and other private documents, have been admitted, as declaratory of the public matters recited in them.[4] Maps, also, showing the

[1] Ireland *v.* Powell, Salop. Spr. Ass. 1802, per Chambre, J.; Peake's Evid. 13, 14 (Norris's edit. p. 27). [* It is no ground of objection to the admissibility of such evidence, that matters of private interest are also involved in the public controversy. Reg. *v.* Bedford, 4 El. & Bl. 535. S. C. 29 Eng. Law and Eq. R. 89.]

[2] Rex *v.* Antrobus, 2 Ad. & El. 788, 794.

[3] White *v.* Lisle, 4 Madd. Ch. R. 214, 224, 225; Bp. of Meath *v.* Ld. Belfield, 1 Wils. 215; Bull. N. P. 295; Weeks *v.* Sparke, 1 M. & S. 679; Withnell *v.* Gartham, 1 Esp. 322; Doe *v.* Thomas, 14 East, 323; Phil. & Am. on Evid. 258; 1 Stark. Evid. 34, 35; Outram *v.* Morewood, 5 T. R. 121, 123; Rex *v.* Eriswell, 3 T. R. 709, per Grose, J. Where particular knowledge of a fact is sought to be brought home to a party, evidence of the general reputation and belief of the existence of that fact, among his neighbors, is admissible to the jury, as tending to show that he also had knowledge of it, as well as they. Brander *v.* Ferridy, 16 Louisiana, R. 296.

[4] Curzon *v.* Lomax, 5 Esp. 60; Brett *v.* Beales, 1 M. & M. 416; Claxton *v.* Dare, 10 B. & C. 17; Clarkson *v.* Woodhouse, 5 T. R. 412, n.; 3 Doug. 189, s. c.; Barnes *v.* Mawson, 1 M. & S. 77, 78; Coombs *v.* Coether, 1 M. & M. 398; Beebe *v.* Parker, 5 T. R. 26; Freeman *v.* Phillips, 4 M. & S. 486; Crease *v.* Barrett, 1 Cr. Mees. & Ros. 923; Denn *v.*

boundaries of towns and parishes, are admissible, if it appear that they have been made by persons having adequate knowledge.[1] Verdicts, also, are receivable evidence of reputation, in questions of public or general interest.[2] Thus, for example, where a public right of way was in question, the plaintiff was allowed to show a verdict rendered in his own favor, against a defendant in another suit, in which the same right of way was in issue; but Lord Kenyon observed, that such evidence was, perhaps, not entitled to much weight, and certainly was not conclusive. The circumstance, that the verdict was *post litem motam*, does not affect its admissibility.[3]

§ 140. It is further to be observed, that reputation is evidence as well *against a public right* as in its favor. Accordingly, where the question was, whether a landing-place was public or private property, reputation, from the declaration of ancient deceased persons, that it was the private landing-place of the party and his ancestors, was held admissible; the learned judge remarking, that there was no distinction between the evidence of reputation to establish, and to disparage a public right.[4]

Spray, 1 T. R. 466; Bullen *v.* Michel, 4 Dow, 298; Taylor *v.* Cook, 8 Price, 650.

[1] 1 Phil. Evid. 250, 251; Alcock *v.* Cooke, 2 Moore & Payne, 625; 5 Bing. 340, s. c.; Noyes *v.* White, 19 Conn. 250. Upon a question of boundary between two farms, it being proved that the boundary of one of them was identical with that of a hamlet, evidence of reputation, as to the bounds of the hamlet was held admissible. Thomas *v.* Jenkins, 1 N. & P. 588. But an old map of a parish, produced from the parish chest, and which was made under a private inclosure act, was held inadmissible evidence of boundary, without proof of the inclosure act. Reg. *v.* Milton, 1 C. & K. 58.

[2] But an interlocutory decree for preserving the *status quo*, until a final decision upon the right should be had, no final decree ever having been made, is inadmissible as evidence of reputation. Pim *v.* Currell, 6 M. & W. 234.

[3] Reed *v.* Jackson, 1 East, 355, 357; Bull. N. P. 233; City of London *v.* Clarke, Carth. 181; Rhodes *v.* Ainsworth, 1 B. & Ald. 87, 89, per Holroyd, J.; Lanoum *v.* Lovell, 9 Bing. 465, 469; Cort *v.* Birkbeck, 1 Doug. 218, 222, per Lord Mansfield; Case of the Manchester Mills, 1 Dong. 221, n.; Berry *v.* Banner, Peake's Cas. 156; Biddulph *v.* Ather, 2 Wils. 23; Brisco *v.* Lomax, 3 N. & P. 388; Evans *v.* Rees, 2 P. & D. 627; 10 Ad. & El. 151, s. c.

[4] Drinkwater *v.* Porter, 7 C. & P. 181; R. *v.* Sutton, 3 N. & P. 569.

CHAPTER VII.

OF ANCIENT POSSESSIONS.

[*§ 141. Ancient documents admitted to establish ancient possessions.
142. The document must come from the proper custody.
143. Generally required that acts of use under them be shown.
144. These documents should appear to be parts of the transactions in question.
145. Under same restrictions reputation received to establish public, but not private, boundaries.
146. Perambulations of public boundaries established in a similar manner.]

§ 141. A *second exception* to the rule, rejecting hearsay evidence, is allowed in cases of *ancient possession*, and in favor of the admission of ancient documents in support of it. In matters of private right, not affecting any public or general interest, hearsay is generally inadmissible. But the admission of ancient documents, purporting to constitute *part of the transactions themselves*, to which, as acts of ownership, or of the exercise of right, the party against whom they are produced is not privy, stands on a different principle. It is true, on the one hand, that the documents in question consist of evidence which is not *proved* to be part of any *res gestæ*, because the only proof of the transaction consists in the documents themselves; and these may have been fabricated, or, if genuine, may never have been acted upon. And their effect, if admitted in evidence, is to benefit persons connected in interest with the original parties to the documents, and from whose custody they have been produced. But, on the other hand, such documents always accompany and form a part of every legal transfer, of title and possession by act of the parties; and there is, also, some presumption against their fabrication, where they refer to co-existing subjects by which their truth might be examined.[1] On this ground, therefore, as well as because such is generally the only attainable evidence of ancient possession, this proof is admitted, under the qualifications which will be stated.

[1] 1 Phil. Evid. 273; 1 Stark Evid. 66, 67; Clarkson *v.* Woodhouse, 5 T. R. 413, n., per Ld. Mansfield.

§ 142. As the value of these documents depends mainly on their having been contemporaneous, at least, with the act of transfer, if not part of it, care is *first* taken to *ascertain their genuineness;* and this may be shown *primâ facie*, by proof that the document comes from the *proper custody*, or by otherwise accounting for it. Documents found in a place, in which, and under the care of persons, with whom such papers might naturally and reasonably be expected to be found, or in the possession of persons having an interest in them, are in precisely the custody which gives authenticity to documents found within it.[1] "For it is not necessary," observed Tindal, C. J., "that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit, that the investigation commences, whether it is reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place of deposit strictly and

[1] Per Tindal, C. J., in Bishop of Meath *v.* Marq. of Winchester, 2 Bing. N. C. 183, 200, 201, expounded and confirmed by Parke, B., in Croughton *v.* Blake, 12 M. & W. 205, 208; and in Doe d. Jacobs *v.* Phillips, 10 Jur. 34; 8 Ad. & El. 158, N. S. See also Lygon *v.* Strutt, 2 Anstr. 601; Swinnerton *v.* Marq. of Stafford, 3 Taunt. 91; Bullen *v.* Michel, 4 Dow. 297; Earl *v.* Lewis, 4 Esp. 1; Randolph *v.* Gordon, 5 Price, 312; Manby *v.* Curtis, 1 Price, 225, 232, per Wood, B.; Bertie *v.* Beaumont, 2 Price, 303, 307; Barr *v.* Gratz, 4 Wheat. 213, 221; Winne *v.* Patterson, 9 Peters, 663–675; Clarke *v.* Courtney, 5 Peters, 319, 344; Jackson *v.* Laroway, 3 Johns. Cas. 383, approved in Jackson *v.* Luquere, 5 Cowen, 221, 225; Hewlett *v.* Cock, 7 Wend. 371, 374; Duncan *v.* Beard, 2 Nott & McC. 400; Middleton *v.* Mass, 2 Nott & McC. 55; Doe *v.* Beynon, 4 P. & D. 193; *infra*, § 570; Doe *v.* Pearce, 2 M. & Rob. 240; Tolman *v.* Emerson, 4 Pick. 160; [United States *v.* Castro, 2 How. 346.] An ancient extent of crown lands, found in the office of the land revenue records, it being the proper repository, and purporting to have been made by the proper officer, has been held good evidence of the title of the crown to lands therein stated to have been purchased by the crown from a subject. Doe d. Wm. IV. *v.* Roberts, 13 M. & W. 520. [An ancient private survey is not evidence. Daniel *v.* Wilkin, 7 Exch. R. 429.] Courts will be liberal in admitting deeds, where no suspicion arises as to their authenticity. Doe *v.* Keeling, 36 Leg. Obs. 312; 12 Jur. 433; 11 Ad. & El. 884, N. S. The proper custody of an expired lease is that of the lessor; Ibid. per Wightman, J. Whether a document comes from the proper custody is a question for the judge and not for the jury to determine; Ibid. Rees *v.* Walters, 3 M. & W. 527, 531. The rule stated in the text is one of the grounds on which we insist on the genuineness of the books of the Holy Scriptures. They are found in the proper custody, or place, where alone they ought to be looked for; namely, the Church, where they have been kept from time immemorial. They have been constantly referred to, as the foundation of faith, by all the opposing sects, whose existence God, in his wisdom, has seen fit to permit; whose jealous vigilance would readily detect any attempt to falsify the text, and whose diversity of creeds would render any mutual combination morally impossible. The burden of proof is, therefore, on the objector, to impeach the genuineness of these books; not on the Christian, to establish it. See Greenleaf on the Testimony of the Evangelists, Prelim. Obs. § 9.

absolutely proper, there may be many and various that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases, the proposition to be determined is, whether the actual custody is so reasonably and probably accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases."

§ 143. It is further requisite, where the nature of the case will admit it, that proof be given of *some act done* in reference to the documents offered in evidence, as a further assurance of their genuineness, and of the claiming of title under them. If the document bears date *post litem motam*, however ancient, some evidence of correspondent acting is always scrupulously required, even in cases where traditionary evidence is receivable.[1] But in other cases, where the transaction is very ancient, so that proof of contemporaneous acting, such as possession, or the like, is not probably to be obtained, its production is not required.[2] But where unexceptionable evidence of enjoyment, referable to the document, may reasonably be expected to be found, it must be produced.[3] If such evidence, referable to the document, is not to be expected, still it is requisite to prove some acts of modern enjoyment, with reference to similar documents, or that modern possession or user should be shown, corroborative of the ancient documents.[4]

§ 144. Under these qualifications, *ancient documents*, purporting to be a *part of the transactions to which they relate*, and not a mere narrative of them, are receivable as evidence, that those transactions actually occurred. And though they are spoken of as hearsay evidence of ancient possession, and as such are said to be admitted in exception to the general rule; yet they seem rather to be parts of the *res gestæ*, and therefore admissible as original evidence, on the principle already discussed. An ancient deed, by which is meant one more than thirty years old, having nothing

[1] 1 Phil. Evid. 277; Brett *v.* Beales, 1 Mood. & M. 416; [United States *v.* Castro, 24 How. 346.]

[2] Clarkson *v.* Woodhouse, 5 T. R. 412, 413, n., per Ld. Mansfield; *supra*, § 130, and cases there cited.

[3] 1 Phil. Evid. 277; Plaxton *v.* Dare, 10 B. & C. 17.

[4] Rogers *v.* Allen, 1 Campb. 309, 311; Clarkson *v.* Woodhouse, 5 T. R. 412, n. See the cases collected in note to § 144, *infra*.

suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead; and, if it is found in the proper custody, and is corroborated by evidence of ancient or modern corresponding enjoyment,[1] or by other equivalent or explanatory proof, it is to be presumed that the deed constituted part of the actual transfer of property therein mentioned; because this is the usual and ordinary course of such transactions among men. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statue may be made out from an existing *torso*, or a perfect skeleton from the fossil remains of a part.

§ 145. Under this head may be mentioned the case of *ancient boundaries;* in proof of which, it has sometimes been said, that traditionary evidence is admissible from the nature and necessity of the case. But, if the principles already discussed in regard to the admission of hearsay are sound, it will be difficult to sustain an exception in favor of such evidence merely as applying to boundary, where the fact is particular, and not of public or general interest. Accordingly, though evidence of reputation is

[1] It has been made a question, whether the document may be read in evidence, before the proof of possession or other equivalent corroborative proof is offered; but it is now stated that the document, if otherwise apparently genuine, may be first read; for the question, whether there has been a corresponding possession, can hardly be raised till the court is made acquainted with the tenor of the instrument. Doe *v.* Passingham, 2 C. & P. 440. If the deed appears, on its face, to have been executed under an authority which is matter of record, it is not admissible, however ancient it may be, as evidence of title to land, without proof of the authority under which it was executed. Tolman *v.* Emerson, 4 Pick. 160. A graver question has been, whether the proof of possession is indispensable; or whether its absence may be supplied by other satisfactory corroborative evidence. In Jackson d. Lewis *v.* Laroway, 3 Johns. Cas. 283, it was held by Kent, J., against the opinion of the other judges, that it was indispensable; on the authority of Fleta, lib. 6, cap. 34; Co. Lit. 6 b; Isack *v.* Clarke, 1 Roll. R. 132; James *v.* Trollop, Skin. 239; 2. Mod. 323; Forbes *v.* Wale, 1 W. Bl. R. 532; and the same doctrine was again asserted by him, in delivering the judgment of the court, in Jackson d. Burhans *v.* Blanshan, 3 Johns. 292, 298. See also Thompson *v.* Bullock, 1 Bay, 364; Middleton *v.* Mass, 2 Nott & McC. 55; Carroll *v.* Norwood, 1 Har. & J. 174, 175; Shaller *v.* Brand, 6 Binn. 439; Doe *v.* Phelps, 9 Johns. 169, 171. But the weight of authority at present seems clearly the other way; and it is now agreed that, where proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances. See Ld. Rancliffe *v.* Parkins, 6 Dow, 202, per Ld. Eldon; McKenire *v.* Frazer, 9 Ves. 5; Doe *v.* Passingham, 2 C. & P. 440; Barr *v.* Gratz, 4 Wheat. 213, 221; Jackson d. Lewis *v.* Laroway, 3 Johns. Cas. 283, 287; Jackson d. Hunt *v.* Luquere, 5 Cowen, 221, 225; Jackson d. Wilkins *v.* Lamb, 7 Cowen, 431; Hewlett *v.* Cock, 7 Wend. 371, 373, 374; Willson *v.* Betts, 4 Denio, 201. Where an ancient document, purporting to be an exemplification, is produced from the proper place of deposit, having the usual slip of parchment to which the great seal is appended, but no appearance that any seal was ever affixed, it is still to be presumed, that the seal was once there and has been accidentally removed, and it may be read in evidence as an exemplification. Mayor, &c. of Beverley *v.* Craven, 2 M. & Rob. 140.

received, in regard to the boundaries of parishes, manors, and the like, which are of public interest, and generally of remote antiquity, yet, by the weight of authority and upon better reason, such evidence is held to be inadmissible for the purpose of proving the boundary of a private estate, when such boundary is not identical with another of a public or *quasi* public nature.[1] Where

[1] Ph. and Am. on Evid. 255, 256; *supra*, § 139, note (2); Thomas *v.* Jenkins, 1 N. & P. 588; Reed *v.* Jackson, 1 East, 355, 357, per Ld. Kenyon; Doe *v.* Thomas, 14 East, 323; Morewood *v.* Wood, Id. 327, note; Outram *v.* Morewood, 5 T. R. 121, 123, per Ld. Kenyon; Nichols *v.* Parker, and Clothier *v.* Chapman, in 14 East, 331, note; Weeks *v.* Sparke, 1 M. & S. 688, 689; Duravan *v.* Llewellyn, 15 Q. B. 791, Exch. Chanc.; Cherry *v.* Boyd, Littell's Selected Cases, 8, 9; 1 Phil. Evid. 182 (3d Lond. ed.), cited and approved by Tilghman, C. J., in Buchanan *v.* Moore, 10 S. & R. 281. In the passage thus cited, the learned author limits the admissibility of this kind of evidence to questions of a public or general nature; including a right of common by custom; which, he observes, "is, strictly speaking, a private right; but it is a *general* right, and *therefore*, so far as regards the admissibility of this species of evidence, has been *considered as public, because it affects a large number of occupiers within a district.*" *Supra*, §§ 128, 138; Gresley on Evid. 220, 221. And more recently, in England it has been decided upon full consideration, that traditionary evidence, respecting rights not of a public nature, is inadmissible. Dunraven *v.* Llewellyn, 15 Ad. & El. 791, N. S. The admission of traditionary evidence, in cases of boundary, occurs more frequently in the United States than in England. By far the greatest portion of our territory was originally surveyed in large masses or tracts, owned either by the State, or by the United States, or by one, or a company, of proprietors; under whose authority these tracts were again surveyed and divided into lots suitable for single farms, by lines crossing the whole tract, and serving as the common boundary of very many farm-lots, lying on each side of it. So that it is hardly possible, in such cases, to prove the original boundaries of one farm, without affecting the common boundary of many; and thus, in trials of this sort, the question is similar, in principle, to that of the boundaries of a manor, and therefore traditionary evidence is freely admitted. Such was the case of Boardman *v.* Reed, 6 Peters, 328, where the premises in question being a tract of eight thousand acres, were part of a large connection of surveys, made together, and containing between fifty and one hundred thousand acres of land; and it is to such tracts, interesting to very many persons, that the remarks of Mr. Justice M'Lean, in that case (p. 341), are to be applied. In Conn. *et al. v.* Penn. *et al.* 1 Pet. C. C. Rep. 496, the tract whose boundaries were in controversy was called the manor of Springetsbury and contained seventy thousand acres; in which a great number of individuals had severally become interested. In Doe d. Taylor *v.* Roe *et al.* 4 Hawks, 116, traditionary evidence was admitted in regard to Earl Granvill's line, which was of many miles in extent, and afterwards constituted the boundary between counties, as well as private estates. In Ralston *v.* Miller, 3 Randolph, 44, the question was upon the boundaries of a street in the city of Richmond; concerning which kind of boundaries it was said, that ancient reputation and possession were entitled to infinitely more respect, in deciding upon the boundaries of the lots, than any experimental surveys. In several American cases, which have sometimes been cited in favor of the admissibility of traditionary evidence of boundary, even though it consisted of particular facts, and in cases of merely private concern, the evidence was clearly admissible on other grounds, either as part of the original *res gestæ*, or as the declaration of a party in possession, explanatory of the nature and extent of his claim. In this class may be ranked the cases of Caufman *v.* The Congregation of Cedar Spring, 6 Binn. 59; Sturgeon *v.* Waugh, 2 Yeates, 476; Jackson d. McDonald *v.* McCall, 10 Johns. 377; Hamilton *v.* Minor, 2 S. & R. 70; Higley *v.* Bidwell, 9 Conn. 477; Hall *v.* Gittings, 2 Harr. & Johns. 112; Redding *v.* McCubbin, 1 Har. & McHen. 84. In Wooster *v.* Butler, 13 Conn. R. 309, it was said by Church, J., that traditionary evidence was receivable, in *Connecticut*, to prove the boundaries of land between individual proprietors. But this dictum was not called for in the case: for the question was, whether there had anciently been a *highway* over a certain tract of up-

the question is of such general nature, whether it be of boundary, or of right of common by custom, or the like, evidence of reputation is admitted only under the qualifications already stated, requiring competent knowledge in the declarants, or persons from whom the information is derived, and that they be persons free

land; which being a subject of common and general interest, was clearly within the rule. It has, however, subsequently been settled as a point of local law in that state, that such evidence is admissible to prove private boundaries. Hinny *v.* Farnsworth, 17 Conn. R. 355, 363. In *Pennsylvania*, reputation and hearsay are held entitled to respect, in a question of boundary, where from lapse of time there is great difficulty in proving the existence of the original landmarks. Nieman *v.* Ward, 1 Watts & Serg. 68. In Den d. Tate *v.* Southard, 1 Hawks, 45, the question was, whether the lines of the surrounding tracts of land, if made for those tracts alone, and not for the tract in dispute, might be shown *by reputation*, to be the "*known and visible boundaries*" of the latter tract, within the fair meaning of those words in the statute of *North Carolina*, of 1791, ch. 15. It was objected, that the boundaries mentioned in the act were those only, which had been expressly recognized as the bounds of the particular tract in question, by some grant or mesne conveyance thereof; but the objection was overruled. But in a subsequent case (Den d. Sasser *v.* Herring, 3 Dever. Law Rep. 340), the learned chief justice admits, that in that state, the rules of the common law, in questions of private boundary, have been broken in upon. "We have," he remarks, "in questions of boundary, given to the single declarations of a deceased individual, as to a line or corner, the weight of common reputation, and permitted such declarations to be proven; under the rule, that, in questions of boundary, hearsay is evidence. Whether this is within the spirit and reason of the rule, it is now too late to inquire. It is the well-established law of this state. And if the propriety of the rule was now *res integra*, perhaps the necessity of the case, arising from the situation of our country, and the want of self-evident *termini* of our lands, would require its adoption. For, although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity, we have, in this instance, sacrificed the principles upon which the rules of evidence are founded." A similar course has been adopted in *Tennessee*. Beard *v.* Talbot, 1 Cooke, 142. In *South Carolina*, the declarations of a deceased surveyor, who originally surveyed the land, are admissible, on a question as to its location. Speer *v.* Coate, 3 McCord, 227; Blythe *v.* Sutherland, Id. 258. In *Kentucky*, the latter practice seems similar to that in North Carolina. Smith *v.* Nowells, 2 Littell, Rep. 159; Smith *v.* Prewitt, 2 A. K. Marsh. 155, 158. In *New Hampshire*, the like evidence has in one case been held admissible, upon the alleged authority of the rule of the common law, in 1 Phil. Evid. 182; but in the citation of the passage by the learned chief justice, it is plain, from the omission of part of the text, that the restriction of the rule to subjects of public or general interest was not under his consideration. Shepherd *v.* Thompson, 4 N. Hamp. Rep. 213, 214. More recently, however, it has been decided in that state, "that the declarations of deceased persons, who, from their situation, appear to have had the means of knowledge respecting private boundaries, and who had no interest to misrepresent, may well be admitted in evidence." Great Falls Co. *v.* Worster, 15 N. Hamp. 412, 437; Smith *v.* Powers, Idem. 546, 564. Subject to these exceptions, the general practice in this country, in the admission of traditionary evidence as to boundaries, seems to agree with the doctrine of the common law as stated in the text. In Weems *v.* Disney, 4 Har. & McHen. 156, the depositions admitted were annexed to a return of commissioners, appointed under a statute of *Maryland*, "for marking and bounding lands," and would seem, therefore, to have been admissible as part of the return, which expressly referred to them; but no final decision was had upon the point, the suit having been compromised. In Buchanan *v.* Moore, 10 S. & R. 275, the point was, whether traditionary evidence was admissible while the declarant was *living*. By the Roman law, traditionary evidence of common fame seems to have been deemed admissible, even in matters of private boundary. Mascard. De Probat. vol. 1, p. 391, Concl. 396.

from particular and direct interest at the time, and are since deceased.[1]

§ 146. In this connection may be mentioned the subject of *perambulations*. The writ *de perambulatione faciendâ* lies at common law, when two lords are in doubt as to the limits of their lordships, villas, &c., and by consent appear in chancery, and agree that a perambulation be made between them. Their consent being enrolled in chancery, a writ is directed to the sheriff to make the perambulation, by the oaths of a jury of twelve knights, and to set up the bounds and limits, in certainty, between the parties.[2] These proceedings and the return are evidence against the parties and all others in privity with them, on grounds hereafter to be considered. But the perambulation consists not only of this higher written evidence, but also of the acts of the persons making it, and their assistants, such as marking boundaries, setting up monuments, and the like, including their declarations respecting such acts, made during the transactions. Evidence of what these persons were heard to say upon such occasions is always received; not, however, as hearsay, and under any supposed exception in favor of questions of ancient boundary, but as part of the *res gestæ*, and explanatory of the acts themselves, done in the course of the ambit.[3] Indeed, in the case of such extensive domains as lordships, they being matters of general interest, traditionary evidence of common fame seems also admissible on the other grounds, which have been previously discussed.[4]

[1] *Supra*, §§ 128, 129, 130, 135, 136, 137. It is held in *New York*, that in ascertaining facts, relative to the possession of, and title to, lands, which occurred more than a century before the time of trial, evidence is admissible which, in regard to recent events, could not be received; such as histories of established credit, as to public transactions; the recitals in public records, statutes, legislative journals, and ancient grants and charters; judicial records; ancient maps, and depositions, and the like. But it is admitted that this evidence is always to be received with great caution, and with due allowance for its imperfection, and its capability of misleading. Bogardus *v.* Trinity Church, Kinney's Law Compend. for 1850, p. 159. [See also as to the admissibility of ancient maps and surveys, Ross *v.* Rhoads, 15 Penn. St. R. 163; Penny Pot Landing *v.* Philadelphia, 16 Ib. 79; Whitehouse *v.* Bickford, 9 Foster, 471; Adams *v.* Stanyan, 4 Ib. 405; Daniel *v.* Wilkin, 12 English Law & Eq. 547.]

[2] 5 Com. Dig. 732, Pleader, 3 G.; F. N. B. [133] D.; 1 Story on Eq. Jurisp. § 611. See also St. 13 G. 3, c. 81, § 14; St. 41 G. 3, c. 81, § 14; St. 58 G. 3, c. 45, § 16.

[3] Weeks *v.* Sparke, 1 M. & S. 687, per Ld. Ellenborough; *supra*, § 108; Ellicott *v.* Pearl, 1 McLean, 211.

[4] *Supra*, § 128–137. The writ *de perambulatione faciendâ* is not known to have been adopted in practice, in the United States; but in several of the states, remedies somewhat similar in principle have been provided by statutes. In some of the states, provision is only made for a periodical perambulation of the boundaries of towns by the selectmen; LL. Maine, Rev. 1840, ch. 5; LL. N. Hamp. 1842, ch. 37; Mass. Rev. Stats. ch. 15; LL. Connecticut, Rev. 1849, tit. 3, ch. 7; or, for a definite settlement of controversies re-

specting them, by the public surveyor, as in New York, Rev. Code, Part I. ch. 8, tit. 6. In others, the remedy is extended to the boundaries of private estates. See Elmer's Digest, pp. 98, 99, 315, 316; New Jersey, Rev. St. 1846, tit. 22, ch. 12; Virginia, Rev. Code, 1819, vol. 1, pp. 358, 359. A very complete summary remedy, in all cases of disputed boundary, is provided in the statutes of Delaware, Revision of 1829, pp. 80, 81, tit. Boundaries, III. To perambulations made under any of these statutes, the principles stated in the text, it is conceived, will apply.

CHAPTER VIII.

OF DECLARATIONS AGAINST INTEREST.

§ 147. A THIRD *exception* to the rule, rejecting hearsay evidence, is allowed in the case of *declarations and entries made by persons since deceased, and against the interest of the persons making them*, at the time when they were made. We have already seen,[1] that declarations of third persons, admitted in evidence, are of two classes; one of which consists of written entries, made in the course of official duty, or of professional employment; where the entry is one of a number of facts, which are ordinary and usually connected with each other, so that the proof of one affords a presumption that the others have taken place; and, therefore, a fair and regular entry, such as usually accompanies facts similar to those of which it speaks, and apparently contemporaneous with them, is received as original presumptive evidence of those facts. And, the entry itself being original evidence, it is of no importance, as regards its admissibility, whether the person making it be yet living or dead. But declarations of the other class, of which we are now to speak, are *secondary* evidence, and are received only in consequence of the death of the person making them. This class embraces not only entries in books, but all other dec-

[1] *Supra*, §§ 115, 116, and cases there cited.

larations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared or at a subsequent day.[1] But, to render them admissible, it must appear that the declarant is deceased; that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interest.[2] When these circumstances concur, the evidence is received, leaving its weight and value to be determined by other considerations.

§ 148. The *ground* upon which this evidence is received, is the *extreme improbability of its falsehood.* The regard which men usually pay to their own interest is deemed a sufficient security, both that the declarations were not made under any mistake of fact, or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true. The apprehension of fraud in the statement is rendered still more improbable from the circumstance, that it is not receivable in evidence until after the death of the declarant; and that it is always competent for the party, against whom such declarations are adduced, to point out any sinister motive for making them. It is true, that the ordinary and highest tests of the fidelity, accuracy, and completeness of judicial evidence are

[1] Ivat *v.* Finch, 1 Taunt. 141; Doe *v.* Jones, 1 Campb. 367; Davies *v.* Pierce, 2 T. R. 53, and Holloway *v.* Raikes, there cited; Doe *v.* Williams, Cowp. 621; Peaceable *v.* Watson, 4 Taunt. 16; Stanley *v.* White, 14 East, 332, 341, per Ld. Ellenborough; Haddow *v.* Parry, 3 Taunt. 303; Goss *v.* Watlington, 3 Brod. & Bing. 132; Strode *v.* Winchester, 1 Dick. 397; Barker *v.* Ray, 2 Russ. 63, 76, and cases in p. 67, note; Warren *v.* Greenville, 2 Stra. 1129; 2 Burr. 1071, 1072, s. c.; Doe *v.* Turford, 3 B. & Ad. 898, per Parke, J.; Harrison *v.* Blades, 3 Campb. 457; Manning *v.* Leachmere, 1 Atk. 453.

[2] Short *v.* Lee, 2 Jac. & Walk. 464, 488, per Sir Thomas Plumer, M. R.; Doe *v.* Robson, 15 East, 32, 34; Higham *v.* Ridgway, 10 East, 109, per Ld. Ellenborough; Middleton *v.* Melton, 10 B. & C. 317, 327, per Parke, J.; Regina *v.* Worth, 4 Ad. & El. N. S. 137, per Ld. Denman; 2 Smith's Leading Cases, 193, note, and cases there cited; Spargo *v.* Brown, 9 B. & C. 935. The interest, with which the declarations were at variance, must be of a *pecuniary* nature. Davis *v.* Lloyd, 1 Car. & P. 276. The apprehension of possible danger of a prosecution is not sufficient. The Sussex Peerage Case, 11 Clark & Fin. 85. In Holladay *v.* Littlepage, 2 Munf. 316, the joint declarations of a deceased shipmaster, and the living owner, that the defendant's passage-money had been paid by the plaintiff, were held admissible, as parts of the *res gestæ*, being contemporaneous with the time of sailing. This case, therefore, is not opposed to the others cited. Neither is Sherman *v.* Crosby, 11 Johns. 70, where a receipt of payment of a judgment recovered by a third person against the defendant was held admissible in an action for the money so paid, by the party paying it, he having had authority to *adjust* the demand, and the receipt being a documentary fact in the adjustment; though the attorney who signed the receipt was not produced, nor proved to be dead. In auditing the accounts of guardians, administrators, &c., the course is, to admit receipts as *primâ facie* sufficient vouchers. Shearman *v.* Akins, 4 Pick. 283; Nichols *v.* Webb, 8 Wheat. 326; Welsh *v.* Barrett, 15 Mass. 380; Wilbur *v.* Selden, 6 Cowen, 162; Farmers Bank *v.* Whitehill, 16 S. & R. 89, 90; Stokes *v.* Stokes, 6 Martin, N. S. 351.

here wanting; but their place is, in some measure, supplied by the circumstances of the declarant; and the inconveniences resulting from the exclusion of evidence, having such guaranties for its accuracy in fact, and from its freedom from fraud, are deemed much greater, in general, than any which would probably be experienced from its admission.[1]

§ 149. In some cases, the courts seem to have admitted this evidence, without requiring *proof of adverse interest in the declarant;* while in others stress is laid on the fact, that such interest had already appeared, *aliunde*, in the course of the trial. In one case it was argued, upon the authorities cited, that it was not material that the declarant ever had any actual interest, contrary to his declaration; but this position was not sustained by the court.[2] In many other cases, where the evidence consisted of entries in books of account, and the like, they seem to have been clearly admissible as entries made in the ordinary course of business or duty, or parts of the *res gestæ*, and therefore as original, and not secondary evidence; though the fact, that they were made against the interest of the person making them, was also adverted to.[3] But in regard to declarations in general, not being entries or acts of the last-mentioned character, and which are admissible only on the ground of having been made contrary to the interest of the declarant, the weight of authority, as well as the principle of the exception we are considering, seem plainly to require that such adverse interest should appear, either in the nature of the case, or from extraneous proof.[4] And it seems not to be suffi-

[1] Phil. & Am. on Evid. 307, 308; 1 Phil Evid. 293, 294; Gresley on Evid. 221; [Bird *v.* Hueston, 10 Chritchfield (Ohio), 418.]

[2] Barker *v.* Ray, 2 Russ. 63, 67, 68, cases cited in note; Id. p. 76. Upon this point, Eldon, Lord Chancellor, said:— "The cases satisfy me, that evidence is admissible of declarations made by persons who have a competent knowledge of the subject to which such declarations refer, and where their interest is concerned; and the only doubt I have entertained was as to the position, that you are to receive evidence of declarations where there is no interest. At a certain period of my professional life, I should have said that this doctrine was quite new to me. I do not mean to say more than that I still doubt concerning it. When I have occasion to express my opinion judicially upon it, I will do so; but I desire not to be considered as bound by that, as a rule of evidence." The objection arising from the rejection of such evidence in the case was disposed of in another manner.

[3] It has been questioned, whether there is any difference in the principle of admissibility between a written entry and an oral declaration of an agent, concerning his having received money for his principal. See *supra*, § 113, note; Fursdon *v.* Clogg, 10 M. & W. 572; *Infra*, § 152, note.

[4] Higham *v.* Ridgway, 10 East, 109; Warren *v.* Greenville, 2 Stra. 1129; expounded by Lord Mansfield, in 2 Burr. 1071, 1072; Gleadow *v.* Atkin, 3 Tyrwh. 302, 303; 1 Cromp. & Mees. 423, 424; Short *v.* Lee, 2 Jac. & W. 489; Marks *v.*

cient that, in one or more points of view, a declaration may be against interest, if it appears, upon the whole, that the interest of the declarant would be rather promoted than impaired by the declaration.[1]

§ 150. Though the exception we are now considering is, as we have just seen, extended to declarations of any kind, yet it is much more frequently exemplified in documentary evidence, and particularly in entries in books of account. Where these are books of collectors of taxes, stewards, bailiffs, or receivers, subject to the inspection of others, and in which the first entry is generally of money received, charging the party making it, they are, doubtless, within the principle of the exception.[2] But it has been extended still farther, to include *entries in private books* also, though retained within the custody of their owners; their liability to be produced on notice, in trials, being deemed sufficient security against fraud; and the entry not being admissible, unless it *charges the party making it* with the receipt of money on account of a third person, *or acknowledges the payment of money* due to himself; in either of which cases it would be evidence against him, and therefore is considered as sufficiently against his interest to bring it within this exception.[3] The entry of a mere *memorandum of an agreement* is not sufficient. Thus, where the settlement of a pau-

Lahee, 3 Bing. N. C. 408, 420, per Parke, J.; Barker *v.* Ray, 2 Russ. 63, 76; *supra*, § 147, and cases in notes.

[1] Phil. & Am. on Evid. 320; 1 Phil. Evid. 305, 306; Short *v.* Lee, 2 Jac. & W. 464.

[2] Barry *v.* Bebbington, 4 T. R. 514; Goss *v.* Watlington, 3 Brod. & Bing. 132; Middleton *v.* Melton, 10 B. & C. 317; Stead *v.* Heaton, 4 T. R. 669; Short *v.* Lee, 2 Jac. & W. 464; Whitmarsh *v.* George, 8 B. & C. 556; Dean, &c. of Ely *v.* Caldecott, 7 Bing. 433; Marks *v.* Lahee, 3 Bing. N. C. 408; Wynne *v.* Tyrwhitt, 4 B. & Ald. 376; De Rutzen *v.* Farr, 4 Ad. & El. 52; 2 Smith's Leading Cas. 193, note; Plaxton *v.* Dare, 10 B. & C. 17, 19; Doe *v.* Cartwright, Ry. & M. 62. An entry by a steward in his books, in his own favor, unconnected with other entries against him, is held not admissible to prove the facts stated in such entry. Knight *v.* Marq. of Waterford, 4 Y. & C. 284. But where the entry goes to show a general balance in his own favor, it has been ruled not to affect the admissibility of a particular entry charging himself. Williams *v.* Geaves, 8 C. & P. 592. And see Musgrave *v.* Emerson, 16 Law Journ. 174, Q. B. [An ancient book, kept among the records of a town, purporting to be the "Selectmen's book of accounts with the treasury of the town," is admissible in evidence of the facts therein stated; and, the selectmen being at the same time assessors, an entry in such book of a credit by an order in favor of the collector for a discount of a particular individual's taxes was held to be evidence of the abatement of the tax of such individual. Boston *v.* Weymouth, 4 Cush. 538.]

[3] Warren *v.* Greenville, 2 Stra. 1029; 2 Burr. 1071, 1072, *s. c.*; Higham *v.* Ridgway, 10 East, 109; Middleton *v.* Melton, 10 Barn. & Cress. 317. In those states of the Union in which the original entries of the party, in his own account books, may be evidence for him, and where, therefore, a false entry may sometimes amount to the crime of forgery, there is much stronger reason for admitting the entries in evidence against third persons. See also Hoare *v.* Coryton, 4 Taunt. 560.

per was attempted to be proved by showing a contract of hiring and service; the books of his deceased master, containing minutes of his contracts with his servants, entered at the time of contracting with them, and of subsequent payments of their wages, were held inadmissible; for the entries were not made against the writer's interest, for he would not be liable unless the service were performed, nor were they made in the course of his duty or employment.[1]

§ 151. Where the *entry is itself the only evidence of the charge*, of which it shows the subsequent liquidation, its admission has been strongly opposed, on the ground, that, taken together, it is no longer a declaration of the party against his interest, and may be a declaration ultimately in his own favor. This point was raised in the cases of *Higham* v. *Ridgway*, where an entry was simply marked as *paid*, in the margin; and of *Rowe* v. *Brenton*, which was a debtor and creditor account, in a toller's books, of the money received for tolls, and paid over. But in neither of these cases was the objection sustained. In the former, indeed, there was evidence *aliunde*, that the service charged had been performed; but Lord Ellenborough, though he afterwards adverted to this fact, as a corroborating circumstance, first laid down the general doctrine, that "the evidence was properly admitted, upon the broad principle on which receivers' books have been admitted." But in the latter case there was no such proof; and Lord Tenterden observed, that almost all the accounts which were produced were accounts on both sides; and that the objection would go to the very root of that sort of evidence. Upon these authorities, the admissibility of such entries may perhaps be considered as established.[2] And it is observable, in corroboration of their admissibility, that in most, if not all of the cases, they appear to have been made in the ordinary course of business or of duty, and therefore were parts of the *res gestæ*.[3]

[1] Regina *v.* Worth, 4 Ad. & El. N. S. 132.

[2] Higham *v.* Ridgway, 10 East, 109; Rowe *v.* Brenton, 3 Man. & R. 267; 2 Smith's Leading Cas. 196, note. In Williams *v.* Geaves, 8 C. & P. 592, the entries in a deceased steward's account were admitted, though the balance of the account was in his favor. See also Doe *v.* Tyler, 4 M. & P. 377, there cited. Doe *v.* Whitcomb, 15 Jur. 778.

[3] In Dowe *v.* Vowles, 1 M. & Rob. 261, the evidence offered was merely a tradesman's bill, receipted in full; which was properly rejected by Littledale, J., as it had not the merit of an original entry; for though the receipt of payment was against the party's interest, yet the main fact to be established was the performance of the services charged in the bill, the appearance of which denoted that better evidence existed, in the original entry in the

§ 152. It has also been questioned, whether the entry is to be received in evidence of *matters*, which, though forming *part of the declaration*, were *not in themselves against the interest of the declarant*. This objection goes not only to collateral and independent facts, but to the class of entries mentioned in the preceding section; and would seem to be overruled by those decisions. But the point was solemnly argued in a later case, where it was adjudged, that though, if the point were now for the first time to be decided, it would seem more reasonable to hold, that the memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and the account on which it had been made, giving it the effect only of verbal proof of the same payment; yet, that the authorities had gone beyond that limit, and the entry of a payment against the interest of the party making it had been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it. Accordingly, in that case, where three persons made a joint and several promissory note, and a partial payment was made by one, which was indorsed upon the note in these terms: "Received of W. D. the sum of £280, on account of the within note, *the* £300" (which was the amount of the note) "*having been originally advanced to E. H.*," — for which payment an action was brought by the party paying, as surety, against E. H., as the principal debtor; it was held, upon the authority of *Higham* v. *Ridgway*, and of *Doe* v. *Robson*, that the indorsement, the creditor being dead, was admissible in evidence of the whole statement contained in it; and consequently, that it was *primâ facie* proof, not only of the payment of the money, but of the person who was the principal debtor, for whose account it was paid; leaving its effect to be determined by the jury.[1]

tradesman's book. The same objection, indeed, was taken here, by the learned counsel for the defendant, as in the cases of Higham *v.* Ridgway, and of Rowe *v.* Brenton, namely, that the proof, as to interest, was on both sides, and neutralized itself; but the objection was not particularly noticed by Littledale, J., before whom it was tried; though the same learned judge afterward intimated his opinion, by observing, in reply to an objection similar in principle, in Rowe *v.* Brenton, that "a man is not likely to charge himself, for the purpose of getting a discharge." See also *infra*, § 152.

[1] Davies *v.* Humphreys, 6 Mees. & Welsb. 153, 166. See also Stead *v.* Heaton, 4 T. R. 669; Roe *v.* Rawlings, 7 East, 279; Marks *v.* Lahee, 3 Bing. N. C. 408. The case of Chambers *v.* Bernasconi, 1 Cr. & Jer. 451, 1 Tyrwh. 335, which may seem opposed to these decisions, turned on a different principle. That case involved the effect of an undersheriff's return, and the extent of the circumstances which the sheriff's return

§ 153. In order to render *declarations against interest* admissible, it is *not necessary that the declarant should have been competent*, if living, to testify to the facts contained in the declaration; the evidence being admitted on the broad ground, that the declaration was against the interest of the party making it, in the nature of a confession, and, on that account, so probably true as to justify its reception.[1] For the same reason it does not seem necessary that the fact should have been stated on the personal knowledge of the declarant.[2] Neither is it material whether the same fact is or is not provable by other witnesses who are still living.[3] Whether their testimony, if produced, might be more satisfactory, or its non-production, if attainable, might go to diminish the weight of the declarations, are considerations for the jury, and do not affect the rule of law.

§ 154. But where the evidence consists of entries made by persons acting for others, in the capacity of *agents*, *stewards*, or *receivers*, some proof of such agency is generally required, previous to their admission. The handwriting, after thirty years, need not be proved.[4] In regard to the proof of official character, a distinction has been taken between public and private offices, to the effect, that where the office is public and must exist, it may

ought to include, and as to which it would be conclusive evidence. It seems to have been considered, that the return could properly narrate only those things which it was the officer's duty to do; and, therefore, though evidence of the fact of the arrest, it was held to be no evidence of the place where the arrest was made, though this was stated in the return. The learned counsel also endeavored to maintain the admissibility of the under-sheriff's return, in proof of the place of arrest, as a written declaration, by a deceased person, of a fact against his interest; but the court held that it did not belong to that class of cases. 1 Tyrwh. 333, per Bayley, B. Afterwards, this judgment was affirmed in the Exchequer Chamber, 4 Tyrwh. 531; 1 Cr. Mees. & Ros. 347, 368; the court being "all of opinion, that whatever effect may be due to an entry, made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." See also Thompson *v.* Stevens, 2 Nott & McC. 493; Sherman *v.* Crosby, 11 Johns. 70. Whether a verbal declaration of a deceased agent or officer, made while he was paying over money to his principal or superior, and designating the person from whom he received a particular sum entered by him in his books, is admissible in evidence against that person, *quære*; and see Fursdon *v.* Clogg, 10 M. & W. 572. The true distinction, more recently taken, is this: that where the entry is admitted as being against the interest of the party making it, it carries with it the whole statement; but that where it was made merely in the course of a man's duty, it does not go beyond the matters which it was his duty to enter. Percival *v.* Nanson, 7 Eng. Law & Eq. R. 538, per Pollock, C. B.; 7 Exch. Rep. 1, s. c.

[1] Doe *v.* Robson, 15 East, 32; Short *v.* Lee, 2 Jac. & W. 464, 489; Gleadow *v.* Atkin, 1 Cr. & Mees. 410; Middleton *v.* Melton, 10 B. & C. 317, 326; Bosworth *v.* Crotchet, Ph. & Am. on Evid. 348, n.

[2] Crease *v.* Barrett, 1 Cr. Mees. & R. 919.

[3] Middleton *v.* Melton, 16 B. & C. 327, per Parke, J.; Barry *v.* Bebbington, 4 T. R. 514.

[4] Wynne *v.* Tyrwhitt, 4 B. & Ald. 376

always be presumed that a person who acts in it has been regularly appointed; but that where it is merely private, some preliminary evidence must be adduced of the existence of the office, and of the appointment of the agent or incumbent.[1] Where the entry, by an agent, charges himself in the first instance, that fact has been deemed sufficient proof of his agency;[2] but where it was made by one styling himself clerk to a steward, that alone was considered not sufficient to prove the receipt, by either of them, of the money therein mentioned.[3] Yet where ancient books contain strong internal evidence of their actually being receivers' or agents' books, they may, on that ground alone, be submitted to the jury.[4] Upon the general question, how far mere antiquity in the entry will avail, as preliminary proof of the character of the declarant, or party making the entry; and how far the circumstances, which are necessary to make a document evidence, must be proved *aliunde*, and cannot be gathered from the document itself, the law does not seem perfectly settled.[5] But where the transaction is ancient, and the document charging the party with the receipt of money is apparently genuine and fair, and comes from the proper repository, it seems admissible, upon the general principles already discussed in treating of this exception.[6]

§ 155. There is another class of entries admissible in evidence, which sometimes has been regarded as anomalous, and at others has been deemed to fall within the principle of the present exception to the general rule; namely, the private *books of a deceased*

[1] Short *v.* Lee, 2 Jac. & W. 464, 468.

[2] Doe *v.* Stacy, 6 Car. & P. 139.

[3] De Rutzen *v.* Farr, 4 Ad. & El. 53. And see Doe *v.* Wittcomb, 15 Jur. 778.

[4] Doe *v.* Ld. Geo. Thynne, 10 East, 206, 210.

[5] In one case, where the point in issue was the existence of a custom for the exclusion of foreign cordwainers from a certain town; an entry in the corporation books, signed by one acknowledging himself not a freeman, or free of the corporation, and promising to pay a fine assessed on him for breach of the custom; and another entry, signed by two others, stating that they had distrained and appraised nine pairs of shoes from another person, for a similar offence; were severally held inadmissible, without previously offering some evidence to show by whom the entries were subscribed, and in what situation the several parties actually stood; although the latest of the entries was more than a hundred years old. Davies *v.* Morgan, 1 Cr. & Jer. 587, 590, 593, per Ld. Lyndhurst, C. B. In another case, which was a bill for tithes, against which a *modus* was alleged in defence, a receipt of more than fifty years old was offered, to prove a money payment therein mentioned to have been received for a prescription rent in lieu of tithes; but it was held inadmissible, without also showing who the parties were, and in what character they stood. Manby *v.* Curtis, 1 Price, 225, per Thompson, C. B., Graham, B., and Richards, B.; Wood, B., dissentiente.

[6] See Phil. & Am. on Evid. 331, n. (2); 1 Phil. Evid. 316, n. (6), and cases there cited; Fenwick *v.* Read, 6 Madd. 8, per Sir J. Leach, Vice-Ch.; Bertie *v.* Beaumont, 2 Price, 307; Bp. of Meath *v.* Marquis of Winchester, 3 Bing. N. C. 183, 203; [Doe *v.* Michael, 24 Eng. Law and Eq. R. 180.]

rector or vicar, or of an ecclesiastical corporation aggregate, containing entries of the receipt of ecclesiastical dues, when admitted in favor of their successors, or of parties claiming the same interest as the maker of the entries. Sir Thomas Plumer, in a case before him,[1] said: "It is admitted, that the entries of a rector or vicar are evidence for or against his successors. It is too late to argue upon that rule, or upon what gave rise to it; whether it was the *cursus Scaccarii*, the protection of the clergy, or the peculiar nature of property in tithes. It is now the settled law of the land. *It is not to be presumed that a person, having a temporary interest only, will insert a falsehood in his book from which he can derive no advantage.* Lord Kenyon has said, that the rule is an exception; and it is so; for no other proprietor can make evidence for those who claim under him, or for those who claim in the same right and stand in the same predicament. But it has been the settled law, as to tithes, as far back as our research can reach. We must, therefore, set out from this as a datum; and we must not make comparisons between this and other corporations. No corporation sole, except a rector or vicar, can make evidence for his successor." But the strong presumption that a person, having a temporary interest only, will not insert in his books a falsehood, from which he can derive no advantage, which evidently and justly had so much weight in the mind of that learned judge, would seem to bring these books within the principle on which entries, made either in the course of duty, or against interest, are admitted. And it has been accordingly remarked, by a writer of the first authority in this branch of the law, that after it has been determined that evidence may be admitted of receipts of payment, entered in private books, by persons who are neither obliged to keep such books, nor to account to others for the money received, it does not seem any infringement of principle to admit these books of rectors and vicars. For the entries cannot be used by those who made them; and there is no legal privity between them and their successors. The strong leaning, on their part, in favor of the church, is nothing more, in legal consideration, than the leaning of every declarant in favor of his own interest, affecting the weight of the evidence, but not its admissibility. General observations have occasionally been made respecting these books,

[1] Short *v.* Lee, 2 Jac. & W. 177, 178.

which may seem to authorize the admission of any kind of statement contained in them. But such books are not admissible, except where the entries contain receipts of money or ecclesiastical dues, or are otherwise apparently prejudicial to the interests of the makers, in the manner in which entries are so considered in analogous cases.[1] And proof will be required, as in other cases, that the writer had authority to receive the money stated, and is actually dead; and that the document came out of the proper custody.[2]

[1] Phil. & Am. on Evid. 322, 323, and cases in notes (2) and (3); 1 Phil. Evid. 308, notes. (1), (2); Ward *v.* Pomfret, 5 Sim. 475.

[2] Gresley on Evid. 223, 224; Carrington *v.* Jones, 2 Sim. & Stu. 135, 140; Perigal *v.* Nicholson, 1 Wightw. 63.

CHAPTER IX.

OF DYING DECLARATIONS.

§ 156. A *fourth exception* to the rule, rejecting hearsay evidence, is allowed in the case of *dying declarations*. The general principle, on which this species of evidence is admitted, was stated by Lord Chief Baron Eyre to be this, — that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth. A situation so solemn and so awful is considered by the law, as creating an obligation equal to that which is imposed by a positive oath in a court of justice.[1] It was at one time held, by respectable authorities, that this general principle warranted the admission of dying declarations in all cases, civil and criminal; but it is now well settled that they are admissible, as such, only in cases of homicide, "where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declara-

[1] Rex *v.* Woodcock, 2 Leach's Cr. Cas. 256, 567; Drummond's case, 1 Leach's Cr. Cas. 378. The rule of the Roman Civil Law was the same. Morti proximum, sive moribundum, non præsumendum est mentiri, nec esse immemorem salutis æternæ; licet non præsumatur *semper* dicere verum. Mascard. De Probat. Concl. 1080. In the earliest reported case on this subject, the evidence was admitted without objection, and apparently on this general ground. Rex *v.* Reason *et al.*, 6 State Tr. 195, 201. The rule of the Common Law, under which this evidence is

tions."[1] The reasons for thus restricting it may be, that the credit is not in all cases due to the declarations of a dying person; for his body may have survived the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity and annoyance of those around him, he may say, or seem to say, whatever they may choose to suggest.[2] These, or the like considerations, have been regarded as counterbalancing the force of the general principle above stated; leaving this exception to stand only upon the ground of the public necessity of preserving the lives of the community, by bringing manslayers to justice. For it often happens, that there is no third person present to be an eyewitness to the fact; and the usual witness in other cases of felony, namely, the party injured, is himself destroyed.[3] But in thus restricting the evidence of dying declarations to cases of

admitted, is held not to be repealed by, nor inconsistent with, those express provisions of constitutional law, which secure to the person accused of a crime, the right to be confronted with the witnesses against him. Anthony *v.* The State, 1 Meigs, 265; Woodsides *v.* The State, 2 How. Mis. R. 655; [Campbell *v.* State, 11 Geo. 353.]

[1] Rex *v.* Mead, 2 B. & C. 605. In this case the prisoner had been convicted of perjury, and moved for a new trial, because convicted against the weight of evidence; after which he shot the prosecutor. Upon showing cause against the rule, the counsel for the prosecution offered the dying declarations of the prosecutor, relative to the fact of perjury; but the evidence was adjudged inadmissible. The same point was ruled by Bayley, J., in Rex *v.* Hutchinson, who was indicted for administering poison to a woman pregnant, but not quick with child, in order to procure abortion. 2 B. & C. 608, note. This doctrine was well considered, and approved in Wilson *v.* Boerem, 15 Johns. 286. In Rex *v.* Lloyd *et al.*, 4 C. & P. 233, such declarations were rejected on a trial for robbery. Upon an indictment for the murder of A, by poison, which was also taken by B, who died in consequence, it was held, that the dying declarations of B were admissible, though the prisoner was not indicted for murdering her. Rex *v.* Baker, 2 M. & Rob, 53; [State *v.* Cameron, 2 Chand. 172.] [* Dailey *v.* N. Y. & N. H. Railw. 32 Conn. In some of the states, dying declarations have been received in civil causes. Malaun *v.* Ammon, 1 Grant's Cases (Penn.), 123. But it has arisen from a misapprehension of the true grounds upon which the declarations are receivable as testimony. It is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission, for if that were all that is requisite to render the declarations evidence, the apprehension of death should have the same effect, since it would place the declarant under the same restraint as if the apprehension were founded in fact. But both must concur, both the fact and the apprehension of being *in extremis*. And, although it is not indispensable that there should be no other evidence of the same facts, the rule is, no doubt, based upon the presumption, that in the majority of cases there will be no other equally satisfactory proof of the same facts. This presumption and the consequent probability of the crime going unpunished, is unquestionably the chief ground of this exception in the Law of Evidence. And the great reason why it could not be received generally, as evidence in all cases where the facts involved should thereafter come in question, seems to be that it wants one of the most important and indispensable elements of testimony, that of an opportunity for cross-examination by the party against whom it is offered.]

[2] Jackson *v.* Kniffen, 2 Johns. 31, 35, per Livingston, J.

[3] 1 East, P. C. 353.

trial for homicide of the declarant, it should be observed, that this applies only to declarations offered on the sole ground, that they were made *in extremis;* for where they constitute part of the *res gestæ*, or come within the exception of declarations against interest, or the like, they are admissible as in other cases; irrespective of the fact that the declarant was under apprehension of death.[1]

§ 157. The persons, whose declarations are thus admitted, are considered as standing in the same situation as if they were sworn; the danger of impending death being equivalent to the sanction of an oath. It follows, therefore, that where the declarant, if living, would have been incompetent to testify, by reason of infamy, or the like, his dying declarations are inadmissible.[2] And, as an oath derives the value of its sanction from the religious sense of the party's accountability to his Maker, and the deep impression that he is soon to render to Him the final account; wherever it appears that the declarant was incapable of this religious sense of accountability, whether from infidelity, imbecility of mind, or tender age, the declarations are alike inadmissible.[3] On the other hand, as the testimony of an accomplice is admissible, against his fellows, the dying declarations of a *particeps criminis* in an act, which resulted in his own death, are admissible against one indicted for the same murder.[4]

§ 158. It is essential to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them

[1] *Supra*, §§ 102, 108, 109, 110, 147, 148, 149. To some of these classes may be referred the cases of Wright *v.* Littler, 3 Burr. 1244; Aveson *v.* Ld. Kinnaird, 6 East, 188; and some others. It was once thought that the dying declarations of the subscribing witness to a forged instrument were admissible to impeach it; but such evidence is now rejected, for the reasons already stated. *Supra*, § 126. See Stobart *v.* Dryden, 1 Mees. & W. 615, 627. In Regina *v.* Megson *et al.*, 9 C. & P. 418, 420, the prisoners were tried on indictments, one for the murder of Ann Stewart, and the other for a rape upon her. In the former case, her declarations were rejected, because not made *in extremis;* and in the latter so much of them as showed that a dreadful outrage had been perpetrated upon her was received as part of the outrage itself, being, in contemplation of law, contemporaneous; but so much as related to the identity of the perpetrators was rejected. See also Regina *v.* Hewett, 1 Car. & Marshm. 534. [See State *v.* Shelton, 2 Jones Law (N. C.) 360; State *v.* Peace, 1 Ib. 251; Oliver *v.* State, 17 Ala. 587.]

[2] Rex *v.* Drummond, 1 Leach's Cr Cas. 378.

[3] Rex *v.* Pike, 3 C. & P. 598; Regina *v.* Perkins, 9 C. & P. 395; 2 Mood. Cr. C. 135; 2 Russell on Crimes, 688.

[4] Tinckler's case, 1 East, P. C. 354. [Where the declarations have been put in evidence, and an attempt has been made by the other side to destroy the effect of such declarations by showing the bad character of the deceased, the prosecution, for the purpose of corroborating the evidence, may prove that the deceased made other declarations to the same purport, a few moments after he was struck, although it did not appear that he was then under the apprehension of immediate death. State *v.* Thomason, 1 Jones, Law (N. C.) 274.]

in evidence, that they were *made under a sense of impending death;* but it is not necessary that they should be stated, at the time, to be so made. It is enough, if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind.[1] The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence; though, in the absence of better testimony, it may serve as one of the exponents of the deceased's belief, that his dissolution was or was not impending. It is the *impression* of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible.[2] Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible.[3] On the other hand, a belief that he will not recover is not in itself sufficient, unless there be also the prospect of "almost immediate dissolution."[4]

[1] Rex *v.* Woodcock, 2 Leach's Cr. Cas. 567; John's case, 1 East, P. C. 357, 358; Rex *v.* Bonner, 6 C. & P. 386; Rex *v.* Van Butchell, Id. 631; Rex *v.* Mosley, 1 Moody's Cr. Cas. 97; Rex *v.* Spilsbury, 7 C. & P. 187, per Coleridge, J.; Reg. *v.* Perkins, 2 Mood. Cr. Cas. 135; Montgomery *v.* The State, 11 Ohio, 424; Dunn *v.* The State, 2 Pike, 229; Commonwealth *v.* M'Pike, 3 Cush. 181; Reg. *v.* Mooney, 5 Cox, C. C. 318.

[2] In Woodcock's case, 2 Leach's Cr. Cas. 563, the declarations were made forty-eight hours before death; in Tinckler's case, 1 East, P. C. 354, some of them were made ten days before death; and in Rex *v.* Mosley, 1 Mood. Cr. Cas. 97, they were made eleven days before death; and were all received. In this last instance, it appeared that the surgeon did not think the case hopeless, and told the patient so; but that the patient thought otherwise. See also Regina *v.* Howell, 1 Denis. Cr. Cas. 1. In Rex *v.* Bonner, 6 C. & P. 386, they were made three days before death. And see Smith *v.* The State, 9 Humph. 9; Logan *v.* The State, Id. 24; [Oliver *v.* State, 17 Ala. 587; Johnson *v.* State, Ib. 618.]

[3] So ruled in Welborn's case, 1 East, P. C. 358, 359; Rex *v.* Christie, 2 Russ. on Crimes, 685; Rex *v.* Hayward, 6 C. & P. 157, 160; Rex *v.* Crockett, 4 C. & P. 544; Rex *v.* Fagent, 7 C. & P. 238. [The declarations made by one in his last illness, who said he should die, but whom the physician had just told he might recover, are not admissible as dying declarations. By Harris, J. People *v.* Robinson, 2 Parker, Cr. R. 235. See People *v.* Knickerbocker, 1 Ib. 302.]

[4] Such was the language of Hullock, B., in Rex *v.* Van Butchell, 3 C. & P. 629, 631. See acc. Woodcock's case, 2 Leach's Cr. Cas. 567, per Ld. C. B. Eyre; Rex *v.* Bonner, 6 C. & P. 386; Commonwealth *v.* King, 2 Virg. Cases, 78; Commonwealth *v.* Gibson, Id. 111; Commonwealth *v.* Vass, 3 Leigh, R. 786; The State *v.* Poll, 1 Hawks, 442; Regina *v.* Perkins, 9 C. & P. 395; 2 Mood. Cr. Cas. 135, s. c.; Rex *v.* Ashton, 2 Lewin's Cr. Cas. 147.

§ 159. The declarations of the deceased are admissible *only to those things, to which he would have been competent to testify*, if sworn in the cause. They must, therefore, in general, speak to facts only, and not to mere matters of opinion; and must be confined to what is relevant to the issue. But the right to offer them in evidence is not restricted to the side of the prosecutor; they are equally admissible in favor of the party charged with the death.[1] It is not necessary, however, that the examination of the deceased should be conducted after the manner of interrogating a witness in the cause; though any departure from this mode may affect the validity and credibility of the declarations. Therefore it is no objection to their admissibility, that they were made in answer to leading questions, or obtained by pressing and earnest solicitation.[2] But whatever the statement may be, it must be complete in itself; for, if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received.[3]

§ 160. The *circumstances* under which the declarations were made are to be *shown to the judge;* it being his province, and not that of the jury, to determine whether they are admissible. In *Woodcock's* case, the whole subject seems to have been left to the jury, under the direction of the court, as a mixed question of law and fact; but subsequently it has always been held a question exclusively for the consideration of the court; being placed on the same ground with the preliminary proof of documents, and of the competency of witnesses, which is always addressed to the court.[4] But after the evidence is admitted, its credibility is entirely within the province of the jury, who of course are at

[1] Rex *v.* Scaife, 1 Mood. & Ro. 551; 2 Lewin's Cr. Cas. 150, s. c.

[2] Rex *v.* Fagent, 7 C. & P. 238; Commonwealth *v.* Vass, 3 Leigh, R. 786; Rex *v.* Reason *et al.*, 1 Stra. 499; Rex *v.* Woodcock, 2 Leach's Cr. Cas. 563; [Oliver *v.* State, 17 Ala. 587.]

[3] 3 Leigh, R. 787. [Where the deceased being asked "who shot him," replied "the prisoner," the declaration is complete, and cannot be rejected because, from weakness and exhaustion, he was unable to answer another question propounded to him immediately afterwards. McLean *v.* State, 16 Ala. 672.]

[4] Said, per Ld. Ellenborough, in Rex *v.* Hucks, 1 Stark. R. 521, 523, to have been so resolved by all the judges, in a case proposed to them. Welborn's case, 1 East, P. C. 360; John's case, Id. 358; Rex *v.* Van Butchell, 3 C. & P. 629; Rex *v.* Bonner, 6 C. & P. 386; Rex *v.* Spilsbury, 7 C. & P. 187, 190; The State *v.* Poll, 1 Hawks, 444; Commonwealth *v.* Murray, 2 Ashm. 41; Commonwealth *v.* Williams, Id. 69; Hill's case, 2 Gratt. 594; McDaniel *v.* The State, 8 Sm. & M. 401. Where the dying deponent declared that the statement was "as nigh right as he could recollect," it was held admissible. The State *v.* Ferguson, 2 Hill, S. Car. R. 619; [State *v.* Howard, 32 Vt. 380.]

liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give the testimony only such credit as, upon the whole, they may think it deserves.[1]

§ 161. If the statement of the deceased was *committed to writing and signed by him*, at the time it was made, it has been held essential that the writing should be produced, if existing; and that neither a copy, nor parol evidence of the declarations, could be admitted to supply the omission.[2] But where the declarations had been repeated at different times, at one of which they were made under oath, and informally reduced to writing by a witness, and at the others they were not, it was held that the latter might be proved by parol, if the other could not be produced.[3] If the deposition of the deceased has been taken under any of the statutes on that subject, and is inadmissible, as such, for want of compliance with some of the legal formalities, it seems it may still be treated as a dying declaration, if made *in extremis*.[4]

§ 161*a*. It has been held that the *substance* of the declarations may be given in evidence, if the witness is not able to state the precise language used.[5] And we have already seen that it is no objection to their admissibility, that they were obtained in answer to questions asked by the bystanders, nor that the questions themselves were leading questions; and that, if it appear that the declarations were intended by the dying person to be connected with and qualified by other statements, material to the completeness of the narrative, and that this was prevented by interruption or death, so that the narrative was left incomplete and partial, the evidence is inadmissible.[6]

[1] 2 Stark. Evid. 263; Phil. & Am. on Evid. 304; Ross *v.* Gould, 5 Greenl. 204; Vass's case, 3 Leigh, R. 794. See also the remarks of Mr. Evans, 2 Poth. on Oblig. 256 (294), App. No. 16, who thinks that the jury should be directed, previous to considering the effect of the evidence, to determine,—1st, Whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred;—2d, Whether the inference deduced from such circumstances or expressions is correct;—3d, Whether the deceased did make the declarations alleged against the accused;—and 4th, Whether those declarations are to be admitted, as sincere and accurate. Trant's case, McNally's Evid. 385.

[2] Rex *v.* Gay, 7 C. & P. 230; Trowter's case, P. 8 Geo. 1. B. R. 12 Vin. Abr. 118, 119; Leach *v.* Simpson *et al.*, 1 Law & Eq. R. 58; 5 M. & W. 309; 7 Dowl. P. C. 13; 3 Jur. 654, s. c.; [State *v.* Cameron, 2 Chand. 172.]

[3] Rex *v.* Reason *et al.*, 1 Str. 499, 500.

[4] Rex *v.* Woodcock, 2 Leach, Cr. Cas. 563; Rex *v.* Callaghan, McNally's Evid. 385.

[5] Montgomery *v.* The State, 11 Ohio, 424; Ward *v.* The State, 8 Blackf. 101. And see *infra*, § 165. [The substance of the declarations is sufficient, and it may be given, if need be, by an interpreter. Starkey *v.* People, 17 Ill. 17.]

[6] Vass's case, 3 Leigh, R. 786; *supra*, § 159.

§ 161*b*. The testimony here spoken of may be given as well *by signs* as by words. Thus, where one, being at the point of death and conscious of her situation, but unable to articulate by reason of the wounds she had received, was asked to say whether the prisoner was the person who had inflicted the wounds, and, if so, to squeeze the hand of the interrogator, and she thereupon squeezed his hand, it was held that this evidence was admissible and proper for the consideration of the jury.[1]

§ 162. Though these declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances, in respect of which the deceased was not likely to have been mistaken, are entitled to great weight, if precisely identified; yet it is always to be recollected, that the accused has not the *power of cross-examination*, — a power quite as essential to the eliciting of all the truth, as the obligation of an oath can be; and that where the witness has not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements; especially as the salutary and restraining fear of punishment for perjury is in such cases withdrawn. And it is further to be considered, that the particulars of

[1] Commonwealth *v.* Casey, 6 Monthly Law Rep. p. 203; [11 Cush. 417, 421. The entire opinion of the court, by Shaw, C. J., is as follows; "We appreciate the importance of the question offered for our decision. Where a person has been injured in such a way, that his testimony cannot be had in the customary way, the usual and ordinary rules of evidence must, from the necessity of the case, be departed from. The point first to be established is, that the person whose dying declarations are sought to be admitted was conscious that he was near his end at the time of making them; for this is supposed to create a solemnity equivalent to an oath. If this fact be satisfactorily established, and if the declarations are made freely and voluntarily, and without coercion, they may be admitted as competent evidence to go to the jury. But, after they are admitted, the facts of the declarations and their credibility are still for the judgment of the jury.

"In regard to the matter before the court, and the admissibility of the signs by Mrs. Taylor, in reply to the questions put to her, it is to be observed that all words are signs; some are made by the mouth, and others by the hands. There was a civil case tried in Berkshire County, where a suit was brought against a railroad company, and the question was, whether a female who was run over survived the accident for any length of time. She was unable to speak, but was asked, if she had consciousness, to press their hands, and the testimony was admitted. If the injured party had but the action of a single finger, and with that finger pointed to the words "yes" and "no," in answer to questions, in such a manner as to render it probable that she understood, and was at the same time conscious that she could not recover, then it is admissible evidence. It is, therefore, the opinion of the court, that the circumstances under which the responses were given by Mrs. Taylor to the questions which were put her warrant that the evidence shall be admitted, but it is for the jury to judge of its credibility, and of the effect which shall be given to it."]

the violence, to which the deceased has spoken, were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed; and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.[1]

[1] Phil. & Am. on Evid. 305, 306; 1 Phil. Evid. 292; 2 Johns. 35, 36, per Livingston, J. See also Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255 (293); 2 Stark. Evid. 263. See also Rex *v.* Ashton, 2 Lewin's Cr. Cas. 147, per Alderson, B.

CHAPTER X.

OF THE TESTIMONY OF WITNESSES SUBSEQUENTLY DEAD, ABSENT, OR DISQUALIFIED.

[*§ 163. Admissibility of evidence of deceased witness at a former trial.
164. Not requisite all the parties to the suits should have been the same, but that the party should have opportunity for cross-examination.
165. The substance of what the witness testified, both on direct and cross-examination, must be proved.
166. Any witness may prove it, from memory and his notes taken at the time.
167. Cases where the witness has become incompetent from subsequently acquired interest.
168. It would seem, in such cases, the testimony given at a former trial should be received. Qualification of the rule stated by the author.]

§ 163. In the *fifth class* of exceptions to the rule rejecting hearsay evidence may be included *the testimony of deceased witnesses, given in a former action, between the same parties;* though this might, perhaps, with equal propriety, be considered under the rule itself. This testimony may have been given either orally, in court, or in written depositions taken out of court. The latter will be more particularly considered hereafter, among the instruments of evidence. But at present we shall state some principles applicable to the testimony, however given. The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine the witness. But where the testimony was given under oath, in a judicial proceeding, in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties.[1] It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick,

[1] Bull. N. P. 239, 242; Mayor of Doncaster *v.* Day, 3 Taunt. 262; Glass *v.* Beach, 5 Verm. 172; Lightner *v.* Wike, 4 S. & R. 203.

and unable to testify, or has been summoned, but appears to have been kept away by the adverse party.[1] But testimony thus offered is open to all the objections which might be taken, if the witness were personally present.[2] And if the witness gave a written deposition in the cause, but afterwards testified orally in court, parol evidence may be given of what he testified *vivâ voce*, notwithstanding the existence of the deposition.[3]

§ 164. The admissibility of this evidence seems to *turn* rather *on the right to cross-examine*, than upon the precise nominal identity of all the parties. Therefore, where the witness testified in a suit, in which A and several others were plaintiffs, against B

[1] Bull. N. P. 239, 243; 1 Stark. Evid. 264; 12 Vin. Abr. 107, A. b. 31; Godb. 326; Rex *v.* Eriswell, 3 T. R. 707, 721, per Ld. Kenyon; [Long *v.* Davis, 18 Ala. 801; Covanhovan *v.* Hart, 21 Penn. (9 Harris), 495.] As to the effect of interest subsequently acquired, see *infra*, § 167. Upon the question whether this kind of evidence is admissible in any other contingency except the death of the witness, there is some discrepancy among the American authorities. It has been refused, where the witness had subsequently become interested, but was living and within reach; Chess *v.* Chess, 17 S. & R. 409; Irwin *v.* Reed, 4 Yates, 512: where he was not to be found within the jurisdiction, but was reported to have gone to an adjoining state; Wilber *v.* Selden, 6 Cowan, 162: where, since the former trial, he had become incompetent by being convicted of an infamous crime; Le Baron *v.* Crombie, 14 Mass. 234: where, though present, he had forgotten the facts to which he had formerly testified; Drayton *v.* Wells, 1 Nott & McCord, 409: and where he has proved to have left the state, after being summoned to attend at the trial; Finn's case, 5 Rand. 701. In this last case it was held, that this sort of testimony was not admissible in any criminal case whatever. [See also Brogy *v.* Commonwealth, 10 Gratt. 722.] In the cases of Le Baron *v.* Crombie, Wilber *v.* Selden, and also in Crary *v.* Sprague, 12 Wend. 41, it was said, that such testimony was not admissible in any case, except where the witness was shown to be dead; but this point was not in either of those cases directly in judgment; and in some of them it does not appear to have been fully considered. [See also Weeks *v.* Lowerre, 8 Barb. 530.] On the other hand, in Drayton *v.* Wells, it was held by Cheves, J., to be admissible in four cases: 1st, where the witness is dead; 2d, insane; 3d, beyond seas; and 4th, where he has been kept away by contrivance of the other party. See also Moore *v.* Pearson, 6 Watts & Serg. 51. In Magill *v.* Kauffman, 4 S. & R. 317, and in Carpenter *v.* Groff, 5 S. & R. 162, it was admitted on proof that the witness had removed from Pennsylvania to Ohio,—it was also admitted, where the witness was unable to testify, by reason of sickness, in Miller *v.* Russell, 7 Martin, 266, N. S.; and even where he, being a sheriff, was absent on official duty. Noble *v.* Martin, 7 Martin, 282, N. S. But if it appears that the witness was not fully examined at the former trial, his testimony cannot be given in evidence. Noble *v.* McClintock, 6 Watts & Serg. 58. If the witness is gone, no one knows whither, and his place of abode cannot be ascertained by diligent inquiry, the case can hardly be distinguished in principle from that of his death; and it would seem that his former testimony ought to be admitted. If he is merely out of the jurisdiction, but the place is known, and his testimony can be taken under a commission, it is a proper case for the judge to decide, in his discretion, and upon all the circumstances, whether the purposes of justice will be best served by issuing such commission, or by admitting the proof of what he formerly testified.

[2] Wright *v.* Tatham, 2 Ad. & El. 3, 21. Thus, where the witness at the former trial was called by the defendant, but was interested on the side of the plaintiff, and the latter, at the second trial, offers to prove his former testimony, the defendant may object to the competency of the evidence, on the ground of interest. Crary *v.* Sprague, 12 Wend. 41.

[3] Tod *v.* E. of Winchelsea, 3 C. & P 387.

alone, his testimony was held admissible, after his death, in a subsequent suit, relating to the same matter, brought by B against A alone.[1] And though the two trials were not between the parties, yet if the second trial is between those who represent the parties to the first, by privity in blood, in law, or in estate, the evidence is admissible. And if, in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point or fact in another action between the same parties or their privies, though the last suit be for other lands.[2] The principle on which, chiefly this evidence is admitted, namely, the right of cross-examination, requires that its admission be carefully restricted to the extent of that right; and that where the witness incidentally stated matter, as to which the party was not permitted by the law of trials to cross-examine him, his statement as to that matter ought not afterwards to be received in evidence against such party. Where, therefore, the point in issue in both actions was not the same, the issue in the former action having been upon a common or free fishery, and, in the latter, it being upon a several fishery, evidence of what a witness, since deceased, swore upon the former trial, was held inadmissible.[3]

§ 165. It was formerly held, that the person called to prove

[1] Wright *v.* Tatham, 1 Ad. & El. 3. But see Matthews *v.* Colburn, 1 Strob. 258. [So it is admissible in a subsequent action, in which the same matter is in issue, between persons who were parties to the former action, although other persons, not now before the court, were also parties to the former action. Philadelphia, W. & B. R. R. Co. *v.* Howard, 13 How. U. S. 307. But where in a suit for land against two persons jointly, certain facts were admitted and agreed on by all the parties, in a subsequent suit for the same land between the same defendants, this admission and agreement, though in writing, is not evidence. Frye *v.* Gragg, 35 Maine, 29.]

[2] Outram *v.* Morewood, 3 East, 346, 354, 355, per Ld. Ellenborough; Peake's Evid. (3d. ed.) p. 37; Bull. N. P. 232; Doe *v.* Derby, 1 Ad. & El. 783; Doe *v.* Foster, Id. 791, note; Lewis *v.* Clerges, 3 Bac. Abr. 614; Shelton *v.* Barbour, 2 Wash. 64; Rushford *v.* Countess of Pembroke, Hard. 472; Jackson *v.* Lawson, 15 Johns. 544; Jackson *v.* Bailey, 2 Johns. 17; Powell *v.* Waters, 17 Johns. 176. See also Ephraims *v.* Murdoch, 7 Blackf. 10; Harper *v.* Burrow, 6 Ired. 30; Clealand *v.* Huey, 18 Ala. 343.]

[3] Melvin *v.* Whiting, 7 Pick. 79. See also Jackson *v.* Winchester, 4 Dall. 206; Ephraims *v.* Murdoch, 7 Blackf. 10. [Where there was a preliminary examination before a magistrate of a defendant charged with a crime, and a witness, since deceased, there testified for the government and was cross-examined by defendant's counsel, and subsequently an indictment was found, it was held, on the trial of the indictment, that the evidence of what the witness testified to at the preliminary examination was admissible. United States *v.* Macomb, 5 McLean, 286; Davis *v.* State, 17 Ala. 354; Kendrick *v.* State, 10 Humph. 479. The testimony given before arbitrators, by a witness, since deceased, is admissible in evidence in a subsequent suit between the same parties on the same subject-matter, although the award has since been set aside, provided the submission was good, and the arbitrators had jurisdiction. McAdams *v.* Stilwell, 13 Penn. State R. 90. See Elliott *v.* Heath, 14 N. H. 131.]

what a deceased witness testified on a former trial, must be required to repeat his *precise words*, and that testimony merely to the effect of them was inadmissible.[1] But this strictness is not

[1] 4 T. R. 290, said, per Ld. Kenyon, to have been so "agreed on all hands," upon an offer to prove what Ld. Palmerston had testified. So held, also, by Washington, J., in United States *v.* Wood, 3 Wash. 440; 1 Phil. Evid. 260 [215], 3d. ed.; Foster *v.* Shaw, 7 Serg. & R. 163, per Duncan, J.; Wilber *v.* Seldon, 6 Cowen, 165; Ephraims *v.* Murdoch, 7 Blackf. 10. The same rule is applied to the proof of dying declarations. Montgomery *v.* Ohio, 11 Ohio R. 421. In *New Jersey* it has been held, that if a witness testifies that he has a distinct recollection, independent of his notes, of the fact that the deceased was sworn as a witness at the former trial, of what he was produced to prove, and of the substance of what he then stated; he may rely on his notes for the language, if he believes them to be correct. Sloan *v.* Somers, 1 Spencer, R. 66. In *Massachusetts*, in The Commonwealth *v.* Richards, 18 Pick. 434, the witnesses did not state the precise words used by the deceased witness, but only the substance of them, from recollection, aided by notes taken at the time; and one of the witnesses testified that he was confident that he stated substantives and verbs correctly, but was not certain as to the prepositions and conjunctions. Yet the court held this insufficient, and required that the testimony of the deceased witness be stated in his own language, *ipsissimis verbis*. The point was afterwards raised in Warren *v.* Nichols, 6 Met. 261; where the witness stated that he could give the substance of the testimony of the deceased witness, but not the precise language; and the court held it insufficient; Hubbard, J., *dissentiente*. The rule, however, as laid down by the court in the latter case, seems to recognize a distinction between giving the substance of the deceased witness's testimony, and the substance of the language; and to require only that his language be stated substantially, and in all material particulars, and not *ipsissimis verbis*. The learned chief justice stated the doctrine as follows: "The rule upon which evidence may be given of what a deceased witness testified on a former trial between the same parties, in a case where the same question was in issue, seems now well established in this commonwealth by authorities. It was fully considered in the case of Commonwealth *v.* Richards, 18 Pick. 434. The principle on which this rule rests was accurately stated, the cases in support of it were referred to, and with the decision of which we see no cause to be dissatisfied. The general rule is, that one person cannot be heard to testify as to what another person has declared, in relation to a fact within his knowledge, and bearing upon the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two: First, because the averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and secondly, because the party upon whose interests it is brought to bear has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends. Now the rule, which admits evidence of what another said on a former trial, must effectually exclude both of these reasons. It must have been *testimony;* that is, the affirmation of some matter of fact, under oath; it must have been in a suit between the same parties in interest, so as to make it sure that the party, against whom it is now offered, had an opportunity to cross-examine; and it must have been upon the same subject-matter, to show that his attention was drawn to points now deemed important. It must be the same testimony which the former witness gave, because it comes to the jury under the sanction of his oath, and the jury are to weigh the testimony and judge of it, as he gave it. The witness, therefore, must be able to state the language in which the testimony was given, *substantially* and *in all material particulars*, because that is the vehicle by which the testimony of the witness is transmitted, of which the jury are to judge. If it were otherwise, the statement of the witness, which is offered, would not be of the testimony of the former witness; that is, of the ideas conveyed by the former witness, in the language in which he embodied them; but it would be a statement of the present witness's understanding and comprehension of those ideas, expressed in language of his own. Those ideas may have been misunderstood, modified, perverted, or colored, by passing through the mind of the witness, by his knowledge or ignorance of the subject, or the language in which the testimony was given, or by his own prejudices, predilections, or habits of thought or reasoning. To illustrate this distinction, as we understand it to be fixed by

now insisted upon, in proof of the crime of perjury;[1] and it has been well remarked, that to insist upon it in other cases, goes in effect to exclude this sort of evidence altogether, or to admit it only where, in most cases, the particularity and minuteness of the witness's narrative, and the exactness with which he undertakes to repeat every word of the deceased's testimony, ought to excite just doubts of his own honesty, and of the truth of his evidence. It seems, therefore, to be generally considered sufficient, if the witness is able to state the substance of what was sworn on the former trial.[2] But he must state, in substance, the whole of what

the cases: If a witness, remarkable for his knowledge of law, and his intelligence on all other subjects, of great quickness of apprehension and power of discrimination, should declare that he could give the substance and effect of a former witness's testimony, but could not recollect his language, we suppose he would be excluded by the rule. But if one of those remarkable men should happen to have been present, of great solidity of mind upon most subjects, but of extraordinary tenacity of memory for language, and who would say that he recollected and could repeat all the words uttered by the witness; although it should be very manifest that he himself did not understand them, yet his testimony would be admissible. The witness called to prove former testimony must be able to satisfy one other condition, namely, that he is able to state all that the witness testified on the former trial, as well upon the direct as the cross-examination. The reason is obvious. One part of his statement may be qualified, softened, or colored by another. And it would be of no avail to the party against whom the witness is called to state the testimony of the former witness, that he has had the right and opportunity to cross-examine that former witness, with a view of diminishing the weight or impairing the force of that testimony against him, if the whole and entire result of that cross-examination does not accompany the testimony. It may, perhaps, be said, that, with these restrictions, the rule is of little value. It is no doubt true, that in most cases of complicated and extended testimony, the loss of evidence, by the decease of a witness, cannot be avoided. But the same result follows, in most cases, from the decease of a witness whose testimony has not been preserved in some of the modes provided by law. But there are some cases in which the rule can be usefully applied, as in case of testimony embraced in a few words,—such as proof of demand or notice, on notes or bills,—cases in which large amounts are often involved. If it can be used in a few cases, consistently with the true and sound principles of the law of evidence, there is no reason for rejecting it altogether. At the same time, care should be taken so to apply and restrain it, that it may not, under a plea of necessity, and in order to avoid hard cases, be so used as to violate those principles. It is to be recollected, that it is an exception to the general rule of evidence, supposed to be extremely important and necessary; and unless a case is brought fully within the reasons of such exception, the general rule must prevail." See 6 Met. 264–266. See also Marsh *v.* Jones, 6 Washb. 378.

[1] Rex *v.* Rowley, 1 Mood. Cr. Cas. 111.

[2] See Cornell *v.* Green, 10 Serg. & R. 14, 16, where this point is briefly, but powerfully discussed, by Mr. Justice Gibson. See also Miles *v.* O'Hara, 4 Binn. 108; Caton *v.* Lenox, 5 Randolph, 31, 36; Rex *v.* Rowley, 1 Mood. Cr. C. 111; Chess *v.* Chess, 17 Serg. & R. 409, 411, 412; Jackson *v.* Bailey, 2 Johns. 17; 2 Russ. on Crimes, 638 [683], (3d Am. ed.); Sloan *v.* Somers, 1 Spencer's R. 66; Garrett *v.* Johnson, 11 G. & J. 28; Canney's case, 9 Law Reporter, 408; The State *v.* Hooker, 2 Washb. 658; Gildersleeve *v.* Caraway, 10 Ala. R. 260; Gould *v.* Crawford, 2 Barr. 89; Wagers *v.* Dickey, 17 Ohio R. 439; [United States *v.* Macomb, 5 McLean, 286; Emery *v.* Fowler, 39 Maine, 326; Young *v.* Dearborn, 2 Foster, 372; Williams *v.* Willard, 23 Vt. 369; Van Buren *v.* Cockburn, 14 Barb. 118; Jones *v.* Wood, 16 Penn. State R. 25; Riggins *v.* Brown, 12 Geo. 271; Walker *v.* Walker, 14 Ib. 242; Davis *v.* State, 17 Ala. 354; Clealand *v.* Huey, 18 Ib. 343; Kendrick *v.* State, 10 Humph. 479; *supra*, § 161*a*.]

was said on the particular subject which he is called to prove. If he can state only what was said on that subject by the deceased, on his examination in chief, without also giving the substance of what he said upon it in his cross-examination, it is inadmissible.[1]

§ 166. What the deceased witness testified may be *proved by any person*, who will swear from his own memory; or by notes taken by any person, who will swear to their accuracy;[2] or, perhaps, from the necessity of the case, by the *judge's own notes*, where both actions are tried before the same judge; for in such case, it seems the judge, from his position, as well from other considerations, cannot be a witness.[3] But, except in this case of necessity, if it be admitted as such, the better opinion is, that the judge's notes are not legal evidence of what a witness testified before him; for they are no part of the record, nor is it his official duty to take them, nor have they the sanction of his oath to their accuracy or completeness.[4] But in chancery, when a new trial

[1] Wolf *v.* Wyeth, 11 Serg. & R. 149; Gildersleeve *v.* Caraway, 10 Ala. R. 260. [See Rhine *v.* Robinson, 27 Penn. State R. 30.]

[2] Mayor of Doncaster *v.* Day, 3 Taunt. 267; Chess *v.* Chess, 17 Serg. & R. 409. The witness, as has been stated in a preceding note, must be able to testify, from his recollection alone, that deceased was sworn as a witness, the matter or thing which he was called to prove, and the substance of what he stated; after which his notes may be admitted. Sloan *v.* Somers, 1 Spencer, N. J. R. 66; *supra*, § 165, note (2).

[3] Glassford on Evid. 602; Tait on Evid. 432; Regina *v.* Garard, 8 C. & P. 595; *infra*, § 249.

[4] Miles *v.* O'Hara, 4 Binn. 108; Foster *v.* Shaw, 7 Serg. & R. 156; *Ex parte* Learmouth, 6 Madd. R. 113; Reg. *v.* Plummer, 8 Jur. 922, per Gurney, B.; Livingston *v.* Cox, 8 Watts & Serg. 61. Courts expressly disclaim any power to compel the production of a judge's notes. Scougall *v.* Campbell, 1 Chitty, R. 283; Graham *v.* Bowham, Id. 284, note. And if an application is made to amend a verdict by the judge's notes, it can be made only to the judge himself, before whom the trial was had. Ibid. 2 Tidd's Pr. 770, 933. Where a party, on a new trial being granted, procured, at great expense, copies of a short-hand writer's notes of the evidence given at the former trial, for the amount of which he claimed allowance in the final taxation of costs; the claim was disallowed, except for so much as would have been the expense of waiting on the judge, or his clerk, for a copy of his notes; on the ground that the latter would have sufficed. Crease *v.* Barrett, 1 Tyrw. & Grang. 112. But this decision is not conceived to affect the question, whether the judges's notes would have been admissible before another judge, if objected to. In Regina *v.* Bird, 5 Cox, C. C. 11; 2 Eng. Law and Eq. Rep. 444, the notes of the judge, before whom a former indictment had been tried, were admitted without objection, for the purpose of showing what beatings were proved at that trial, in order to support the plea of *autrefois acquit*. In *New Brunswick*, a judge's notes have been held admissible, though objected to, on the ground that they were taken under the sanction of an oath, and that such has been the practice. Doe *v.* Murray, 1 Allan, 216. But in a recent case in England, on a trial for perjury, the notes of the judge, before whom the false evidence was given, being offered in proof of that part of the case, Talfourd, J., refused to admit them; observing, that "a judge's notes stood in no other position than anybody else's notes. They could only be used to refresh the memory of the party taking them. It was no doubt unusual to produce the judge as a witness, and would be highly inconvenient to do so; but that did not make his notes evidence." Regina *v.* Child, 5 Cox, C. C. 197, 203. [See also Huff *v.* Bennett, 4 Sanford's Sup. Ct. 120.]

is ordered of an issue sent out of chancery to a court of common law, and it is suggested that some of the witnesses in the former trial are of advanced age, an order may be made that, in the event of their death or inability to attend, their testimony may be read from the judge's notes.[1]

§ 167. The effect of an *interest subsequently acquired* by the witness, as laying a foundation for the admission of proof of his former testimony, remains to be considered. It is in general true, that if a person, who has knowledge of any fact, but is under no obligation to become a witness to testify to it, should afterwards become interested in the subject-matter in which that fact is involved, and his interest should be on the side of the party calling him, he would not be a competent witness until the interest is removed. If it is releasable by the party, he must release it. If not, the objection remains; for neither is the witness, nor a third person, compellable to give a release; though the witness may be compelled to receive one. And the rule is the same in regard to a subscribing witness, if his interest was created by the act of the party calling him. Thus, if the charterer of a ship should afterwards communicate to the subscribing witness of the charter-party an interest in the adventure, he cannot call the witness to prove the execution of the charter-party; nor will proof of his handwriting be received; for it was the party's own act to destroy the evidence.[2] It is, however, laid down, that a witness cannot, by the subsequent voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony.[3] But this rule admits of a qualification, turning upon the manner in which the interest was acquired. If it were acquired wantonly, as by a wager, or fraudulently, for the purpose of taking off his testimony, of which the participation of the adverse party would generally be proof, it would not disqualify him.

But "the pendency of a suit cannot prevent third persons from transacting business, *bonâ fide*, with one of the parties; and, if an interest in the event of the suit is thereby acquired, the common consequence of law must follow, that the person so interested

[1] Hargrave *v.* Hargrave, 19 Jur. 957.

[2] Hovill *v.* Stephenson, 5 Bing. 493; Hamilton *v.* Williams, 1 Hayw. 139; Johnson *v.* Knight, 1 N. Car. Law Rep. 93; 1 Murph. 293; Bennett *v.* Robinson, 3 Stew. & Port. 227, 237; Schall *v.* Miller, 5 Whart. 156.

[3] 1 Stark. Evid. 118; Barlew *v.* Vowell, Skin. 586; George *v.* Pierce, cited by Buller, J., in 3 T. R. 37; Rex *v.* Fox, 1 Str. 652; Long *v.* Baillie, 4 Serg. & R. 222; Burgess *v.* Lane, 3 Greenl. 165; Jackson *v.* Rumsey, 3 Johns. Cas. 234, 237; *infra*, § 418.

cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage."[1] Therefore, where, in an action against one of several underwriters on a policy of insurance, it appeared that a subsequent underwriter had paid, upon the plaintiff's promise to refund the money, if the defendant in the suit should prevail; it was held that he was not a competent witness for the defendant to prove a fraudulent concealment of facts by the plaintiff, it being merely a payment by anticipation, of his own debt in good faith, upon a reasonable condition of repayment.[2] And as the interest which one party acquires in the testimony of another is liable to the contingency of being defeated by a subsequent interest of the witness in the subject-matter, created *bonâ fide*, in the usual and lawful course of business, the same principle would seem to apply to an interest arising by operation of law, upon the happening of an uncertain event, such as the death of an ancestor, or the like. But though the interest which a party thus acquires in the testimony of another is liable to be affected by the ordinary course of human affairs, and of natural events, the witness being under no obligation, on that account, either to change the course of his business, or to abstain from any ordinary and lawful act or employment; yet it is a right of which neither the witness, nor any other person, can by voluntary act and design deprive him. Wherever, therefore, the subsequent interest of the witness has been created either wantonly, or in bad faith, it does not exclude him; and doubtless the participation of the adverse party in the creation of such interest would, if not explained by other circumstances, be very strong *primâ facie*

[1] 3 Camph. 381, per Ld. Ellenborough. The case of Bent *v.* Baker, 3 T. R. 27, seems to have been determined on a similar principle, as applied to the opposite state of facts; the subsequent interest, acquired by the broker, being regarded as affected with bad faith on the part of the assured, who objected to his admission. The distinction taken by Lord Ellenborough was before the Supreme Court of the United States in Winship *v.* The Bank of the United States, 5 Peters, 529, 541, 542, 545, 546, 552, but no decision was had upon the question, the court being equally divided. But the same doctrine was afterwards discussed and recognized, as "founded on the plainest reasons," in Eastman *v.* Winship, 14 Pick. 44; 10 Wend. 162, 164, acc.

[2] Forrester *v.* Pigou, 3 Camph. 380; 1 M. & S. 9, s. c.; Phelps *v.* Riley, 6 Conn. 266. In Burgess *v.* Lane, 3 Greenl. 165, the witness had voluntarily entered into an agreement with the defendant, against whom he had an action pending in another court, that that action should abide the event of the other, in which he was now called as a witness for the plaintiff; and the court held, that it did not lie with the defendant, who was party to that agreement, to object to his admissibility. But it is observable, that that agreement was not made in discharge of any real or supposed obligation, as in Forrester *v.* Pigou; but was on a new subject, was uncalled for, and purely voluntary; and therefore subjected the adverse party to the imputation of bad faith in making it.

evidence of bad faith; as an act of the witness, uncalled for, and out of the ordinary course of business, would be regarded as wanton.[1]

§ 168. If, in cases of disqualifying interest, the witness has *previously given a deposition in the cause*, the deposition may be read in chancery, as if he were since deceased, or insane, or otherwise incapacitated. It may also be read in the trial, at law, of an issue out of chancery. In other trials at law, no express authority has been found for reading the deposition; and it has been said, that the course of practice is otherwise; but no reason is given, and the analogies of the law are altogether in favor of admitting the evidence.[2] And as it is hardly possible to conceive a reason for the admission of prior testimony given in one form, which does not apply to the same testimony given in any other form, it would seem clearly to result, that where the witness is subsequently rendered incompetent by interest, lawfully acquired, in good faith, evidence may be given of what he formally testified orally, in the same manner as if he were dead; and the same principle will lead us farther to conclude, that, in all cases where the party has, without his own fault or concurrence, irrecoverably lost the power of producing the witness again, whether from physical or legal causes, he may offer the secondary evidence of what he testified in the former trial. If the lips of the witness are sealed, it can make no difference in principle, whether it be by the finger of death, or the finger of the law. The interest of the witness, however, is no excuse for not producing him in court; for perhaps the adverse party will waive any objection on that account. It is only when the objection is taken and allowed, that a case is made for the introduction of secondary evidence. [* Our author seems, in the preceding sections, to have stated some points more loosely than is consistent with his usual accuracy. We see no more reason why the judge, presiding at a former trial, should be exempted from verifying his minutes, if required by

[1] See *infra*, § 418, where the subject is again considered.

[2] This is now the established practice in chancery; Gresley on Evid. 366, 367; and in Chess *v.* Chess, 17 Serg. & R. 412, it was conceded by Tod, J., that the reason and principle of the rule applied with equal force, in trials at law; though it was deemed in that case to have been settled otherwise, by the course of decisions in Pennsylvania. See also 1 Stark. Evid. 264, 265; 1 Smith's Chan. Pr. 344; Gosse *v.* Tracy, 1 P. W. 287; 2 Vern. 699, s. c.; Andrews *v.* Palmer, 1 Ves. & B. 21; Luttrell *v.* Reynell, 1 Mod. 284; Jones *v.* Jones, 1 Cox, 184; Union Bank *v.* Knapp, 3 Pick. 108, 109, per Putnam, J.; Wafer *v.* Hemken, 9 Rob. 203. [See also Scammon *v.* Scammon, 33 N. H. 52, 58.]

oath, and by cross-examination, than any other witness. Our own minutes have always been used, in such cases, by consent; but we never supposed they possessed any legal verity. And we have never supposed the rule of admitting the testimony of a deceased witness, at a former trial, extended to all cases where the witness, for any cause, could not be produced. It will be found, we believe, that that rule applies to the deposition of a witness *de bene esse*, or *in perpetuam*, and not to his testimony upon former trials.]

CHAPTER XI.

OF ADMISSIONS.

§ 198. Presumptions of acquiescence from constant access to documents.
199. Great caution required in making inferences from silence.
200. So also in regard to oral admissions of party.
201. The whole admission must be received.
202. Answer in chancery, the whole taken together. All not equally reliable.
203. Oral admissions will not supply the place of writings.
204. Estoppels *in pais*, how far conclusive.
205. Payment of money into court admits the cause of action to that extent.
206. Court may relieve counsel from concessions made by surprise, accident, or mistake.
207. Party estopped to deny what he has induced other parties to act upon.
208. It is not important whether it be really the fact or not.
209. Admissions not acted upon by others may be controverted.
210. Many admissions held conclusive on grounds of public policy.
211. Estoppels by deed not conclusive upon strangers.
212. Receipts, accounts rendered, and accounts stated, &c., not conclusive.]

§ 169. Under the head of exceptions to the rule rejecting hearsay evidence, it has been usual to treat of *admissions and confessions* by the party, considering them as declarations against his interest, and therefore probably true. But in regard to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act done, believed himself to be speaking or acting against his own interest; but often the contrary. Such evidence seems, therefore, more properly admissible as a *substitute* for the ordinary and legal proof, either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct.[1] It is in this light that confessions and admissions are regarded by the Roman law, as is stated by Mascardus. *Illud igitur in primis, ut hinc potissimum exordiar, non est ignorandum, quod etsi confessioni inter probationum species locum in præsentia tribuerimus; cuncti tamen fere Dd. unanimes sunt arbitrati, ipsam potius esse ab onere probandi relevationem, quam proprie probationem.*[2] Many admissions, however, being

[1] See *supra*, § 27.

[2] Mascard. De Probat., vol. 1, Quæst. 7, n. 1, 10, 11; Menochius, De Præsump., lib. 1, Quæs. 61, n. 6; Alciatus, De Præsump., Pars. 2, n. 4. The Roman law distinguishes, with great clearness and precision, between confessions *extra judicium*, and confessions *in judicio*; treating the former as of very little and often of no weight, unless corroborated, and the latter as generally, if not always, conclusive, even to the overthrow of the *præsumptio juris et de jure*; thus constituting an exception to the conclusiveness of this class of presumptions. But to give a confession this effect, certain things are essen-

made by third persons, are receivable on mixed grounds; partly as belonging to the *res gestæ*, partly as made against the interest of the person making them, and partly because of some privity with him against whom they are offered in evidence. The whole subject, therefore, properly falls under consideration in this connection.

§ 170. In our law, the term *admission* is usually applied to *civil transactions* and to those matters of fact, in criminal cases, which do not involve criminal intent; the term *confession* being generally restricted to *acknowledgments of guilt.* We shall therefore treat them separately, beginning with admissions. The rules of evidence are in both cases the same. Thus, in the trial of Lord Melville, charged, among other things, with criminal misapplication of moneys received from the exchequer, the admission of his agent and authorized receiver was held sufficient proof of the fact of his receiving the public money; but not admissible to establish the charge of any criminal misapplication of it. The law was thus stated by Lord Chancellor Erskine: "This first step in the proof" (namely, the receipt of the money), "must advance by evidence applicable alike to civil, as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal, as distinguished from civil justice, how the noble person now on trial may be affected by the fact, when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime."[1]

§ 171. We shall first consider the person, whose admissions may be received. And here the general doctrine is, that the declarations of a *party to the record* or of one *identified in interest with him*, are, as against such party, admissible in evidence.[2] If

tial, which Mascardus cites out of Tancred: —

Major, sponte, sciens, contra se, ubi jus fit;
Nec natura, favor, lis jusve repugnet, et hostis.

Mascard. *ub. sup.* n. 15; Vid. Dig. lib. 42, tit. 2, de confessis; Cod. lib. 7, tit. 59; Van Leeuwen's Comm., book v., ch. 21.

[1] 29 Howell's State Trials, col. 764.

[2] Spargo *v.* Brown, 9 B. & C. 935, per Bayley, J.; *infra*, §§ 180, 203. In the court of chancery, in England, evidence is not received of admissions or declarations of the parties, which are not put in issue by the pleadings, and which there was not, therefore, any opportunity of explaining or disproving. Copeland *v.* Toulmin, 7 Clark & Fin. 350, 373; Austin *v.* Chambers, 6 Clark & Fin. 1; Atwood *v.* Small, Id. 234. But in the United States this rule has not been adopted; and it is deemed sufficient if the proposition to be established is stated in the bill, without stating the particular kind of evidence by which it is to be proved. See Smith *v.* Burnham, 2 Sumn.

they proceed from a stranger, and cannot be brought home to the party, they are inadmissible, unless upon some of the other grounds already considered.[1] Thus, the admissions of a payee of a negotiable promissory note, not overdue when negotiated, cannot be received in an action by the indorsee against the maker, to impeach the consideration, there being no identity of interest between him and the plaintiff.[2]

§ 172. This general rule, admitting the declarations of a party to the record in evidence, applies to all cases where the party has *any interest* in the suit, whether others are *joint parties* on the same side with him, or not, and howsoever the interest may appear, and whatever may be its relative amount.[3] But where the party sues alone, and has no interest in the matter, his name being used, of necessity, by one to whom he has assigned all his interest in the subject of the suit, though it is agreed that he cannot be permitted, by his acts or admissions, to disparage the title of his innocent assignee or vendee, yet the books are not so clearly agreed in the mode of restraining him. That chancery will always protect the assignee, either by injunction or otherwise, is very certain; and formerly this was the course uniformly pur-

612; Brandon *v.* Cabiness, 10 Ala. R. 156; Story, Equity Plead. § 265*a*, and note (1), where this subject is fully discussed. And in England, the rule has recently been qualified, so far as to admit a written admission by the defendant of his liability to the plaintiff, in the matter of the pending suit. Malcolm *v.* Scott, 3 Hare, 63; McMahon *v.* Burchell, 1 Coop. Cas. temp. Cottenham, 475; 7 Law Rev. 209. See the cases collected by Mr. Cooper in his note appended to that case. It seems, that pleadings, whether in equity or at common law, are not to be treated as positive allegations of the truth of the facts therein stated, for all purposes; but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied, to be proved, and ultimately to be submitted to judicial decision. Boileau *v.* Rutlin, 2 Exch. 665. [Answers of a party to a suit to interrogatories filed in the ordinary mode of practice are competent evidence against him of the facts stated therein, in another suit, although the issues in the two suits be different. Williams *v.* Cheney, 3 Gray, 215; Judd *v.* Gibbs, Ib. 539. See Church *v.* Shelton, 2 Curtis, C. C. 271; State *v.* Littlefield, 3 R. I. 124.]

[1] *Supra*, §§ 128, 141, 147, 156. There must be some evidence of the identity of the person whose admissions are offered in evidence, with the party in question. Thus, where the witness asked for the defendant by name, at his lodgings, and a person came to the door professing to be the one asked for; the witness being unacquainted with the defendant's person then and since; this was held sufficient to admit the conversation which then was had between the witness and this person, as being, *primâ facie*, the language of the defendant. Reynolds *v.* Staines, 2 C. & K. 745. [Admissions of a party may be proved, although they relate to a written instrument. Loomis *v.* Wadham, 8 Gray, 556.]

[2] Barough *v.* White, 4 B. & C. 325; Bristol *v.* Dan, 12 Wend. 142.

[3] Bauerman *v.* Radenius, 7 T. R. 663; 2 Esp. 653, s. c. In this case the consignees brought an action in the name of the consignor, against the ship-master, for a damage to the goods, occasioned by his negligence; and without supposing some interest to remain in the consignor, the action could not be maintained. It was on this ground that Lawrence, J., placed the decision. See also Norden *v.* Williamson, 1 Taunt. 378; Mandeville *v.* Welch, 5 Wheat. 283, 286; Dan *et al. v.* Brown, 4 Cowen, 483, 492; [Black *v.* Lamb, 1 Beasley, 108.]

sued; the admissions of a party to the record, at common law, being received against him in all cases. But, in later times, the interests of an assignee, suing in the name of his assignor, have also, to a considerable extent, been protected, in the courts of common law, against the effect of any acts or admissions of the latter to his prejudice. A familiar example of this sort is that of a receipt in full, given by the assignor, being nominal plaintiff, to the debtor, after the assignment; which the assignee is permitted to impeach and avoid, in a suit at law, by showing the previous assignment.[1]

§ 173. But a *distinction* has been taken between such admissions as these, which are given in evidence to the jury, under the general issue, and are, therefore, open to explanation, and controlling proof; and those in *more solemn form*, such as releases which are specially pleaded, and operate by way of estoppel; in which latter cases it has been held, that, if the release of the nominal plaintiff is pleaded in bar, the courts of law, sitting in bank, will administer equitable relief by setting aside the plea, on motion; but that, if issue is taken on the matter pleaded, such act or admission of the nominal plaintiff must be allowed its effect at law to the same extent as if he were the real plaintiff in the suit.[2] The American courts, however, do not recognize this distinction; but where a release from the nominal plaintiff is pleaded in bar, a prior assignment of the cause of action, with notice thereof to the defendant, and an averment that the suit is prosecuted by the assignee for his own benefit, is held a good replication.[3] Nor is the nominal plaintiff permitted by the entry of a *retraxit*, or in any other manner injuriously to affect the rights of his assignee in a suit at law.[4]

[1] Henderson *et al. v.* Wild, 2 Campb. 561. Lord Ellenborough, in a previous case of the same kind, thought himself not at liberty, sitting at *Nisi Prius*, to overrule the defence. Alner *v.* George, 1 Campb. 392; Frear *v.* Evertson, 20 Johns. 142. See also Payne *v.* Rogers, Doug. 407; Winch *v.* Keeley, 1 T. R. 619; Cockshott *v.* Bennett, 2 T. R. 763; Lane *v.* Chandler, 3 Smith, R. 77, 83; Skaife *v.* Jackson, 3 B. & C. 421; Appleton *v.* Boyd, 7 Mass. 131; Tiermen *v.* Jackson, 5 Peters, 580; Sargeant *v.* Sargeant, 3 Washb. 371; Head *v.* Shaver, 9 Ala. 791.

[2] Alner *v.* George, 1 Campb. 395, per Ld. Ellenborough; Gibson *v.* Winter, 5 B. & A. 96; Craib *v.* D'Aeth, 7 T. R. 670, note (b); Leigh *v.* Leigh, 1 B. & P. 447; Anon. 1 Salk. 260; Payne *v.* Rogers, Doug. 407; Skaife *v.* Jackson, 3 B. & C. 421.

[3] Mandeville *v.* Welch, 5 Wheat, 277, 283; Andrews *v.* Beeker, 1 Johns. Cas. 411; Raymond *v.* Squire, 11 Johns. 47; Littlefield *v.* Story, 3 Johns. 425; Dawson *v.* Coles, 16 Johns. 51; Kimball *v.* Huntington, 10 Wend. 675; Owings *v.* Low, 5 Gill & Johns. 134.

[4] Welch *v.* Mandeville, 1 Wheat. 233. "By the common law, *choses in action* were not assignable, except to the crown. The civil law considers them as, strictly

§ 174. Though the admissions of a party to the record are generally receivable in evidence against him, yet where there are *several parties on the same side*, the admissions of one are not admitted to affect the others, who may happen to be joined with him, unless there is some joint interest, or privity in design between them;[1] although the admissions may, in proper cases, be received against the person who made them. Thus, in an action against joint makers of a note, if one suffers judgment by default, his signature must still be proved, against the other.[2] And even where there is a joint interest, a release, executed by one of several plaintiffs, will, in a clear case of fraud, be set aside in a court of law.[3] But 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.[4] They stand to each other, in this respect, in a relation

speaking, not assignable; but, by the invention of a fiction, the Roman jurisconsults contrived to attain this object. The creditor who wished to transfer his right of action to another person, constituted him his attorney, or *procurator in rem suam* as it was called; and it was stipulated that the action should be brought in the name of the assignor, but for the benefit and at the expense of the assignee. Pothier de Vente, No. 550. After notice to the debtor, this assignment operated a complete cession of the debt, and invalidated a payment to any other person than the assignee, or a release from any other person than him. Id. 110, 554; Code Napoleon, liv. 3, tit. 6; De la Vente, c. 8, § 1690. The court of chancery, imitating, in its usual spirit, the civil law in this particular, disregarded the rigid strictness of the common law, and protected the rights of the assignee of choses in action. This liberality was at last adopted by the courts of common law, who now consider an assignment of a chose in action as substantially valid, only preserving, in certain cases, the form of an action commenced in the name of the assignor, the beneficial interest and control of the suit being, however, considered as completely vested in the assignee, as *procurator in rem suam*. See Master *v.* Miller, 4 T. R. 340; Andrews *v.* Beecker, 1 Johns. Cas. 411; Bates *v.* New York Insurance Company, 3 Johns. Cas. 242; Wardell *v.* Eden, 1 Johns. 532, in notis; Carver *v.* Tracy, 3 Johns. 426; Raymond *v.* Squire, 11 Johns. 47; Van Vechten *v.* Greves, 4 Johns. 406; Weston *v.* Barker, 12 Johns. 276." See the reporter's note to 1 Wheat. 237. But where the nominal plaintiff was constituted, by the party in interest, his agent for negotiating the contract, and it is expressly made with him alone, he is treated, in an action upon such contract, in all respects as a party to the cause; and any defence against him is a defence, in that action, against the *cestui que trust*, suing in his name. Therefore, where a broker, in whose name a policy of insurance under seal was effected, brought an action of covenant thereon, to which payment was pleaded; it was held that payment of the amount of loss to the broker, by allowing him credit in account for that sum, against a balance for premiums due from him to the defendants, was a good payment, as between the plaintiff on the record and the defendants, and, therefore, an answer to the action. Gibson *v.* Winter *et al.* 5 B. & Adol. 96. This case, however, may, with equal and perhaps greater propriety, be referred to the law of agency. See Richardson *v.* Anderson, 1 Campb. 43, note; Story on Agency, § 413, 429–434.

[1] See *supra*, §§ 111, 112; Dan *et al.* *v.* Brown, 4 Cowen, 483, 492; Rex *v.* Hardwick, 11 East, 578, 589, per Le Blanc, J.; Whitcomb *v.* Whiting, 2 Doug. 652.

[2] Gray *v.* Palmer, 1 Esp. 135. See also Sheriff *v.* Wilks, 1 East, 48.

[3] Jones *et al.* *v.* Herbert, 7 Taunt. 421; Loring *et al.* *v.* Brackett, 3 Pick. 403; Skaife *et al.* *v.* Jackson, 3 B. & C. 421; Henderson *et al.* *v.* Wild, 2 Campb. 561.

[4] Such was the doctrine laid down by

similar to that of existing copartners. Thus, also, the act of making a partial payment within six years, by one of several joint makers of a promissory note, takes it out of the statute of limitations.[1] And where several were both legatees and executors in a will, and also appellees in a question upon the probate of the will, the admission of one of them, as to facts which took place at the time of making the will, showing that the testatrix was imposed upon, was held receivable in evidence against the validity of the will.[2] And where two were bound in a single bill, the admission of one was held good against both defendants.[3]

§ 175. In settlement cases, it has long been held that declarations by *rated parishioners* are evidence against the parish; for they are parties to the cause, though the nominal parties to the

Ld. Mansfield in Whitcomb *v.* Whiting, 2 Doug. 652. Its propriety, and the extent of its application have been much discussed, and sometimes questioned; but it seems now to be clearly established. See Perham *v.* Raynal, 2 Bing. 306; Burleigh *v.* Stott, 8 B. & C. 36; Wyatt *v.* Hodson 8 Bing. 309; Brandram *v.* Wharton, 1 B. & A. 467; Holme *v.* Green, 1 Stark. R. 488. See also, accordingly, White *v.* Hale, 3 Pick. 291; Martin *v.* Root, 17 Mass. 222; Hunt *v.* Brigham, 2 Pick. 581; Frye *v.* Barker, 4 Pick. 382; Beitz *v.* Fuller, 1 McCord, 541; Johnson *v.* Beardslee, 1 Johns. 3; Bound *v.* Lathrop, 4 Conn. 336; Coit *v.* Tracy, 8 Conn. 268, 276, 277; Getchell *v.* Heald, 7 Greenl. 26; Owings *v.* Low, 5 Gill & Johns. 144; Patterson *v.* Choate, 7 Wend. 441; McIntire *v.* Oliver, 2 Hawks, 209; Cady *v.* Shepherd, 11 Pick. 400; Van Reimsdyk *v.* Kane, 1 Gall. 635, 636; [Barrick *v.* Austin, 21 Barb. 241; Camp *v.* Dill, 27 Ala. 553.] But see Bell *v.* Morrison, 1 Peters, 351. But the admission must be distinctly made by a party still liable upon the note; otherwise it will not be binding against the others. Therefore, a payment appropriated, by the election of the creditor only, to the debt in question, is not a sufficient admission of that debt, for this purpose. Holmes *v.* Green, *ub sup.* Neither is a payment, received under a dividend of the effects of a bankrupt promisor. Brandram *v.* Wharton, *ub sup.* In this last case, the opposing decision in Jackson *v.* Fairbank, 2 H. Bl. 340, was considered and strongly disapproved; but it was afterwards cited by Holroyd, J., as a valid decision, in Burleigh *v.* Stott, 8 B. & C. 36. The admission where one of the promisors is dead, to take the case out of the statute of limitations against him, must have been made in his lifetime; Burleigh *v.* Stott, *supra;* Slatter *v.* Lawson, 1 B. & Ad. 396; and by a party originally liable; Atkins *v.* Tredgold, 2 B. & C. 23. This effect of the admission of indebtment by one of several joint promisors, as to cases barred by the statute of limitations, when it is merely a verbal admission, without part payment, is now restricted in England, to the party making the admission, by Stat. 9, Geo. IV. c. 14, (Lord Tenterden's Act.) So in *Massachusetts*, by Gen. Stat. ch. 155, § 14, 16; and in *Vermont*, Rev. St. ch. 58, §§ 23, 27. The application of this doctrine to partners, after the dissolution of the partnership, has already been considered. *Supra*, § 112, note. Whether a written acknowledgment, made by one of several partners, stands upon different ground from that of a similar admission by one of several joint contractors, is an open question. Clark *v.* Alexander, 8 Jur. 496, 498. See *post*, vol. 2, §§ 441, 444; Pierce *v.* Wood, 3 Foster, 520.

[1] Burleigh *v.* Stott, 8 B. & C. 36; Munderson *v.* Reeve, 2 Stark. Evid. 484; Wyatt *v.* Hodson, 8 Bing. 309; Chippendale *v.* Thurston, 4 C. & P. 98; 1 M. & M. 411, s. c; Pease *v.* Hirst, 10 B. & C. 122. But it must be distinctly shown to be a payment on account of the particular debt. Holme *v.* Green, 1 Stark. R. 488.

[2] Atkins *v.* Sanger *et al.*, 1 Pick. 192. See also Jackson *v.* Vail, 7 Wend. 125; Osgood *v.* The Manhattan Co., 3 Cowen, 612.

[3] Lowe *v.* Boteler *et al.*, 4 Har. & McHen. 346; Vicary's case, 1 Gilbert, Evid. by Lofft, p. 59, note.

appeal be churchwardens and overseers of the poor of the parish.[1] The same principle is now applied in England to all other prosecutions against towns and parishes, in respect to the declarations of *ratable inhabitants*, they being substantially parties to the record.[2] Nor is it necessary first to call the inhabitant, and show that he refuses to be examined, in order to admit his declarations.[3] And the same principle would seem to apply to the inhabitants of towns, counties, or other territorial political divisions of this country, who sue and are prosecuted as inhabitants, *eo nomine*, and are termed *quasi* corporations. Being parties, personally liable, their declarations are admissible, though the value of the evidence may, from circumstances, be exceedingly light.[4] [*We believe the practice is not general, in the American states, to admit the declarations of the members of a corporation, as evidence against the corporation itself. And it seems to us, that upon principle they are clearly inadmissible. There is no rule of law better settled than that the admissions of a shareholder will not bind the corporation. Nor will the admission of a director or agent of a private corporation bind the company, except as a part of the *res gestæ*. And it will make no difference that the action is in the corporate name of the President and Directors; that does not make them parties in person. And we see no more reason why the admissions of the inhabitants of a town or parish should bind the municipality, because the action happens to be in form, in the name of such inhabitants, than that all the admissions or declarations of the people at large should be evidence against the public prosecutor in criminal proceedings, when they are instituted in the name of The People, which we believe would be regarded as an absurdity, by every one. We conclude, therefore, that in no

[1] Rex *v.* Inhabitants of Hardwick, 11 East, 579. See *supra*, §§ 128, 129.

[2] Regina *v.* Adderbury, 5 Ad. & El. 187, N. S.

[3] Rex *v.* Inhabitants of Whitley Lower, 1 M. & S. 637; Rex *v.* Inhabitants of Woburn, 10 East, 395.

[4] 11 East, 586, per Ld. Ellenborough; 2 Stark. Evid. 580. The statutes rendering *quasi* corporators competent witnesses (see 54 Geo. III. c. 170; 3 & 4 Vict. c. 25) are not understood as interfering with the rule of evidence respecting admissions. Phil. and Am. on Evid. 395, and n. (2); 1 Phil. Evid. 375, n. (2). In some of the United States, similar statutes have been enacted. LL. *Vermont* (Rev. Code, 1839), ch. 31, § 18; *Massachusetts*, Rev. Stat. ch. 94, § 54; *Delaware* (Rev. Code, 1829), p. 441; *New York*, Rev. Stat. vol. 1, pp. 408, 439 (3d edit.); *Maine*, Rev. Stat. 1840, ch. 115, § 75; *New Hampshire*, Rev. Stat. 1842, ch. 188, § 12; *Pennsylvania*, Dunl. Dig. pp. 215, 913, 1019, 1165; *Michigan*, Rev. Stat. 1846, ch. 102, § 81. In several States, the interest of inhabitants, merely as such, has been deemed too remote and contingent, as well as too minute, to disqualify them, and they have been held competent at common law. Eustis *v.* Parker, 1 New Hamp. 273; Cornwell *v.* Isham, 1 Day, 35; Fuller *v.* Hampton, 5

such case can the admission or declaration of a corporator be fairly regarded as evidence against the corporation.[1]]

§ 176. It is a *joint interest*, and *not a mere community of interest*, that renders such admissions receivable. Therefore the admissions of one executor are not received, to take a case out of the statute of limitations, as against his co-executor.[2] Nor is an acknowledgment of indebtment by one executor admissible against his co-executor, to establish the original demand.[3] The admission of the receipt of money, by one of several trustees, is not received to charge the other trustees.[4] Nor is there such joint interest between a surviving promisor, and the executor of his co-promisor, as to make the act or admission of the one sufficient to bind the other.[5] Neither will the admission of one, who was joint promisor with a *feme sole*, be received to charge her husband, after the marriage, in an action against them all, upon a plea of the statute of limitations.[6] For the same reason, namely, the absence of a joint interest, the admissions of one tenant in common are not receivable against his co-tenant, though both are parties on the same side in the suit.[7] Nor are the admissions of one of several devisees or legatees admissible to impeach the validity of the will, where they may effect others, not in privity with him.[8] Neither are the admissions of one defendant evidence against the other, in an action on the case for the mere negligence of both.[9]

§ 177. It is obvious that an *apparent joint interest is not suffi-*

Conn. 416; Falls *v.* Belknap, 1 Johns. 486; Bloodgood *v.* Jamaica, 12 Johns. 284; *ex parte* Kip, 1 Paige, 613; Corwein *v.* Hames, 11 Johns. 76; Orange *v.* Springfield, 1 Southard, 186; State *v.* Davidson, 1 Bayley, 35; Jonesborough *v.* McKee, 2 Yerger, 167; Gass *v.* Gass, 3 Humph. 278, 285. See *infra*, § 331.

[1] [* Watertown *v.* Cowen, 4 Paige, 510; Burlington *v.* Calais, 1 Vt. R. 385; Low *v.* Perkins, 10 Vt. R. 532.]

[2] Tullock *v.* Dunn, R. & M. 416. Qu. and see Hammon *v.* Huntley, 4 Cowen, 493. But the declarations of an executor or administrator are admissible against him, in any suit by or against him in that character. Faunce *v.* Gray, 21 Pick. 243.

[3] Hammon *v.* Huntley, 4 Cowen, 493; James *v.* Hackley, 16 Johns. 277; Forsyth *v.* Ganson, 5 Wend. 558.

[4] Davies *v.* Ridge *et al.*, 3 Esp. 101.

[5] Atkins *v.* Tredgold *et al.*, 2 B. & C. 23; Slater *v.* Lawson, 1 B. & Ad. 396; Slaymaker *v.* Gundacker's Ex'r, 10 Serg. & Rawl. 75; Hathaway *v.* Haskell, 9 Pick. 42.

[6] Pittnam *v.* Foster *et al.* 1 B. & C. 248.

[7] Dan *et al. v.* Brown *et al.*, 4 Cowen, 483, 492. And see Smith *v.* Vincent, 15 Conn. R. 1.

[8] Hauberger *v.* Root, 6 Watts & Serg. 431.

[9] Daniels *v.* Potter, 1 M. & M. 501; *supra*, § 111. Neither is there such privity among the members of a board of public officers, as to make the admissions of one binding on all. Lockwood *v.* Smith *et al.* 5 Day, 309. Nor among several indorsers of a promissory note. Slaymaker *v.* Gundacker's Ex'r, 10 Serg. & Rawl. 75. Nor between executors and heirs or devisees. Osgood *v.* Manhattan Co., 3 Cowen, 611. [* The same rule applies to the admissions of co-defendants in actions of trover. Edgerton *v.* Wolf, 6 Gray, 453.]

cient to render the admissions of one party receivable against his companions, *where the reality of that interest is the point in controversy*. A foundation must first be laid, by showing, *primâ facie*, that a joint interest exists. Therefore, in an action against several joint makers of a promissory note, the execution of which was the point in issue, the admission of his signature only by one defendant was held not sufficient to entitle the plaintiff to recover against him and the others, though theirs had been proved; the point to be proved against all being a joint promise by all.[1] And where it is sought to charge several as partners, an admission of the fact of partnership by one is not receivable in evidence against any of the others, to prove the partnership. It is only after the partnership is shown to exist, by proof satisfactory to the judge, that the admission of one of the parties is received, in order to affect the others.[2] If they sue upon a promise to them as partners, the admission of one is evidence against all, even though it goes to a denial of the joint right of action, the partnership being conclusively admitted by the form of action.[3]

§ 178. In general, the *answer* of one defendant *in chancery* cannot be read in evidence against his co-defendant; the reason being, that, as there is no issue between them, there can have been no opportunity for cross-examination.[4] But this rule does not apply to cases where the other defendant claims through him, whose answer is offered in evidence; nor to cases where they have a joint interest, either as partners, or otherwise, in the transaction.[5] Wherever the confession of any party would be good evidence against another, in such case, his answer, *a fortiori*, may be read against the latter.[6]

[1] Gray *v.* Palmer *et al.* 1 Esp. 135; [Boswell *v.* Blackman, 12 Geo. 591.]

[2] Nichols *v.* Dowding *et al.* 1 Stark. R. 81; Grant *v.* Jackson *et al.* Peake's Cas. 204; Burgess *v.* Lane *et al.* 3 Greenl. 165; Grafton Bank *v.* Moore, 13 N. Hamp. 99. See *supra*, § 112; *post*, vol. 2, § 484; Latham *v.* Kenniston, 13 N. Hamp. 203; Whitney *v.* Ferris, 10 Johns. 66; Wood *v.* Braddick, 1 Taunt. 104; Sangster *v.* Mazzaredo *et al.* 1 Stark. R. 161; Van Reimsdyk *v.* Kane, 1 Gall. 635; Harris *v.* Wilson, 7 Wend. 57; Buckman *v.* Barnum, 15 Conn. R. 68; [Allcott *v.* Strong, 9 Cush. 323; Dutton *v.* Woodman, Ib. 255; Rich *v.* Flanders, 39 N. Hamp. 304.]

[3] Lucas *et al. v.* De La Cour, 1 M. & S. 249.

[4] Jones *v.* Tuberville, 2 Ves. 11; Morse *v.* Royall, 12 Ves. 355, 360; Leeds *v.* The Marine Ins. Co. of Alexandria, 2 Wheat. 380; Gresley on Eq. Evid. 24; Field *v.* Holland, 6 Cranch, 8; Clark's Ex'rs *v.* Van Reimsdyk, 9 Cranch, 153; Van Reimsdyk *v.* Kane, 1 Gall. 630; Parker *v.* Morrell, 12 Jur. 253; 2 C. & K. 599; Morris *v.* Nixon, 1 How. s. c. Rep. 48.

[5] Field *v.* Holland, 6 Cranch, 8, 24; Clark's Ex'rs *v.* Van Reimsdyk, 9 Cranch, 153, 156; Osborn *v.* United States Bank, 9 Wheat. 738, 832; Christie *v.* Bishop, 1 Barb. Ch. R. 105, 116.

[6] Van Reimsdyk *v.* Kane, 1 Gall. 630, 635.

§ 179. The admissions, which are thus receivable in evidence, must, as we have seen, be those of a person having at the time some interest in the matter, afterwards in controversy in the suit to which he is a party. The admissions, therefore, of a *guardian*, or of an *executor* or *administrator*, made before he was completely clothed with that trust, or of a *prochein amy*, made before the commencement of the suit, cannot be received, either against the ward or infant in the one case, or against himself, as the representative of heirs, devisees, and creditors, in the other;[1] though it may bind the person himself, when he is afterwards a party *suo jure*, in another action. A solemn admission, however, made in good faith, in a pending suit, for the purpose of that trial only, is governed by other considerations. Thus, the plea of *nolo contendere*, in a criminal case, is an admission for that trial only. One object of it is, to prevent the proceedings being used in any other place; and therefore it is held inadmissible in a civil action against the same party.[2] So, the answer of the guardian of an infant defendant in chancery can never be read against the infant in another suit; for its office was only to bring the infant into court and make him a party.[3] But it may be used against the guardian, when he afterwards is a party in his private capacity, for it is his own admission upon oath.[4] Neither can the admission of a *married woman*, answering jointly with her husband, be afterwards read against her, it being considered as the answer of the husband alone.[5]

§ 180. We are next to consider the admissions of persons who

[1] Webb *v.* Smith, R. & M. 106; Fraser *v.* Marsh, 2 Stark. 41; Cowling *v.* Ely, Id. 366; Plant *v.* McEwen, 4 Conn. 544. So, the admissions of one, before he became assignee of a bankrupt, are not receivable against him, where suing as assignee. Fenwick *v.* Thornton, 1 M. & M. 51. But see Smith *v.* Morgan, 2 M. & Rob. 257. Nor is the statement of one partner admissible against the others, in regard to matters which were transacted before he became a partner in the house, and in which he had no interest prior to that time. Catt *v.* Howard, 3 Stark. R. 3. In trover by an infant suing by his guardian, the statements of the guardian, tending to show that the property was in fact his own, are admissible against the plaintiff, as being the declarations of a party to the record. Tenney *v.* Evans, 14 N. Hamp. 343. [* Legge *v.* Edwards, 2 L. J. ch. 125.]

[2] Guild *v.* Lee, 3 Law Reporter, p. 433. So, an admission in one plea cannot be called in aid of the issue in another. Stracey *v.* Blake, 3 C. M. & R. 168; Jones *v.* Flint, 2 P. & D. 594; Gould on Pleading, 432, 433; Mr. Rand's note to Jackson *v.* Stetson, 15 Mass. 58.

[3] Eggleston *v.* Speke, alias Petit, 3 Mod. 258, 259; Hawkins *v.* Luscombe, 2 Swanst. 392, cases cited in note (a); Story on Eq. Pl. 668; Gresley on Eq. Evid. 24, 323; Mills *v.* Dennis, 3 Johns. Ch. 367.

[4] Beasly *v.* Magrath, 2 Sch. & Lefr. 34; Gresley on Eq. Evid. 323.

[5] Hodgson *v.* Merest, 9 Price, 563; Elston *v.* Wood, 2 My. & K. 678.

are not parties to the record, but yet are *interested in the subject-matter of the suit*. The law, in regard to this source of evidence, looks chiefly to the real parties in interest, and gives to their admissions the same weight, as though they were parties to the record. Thus the admissions of the *cestui que trust* of a bond;[1] those of the persons interested in a policy effected in another's name, for their benefit;[2] those of the ship-owners, in an action by the master for freight;[3] those of the indemnifying creditor, in an action against the sheriff;[4] those of the deputy-sheriff, in an action against the high-sheriff for the misconduct of the deputy;[5] are all receivable against the party making them. And, in general, the admissions of any party represented by another, are receivable in evidence against his representative.[6] But here, also, it is to be

[1] Hanson *v.* Parker, 1 Wils. 257. See also Harrison *v.* Vallance, 1 Bing. 45. But the declarations of the *cestui que trust* are admissible, only so far as his interest and that of the trustee are identical. Doe *v.* Wainwright, 3 Nev. & P. 598. And the nature of his interest must be shown, even though it be admitted that he is a *cestui que trust*. May *v.* Taylor, 6 M. & Gr. 261. [The admissions of a silent partner, not a party to record, may be given in evidence. Weed *v.* Kellogg, 6 McLean, 44.] [* But the admissions of one of several *cestuis que trust* of real estate are not admissible to defeat the title of the trustee. Pope *v.* Devereux, 5 Gray, 409.]

[2] Bell *v.* Ansley, 16 East, 141, 143.

[3] Smith *v.* Lyon, 3 Campb. 465.

[4] Dowdon *v.* Fowle, 4 Campb. 38; Dyke *v.* Aldridge, cited 7 T. R. 665; 11 East, 584; Young *v.* Smith, 6 Esp. 121; Harwood *v.* Keyes, 1 M. & Rob. 204; Proctor *v.* Lainson, 7 C. & P. 629.

[5] The admissions of an under-sheriff are not receivable in evidence against the sheriff, unless they tend to charge himself, he being the real party in the cause. He is not regarded as the general officer of the sheriff, to all intents. Snowball *v.* Goodricke, 4 B. & Ad. 541; though the admissibility of his declarations has sometimes been placed on that ground. Drake *v.* Sykes, 7 T. R. 113. At other times they have been received on the ground, that, being liable over to the sheriff, he is the real party to the suit. Yabsley *v.* Doble, 1 Ld. Raym. 190. And where the sheriff has taken a general bond of indemnity from the under-officer, and has given him notice of the pendency of the suit, and required him to defend it, the latter is in fact the real party in interest, whenever the sheriff is sued for his default; and his admissions are clearly receivable, on principle, when made against himself. It has elsewhere been said, that the declarations of an under-sheriff are evidence to charge the sheriff, only where his acts might be given in evidence to charge him; and then, rather as acts than as declarations, the declarations being considered as part of the *res gestæ*. Wheeler *v.* Hambright, 9 Serg. & R. 396, 397. See Scott *v.* Marshall, 2 Cr. & Jer. 238; Jacobs *v.* Humphrey, 2 Cr. & Mees. 413; 2 Tyrw. 272, s. c. But whenever a person is bound by the record, he is, for all purposes of evidence, the party in interest, and, as such, his admissions are receivable against him, both of the facts it recites, and of the amount of damages, in all cases where, being liable over to the nominal defendant, he has been notified of the suit, and required to defend it. Clark's Ex'rs *v.* Carrington, 7 Cranch, 322; Hamilton *v.* Cutts, 4 Mass. 349; Tyler *v.* Ulmer, 12 Mass. 166; Duffield *v.* Scott, 3 T. R. 374; Kip *v.* Brigham, 6 Jones, 158; 7 Johns. 168; Bender *v.* Fromberger, 4 Dall. 436. See also Carlisle *v.* Garland, 7 Bing. 298; North *v.* Miles, 1 Campb. 389; Bowsher *v.* Calley, 1 Campb. 391, note; Underhill *v.* Wilson, 6 Bing. 697; Bond *v.* Ward, 1 Nott & McCord, 201; Carmack *v.* The Commonwealth, 5 Binn. 184; Sloman *v.* Herne, 2 Esp. 695; Williams *v.* Bridges, 2 Stark. R. 42; Savage *v.* Balch, 8 Greenl. 27. [The admissions of a party named as an executor and legatee of a will, as to the unsoundness of the mind of the testator, are admissible, upon a probate of the will. Robinson *v.* Hutchinson, 31 Vt. 443.]

[6] Stark. Evid. 26; North *v.* Miles, 1 Campb. 390.

observed, that the declarations or admissions must have been made while the party making them had some interest in the matter; and they are receivable in evidence only so far as his own interests are concerned. Thus, the declaration of a bankrupt, made before his bankruptcy, is good evidence to charge his estate with a debt; but not so, if it was made afterwards.[1] While the declarant is the only party in interest, no harm can possibly result from giving full effect to his admissions. He may be supposed best to know the extent of his own rights, and to be least of all disposed to concede away any that actually belonged to him. But an admission, made after other persons have acquired separate rights in the same subject-matter, cannot be received to disparage their title, however it may affect that of the declarant himself. This most just and equitable doctrine will be found to apply not only to admissions made by bankrupts and insolvents, but to the case of vendor and vendee, payee and indorsee, grantor and grantee, and, generally, to be the pervading doctrine, in all cases of rights acquired in good faith, previous to the time of making the admissions in question.[2]

§ 181. In some cases, the admissions of *third persons, strangers to the suit*, are receivable. This arises, when the issue is substantially upon the mutual rights of such persons at a particular time; in which case the practice is, to let in such evidence in general, as would be legally admissible in an action between the parties themselves. Thus, in an action against the sheriff for an escape, the debtor's acknowledgment of the debt, being sufficient to charge him, in the original action, is sufficient, as against the sheriff, to support the averment in the declaration, that the party escaping was so indebted.[3] So, an admission of joint liability by a third person has been held sufficient evidence on the part of the defendant, to support a plea in abatement for the non-joinder of such person, as defendant in the suit; it being admissible in an action against him for the same cause.[4] And the admissions of a bankrupt, made before the act of bankruptcy, are receivable in

[1] Bateman *v.* Bailey, 5 T. R. 513; Smith *v.* Simmes, 1 Esp. 330; Deady *v.* Harrison, 1 Stark. R. 60; [*Infra*, § 190.]

[2] Bartlett *v.* Delprat, 4 Mass. 702, 708. Clarke *v.* Waite, 12 Mass. 439; Bridge *v.* Eggleston, 14 Mass. 245, 250, 251; Phenix *v.* Ingraham, 5 Johns. 412; Packer *v.* Gonsalus, 1 Serg. & R. 526; Patton *v.* Goldsborough, 9 Serg. & R. 47; Babb *v.* Clemson, 12 Serg. & R. 328; [*Infra*, § 190.]

[3] Sloman *v.* Herne, 2 Esp. 695; Williams *v.* Bridges, 2 Stark. R. 42; Kempland *v.* Macauley, Peake's Cas. 65.

[4] Clay *v.* Langslow, 1 M. & M. 45. *Sed quære*, and see *infra*, § 395.

proof of the petitioning creditor's debt. His declarations, made after the act of bankruptcy, though admissible against himself, form an exception to this rule, because of the intervening rights of creditors, and the danger of fraud.[1]

§ 182. The admissions of a third person are also receivable in evidence, against the party who has *expressly referred another to him* for information, in regard to an uncertain or disputed matter. In such cases, the party is bound by the declarations of the person referred to, in the same manner, and to the same extent, as if they were made by himself.[2] Thus, upon a plea of *plene administravit*, where the executors wrote to the plaintiff, that if she wished for further information in regard to the assets, she should apply to a certain merchant in the city, they were held bound by the replies of the merchant to her inquiries upon that subject.[3] So, in *assumpsit* for goods sold, where the fact of the delivery of them by the carman was disputed, and the defendant said, "If he will say that he did deliver the goods, I will pay for them;" he was held bound by the affirmative reply of the carman.[4]

§ 183. This principle extends to the case of an *interpreter* whose statements of what the party says are treated as identical with those of the party himself; and therefore may be proved by any person who heard them, without calling the interpreter.[5]

§ 184. Whether the answer of a person thus referred to is *conclusive* against the party does not seem to have been settled.

[1] Hoare *v.* Coryton, 4 Taunt. 560; 2 Rose, 158; Robson *v.* Kemp, 4 Esp. 234; Watts *v.* Thorpe, 1 Campb. 376; Smallcombe *v.* Burges, McClel. R. 45; 13 Price, 136, s. c.; Taylor *v.* Kinloch, 1 Stark. R. 175; 2 Stark. R. 591; Jarrett *v.* Leonard, 2 M. & S. 265. The *dictum* of Lord Kenyon, in Dowton *v.* Cross, 1 Esp. 168, that the admissions of a bankrupt, made after the act of bankruptcy, but before the commission issued, are receivable, is contradicted in 13 Price, 153, 154, and overruled by that and the other cases above cited. See also Bernasconi *v.* Farebrother, 3 B. & Ad. 372. [* The evidence of the principal will not charge the surety, especially after the transaction is terminated. Chelmsford Co. *v.* Demarest, 7 Gray, 1. But the admission of the surety is good against both in the absence of collusion. Chapel *v.* Washburn, 11 Ind. 393.]

[2] [Turner *v.* Yates, 16 How. (U. S.) 14; Chapman *v.* Twitchell, 37 Maine, 59; Chadsey *v.* Greene, 24 Conn. 562.]

[3] Williams *v.* Innes, 1 Campb. 364.

[4] Daniel *v.* Pitt, 1 Campb. 366, note; 6 Esp. 74, s. c.; Brock *v.* Kent, Ib.; Burt *v.* Palmer, 5 Esp. 145; Hood *v.* Reeve, 3 C. & P. 532.

[5] Fabrigas *v.* Mostyn, 11 St. Tr. 171. The cases of the reference of a disputed liability to the opinion of legal counsel, and of a disputed fact regarding a mine to a miner's jury, have been treated as falling under this head; the decisions being held binding, as the answers of persons referred to. How far the circumstance, that if treated as awards, being in writing, they would have been void for want of a stamp, may have led the learned judges to consider them in another light, does not appear. Sybray *v.* White, 1 M. & W. 435. But in this country, where no stamp is required, they would more naturally be regarded as awards upon parol submissions, and therefore conclusive, unless impeached for causes recognized in the law of awards.

Where the plaintiff had offered to rest his claim upon the defendant's affidavit, which was accordingly taken, Lord Kenyon held, that he was conclusively bound, even though the affidavit had been false; and he added, that, to make such a proposition and afterwards to recede from it was *mala fides;* but that, besides that, it might be turned to very improper purposes, such as to entrap the witness, or to find out how far the party's evidence would go in support of his case.[1] But in a later case, where the question was upon the identity of a horse, in the defendant's possession, with one lost by the plaintiff, and the plaintiff had said, that if the defendant would take his oath that the horse was his, he should keep him, and he made oath accordingly; Lord Tenterden observed, that considering the loose manner in which the evidence had been given, he would not receive it as conclusive; but that it was a circumstance on which he should not fail to remark to the jury.[2] And certainly the opinion of Lord Tenterden, indicated by what fell from him in this case, more perfectly harmonizes with other parts of the law, especially as it is opposed to any further extension of the doctrine of estoppels, which sometimes precludes the investigation of truth. The purposes of justice and policy are sufficiently answered, by throwing the burden of proof on the opposing party, as in a case of an award, and holding him bound, unless he impeaches the test referred to by clear proof of fraud or mistake.[3]

§ 185. The *admissions of the wife* will bind the husband, only where she has authority to make them.[4] This authority does not result, by mere operation of law, from the relation of husband and wife; but is a question of fact, to be found by the jury, as in other cases of agency; for though this relation is peculiar in its circumstances, from its close intimacy and its very nature, yet it is not peculiar in its principles. As the wife is seldom expressly constituted the agent of the husband, the cases on this subject are

[1] Stevens *v.* Thacker, Peake's Cas. 187; Lloyd *v.* Willan, 1 Esp. 178; Delesline *v.* Greenland, 1 Bay, 458, acc., where the oath of a third person was referred to. See Reg. *v.* Moreau, 36 Leg. Obs. 69; 11 Ad. & El. 1028, as to the admissibility of an award as an admission of the party. *Infra*, § 537, n. (1).

[2] Garnett *v.* Ball, 3 Stark. R. 160.

[3] Whitehead *v.* Tattersall, 1 Ad. & El. 491.

[4] Emerson *v.* Blonden, 1 Esp. 142; Anderson *v.* Sanderson, 2 Stark. R. 204; Carey *v.* Adkins, 4 Campb. 92. In Walton *v.* Green, 1 C. & P. 621, which was an action for necessaries furnished to the wife, the defence being that she was turned out of doors for adultery, the husband was permitted to prove her confessions of the fact, just previous to his turning her away; but this was contemporary with the transaction of which it formed a part.

almost universally those of implied authority, turning upon the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question. Where he sues for her wages, the fact that she earned them does not authorize her to bind him by her admissions of payment;[1] nor can her declarations affect him, where he sues with her in her right; for in these, and similar cases, the right is his own, though acquired through her instrumentality.[2] But in regard to the inference of her agency from circumstances, the question has been left to the jury with great latitude, both as to the fact of agency, and the time of the admissions. Thus, it has been held competent for them to infer authority in her to accept a notice and direction, in regard to a particular transaction in her husband's trade, from the circumstance of her being seen twice in his counting-room, appearing to conduct his business relating to that transaction, and once giving orders to the foreman.[3] And in an action against the husband, for goods furnished to the wife, while in the country, where she was occasionally visited by him, her letter to the plaintiff, admitting the debt, and apologizing for the non-payment, though written several years after the transaction, was held by Lord Ellenborough sufficient to take the case out of the statute of limitations.[4]

§ 186. The admissions of *attorneys of record* bind their clients, in all matters relating to the progress and trial of the cause. But, to this end, they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. In such cases, they are in general conclusive; and may be given in evidence, even upon a new trial.[5] But other admissions, which are mere matters of

[1] Hall *v.* Hill, 2 Str. 1094. An authority to the wife to conduct the ordinary business of the shop in her husband's absence does not authorize her to bind him by an admission, in regard to the tenancy or the rent of the shop. Meredith *v.* Footner, 11 M. & W. 202; [Jordan *v.* Hubbard, 26 Ala. 433.]

[2] Alban *v.* Pritchet, 6 T. R. 680; Kelley *v.* Small, 2 Esp. 716; Denn *v.* White, 7 T. R. 112, as to her admission of a trespass. Hodgkinson *v.* Fletcher, 4 Camph. 70. Neither are his admissions, as to facts respecting her property, which happened before the marriage, receivable after his death, to affect the rights of the surviving wife. Smith *v.* Scudder, 11 Serg. & R. 325.

[3] Plimmer *v.* Sells, 3 Nev. & M. 422. And see Riley *v.* Suydam, 4 Barb. s. c. R. 222.

[4] Gregory *v.* Parker, 1 Campb. 394; Palethorp *v.* Furnish, 2 Esp. 511, note. See also Clifford *v.* Burton, 1 Bing. 199; 8 More, 16, s. c.; Petty *v.* Anderson, 3 Bing. 170; Cotes *v.* Davis, 1 Campb. 485.

[5] Doe *v.* Bird, 7 C. & P. 6; Langley *v.* Ld. Oxford, 1 M. & W. 508.

conversation with an attorney, though they relate to the facts in controversy, cannot be received in evidence against his client. The reason of the distinction is found in the nature and extent of the authority given; the attorney being constituted for the management of the cause in court, and for nothing more.[1] If the admission is made before suit, it is equally binding, provided it appear that the attorney was already retained to appear in the cause.[2] But in the absence of any evidence of retainer at that time in the cause, there must be some other proof of authority to make the admission.[3] Where the attorney is already constituted in the cause, admissions made by his managing clerk or his agent are received as his own.[4]

§ 187. We are next to consider the admissions of a *principal*, as evidence in an action *against the surety*, upon his collateral undertaking. In the cases on this subject the main inquiry has been, whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*. If so, they have been held admissible; otherwise not. The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done; and therefore is entitled to proof of his conduct by original evidence, where it can be had; excluding all declarations of the principal, made subsequent to the act, to which they relate, and out of the course of his official duty. Thus, where one guaranteed the payment for such goods as the plaintiffs should send to another, in the way of their trade; it was held, that the admissions of the principal debtor, that he had received goods, made after the time of their supposed delivery, were not receivable in evidence against the surety.[5] So, if one becomes surety in a bond, conditioned for the faithful conduct of another as clerk, or collector, it is held, that, in an action on the bond against the surety, confessions of embezzlement, made by the

[1] Young *v.* Wright, 1 Campb. 139, 141; Perkins *v.* Hawkshaw, 2 Stark. R. 239; Elton *v.* Larkins, 1 M. & Rob. 196; Doe *v.* Bird, 7 C. & P. 6; Doe *v.* Richards, 2 C. & K. 216; Watson *v.* King, 3 M. G. & Sc. 608.

[2] Marshall *v.* Cliff, 4 Campb. 133.

[3] Wagstaff *v.* Wilson, 4 B. & Ad. 339.

[4] Taylor *v.* Williams, 2 B. & Ad. 845, 856; Standage *v.* Creighton, 5 C. & P. 406; Taylor *v.* Forster, 2 C. & P. 195; Griffiths *v.* Williams, 1 T. R. 710; Truslove *v.* Burton, 9 Moore, 64. As to the extent of certain admissions, see Holt *v.* Squire, Ry. & M. 282; Marshall *v.* Cliff, 4 Campb. 133. The admission of the due execution of a deed does not preclude the party from taking advantage of a variance. Goldie *v.* Shuttleworth, 1 Campb. 70.

[5] Evans *v.* Beattie, 5 Esp. 26; Bacon *v.* Chesney, 1 Stark. R. 192; Longenecker *v.* Hyde, 6 Binn. 1.

principal after his dismissal, are not admissible in evidence;[1] though, with regard to entries made in the course of his duty, it is otherwise.[2] A judgment, also, rendered against the principal, may be admitted as evidence of that fact, in an action against the surety.[3] On the other hand, upon the same general ground it has been held, that, where the surety confides to the principal the power of making a contract, he confides to him the power of furnishing evidence of the contract; and that, if the contract is made by parol, subsequent declarations of the principal are admissible in evidence, though not conclusive. Thus, where a husband and wife agreed, by articles, to live separate, and C, as trustee and surety for the wife, covenanted to pay the husband a sum of money, upon his delivering to the wife a carriage and horses for her separate use; it was held, in an action by the husband for the money, that the wife's admissions of the receipt by her of the carriage and horses were admissible.[4] So, where A guaranteed the performance of any contract that B might make with C, the admissions and declarations of B were held admissible against A, to prove the contract.[5]

§ 188. But where the surety, being sued for the default of the principal, gives him *notice of the pendency of the suit*, and requests him to defend it; if judgment goes against the surety, the record is conclusive evidence for him, in a subsequent action against the principal for indemnity; for the principal has thus *virtually become party* to it. It would seem, therefore, that in such case the declarations of the principal, as we have heretofore seen, become admissible, even though they operate against the surety.[6]

§ 189. The admissions of one person are also evidence against another, in respect of privity between them. The term *privity* denotes mutual or successive relationship to the same rights of property; and privies are distributed into several classes, according to the manner of this relationship. Thus, there are privies in estate, as, donor and donee, lessor and lessee, and joint-tenants;

[1] Smith *v.* Whittingham, 6 C. & P. 78. See also Goss *v.* Watlington, 3 B. & B. 132; Cutler *v.* Newlin, Manning's Digest, N. P. 137, per Holroyd, J., in 1819; Dawes *v.* Shedd, 15 Mass. 6, 9; Foxcroft *v.* Nevins, 4 Greenl. 72; Hayes *v.* Seaver, 7 Greenl. 237; Respublica *v.* Davis, 3 Yeates, 128; Hotchkiss *v.* Lyon, 2 Blackf. 222; Shelby *v.* The Governor, &c., Id. 239; Beall *v.* Beck, 3 Har. & McHen. 242.

[2] Whitnash *v.* George, 8 B. & C. 556; Middleton *v.* Melton, 10 B. & C. 317; McGahey *v.* Alston, 2 M. & W. 213, 214.

[3] Drummond *v.* Prestman, 13 Wheat. 515.

[4] Fenner *v.* Lewis, 10 Johns. 38.

[5] Meade *v.* McDowell, 5 Binn. 195.

[6] See *supra*, § 180, note (8), and cases there cited. [See Powers *v.* Nash, 37 Maine, 322.]

privies in blood, as, heir and ancestor, and coparceners; privies in representation, as, executors and testator, administrators and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law.[1] The ground upon which admissions bind those in privity with the party making them is, that they are identified in interest; and, of course, the rule extends no farther than this identity. The cases of coparceners and joint-tenants are assimilated to those of joint-promisors, partners, and others having a joint interest, which have already been considered.[2] In other cases, where the party, by his admissions, has qualified his own right, and another claims to succeed him as heir, executor, or the like, he succeeds only to the right, as thus qualified, at the time when his title commenced; and the admissions are receivable in evidence against the representative, in the same manner as they would have been against the party represented. Thus, the declarations of the ancestor, that he held the land as the tenant of a third person, are admissible to show the seisin of that person, in an action brought by him against the heir for the land.[3] Thus, also, where the defendant in a real action relied on a long possession, he has been permitted, in proof of the adverse character of the possession, to give in evidence the declarations of one under whom the plaintiff claimed, that he had sold the land to the person under whom the defendant claimed.[4] And the declarations of an intestate are admissible against his administrator, or any other claiming in his right.[5] The declarations, also, of the former

[1] Co. Lit. 271*a*; Carver *v.* Jackson, 4 Peters, 1, 83; Wood's Inst. L. L. Eng. 236; Tomlin's Law Dict. in Verb. *Privies*. But the admissions of executors and administrators are not receivable against their co-executors or co-administrators. Elwood *v.* Deifendorf, 5 Barb. s. c. R 398. Other divisions have been recognized; namely, privity in tenure between landlord and tenant; privity in contract alone, or the relation between lessor and lessee, or heir and tenant in dower, or by the courtesy, by the covenants of the latter, after he has assigned his term to a stranger; privity in estate alone, between the lessee and the grantee of the reversion; and privity in both estate and contract, as between lessor and lessee, &c.; but these are foreign from our present purpose. See Walker's case, 3 Co. 23; Beverley's case, 4 Co. 123, 124; *supra*, §§ 19, 20, 23, 24. [*Declarations by a former owner of property under whom the party claims title are, in general, evidence, if made during the existence of his title. Hayward Rubber Co. *v.* Dunckle, 30 Vt. R. 29. See also Wheeler *v.* McCorristen, 24 Ill. 210; Norton *v.* Kearney, 10 Wis. 443.]

[2] *Supra*, §§ 174, 180.

[3] Doe *v.* Pettett, 5 B. & Ad. 223; 2 Poth. on Obl. by Evans, p 254; *supra*, §§ 108, 109, and cases there cited.

[4] Brattle Street Church *v.* Hubbard, 2 Met. 363. And see Podgett *v.* Lawrence, 10 Paige, 170; Dorsey *v.* Dorsey, 3 H. & J. 410; Clary *v.* Grimes, 12 G. & J. 31.

[5] Smith *v.* Smith, 3 Bing. N. C. 29; Ivat *v.* Finch, 1 Taunt. 141.

occupant of a messuage, in respect of which the present occupant claimed a right of common, because of vicinage, are admissible evidence in disparagement of the right, they being made during his occupancy; and, on the same principle, other contemporaneous declarations of occupiers have been admitted, as evidence of the nature and extent of their title, against those claiming in privity of estate.[1] Any admission by a landlord in a prior lease, which is relative to the matter in issue, and concerns the estate, has also been held admissible in evidence against a lessee who claims by a subsequent title.[2]

§ 190. The same principle holds in regard to *admissions made by the assignor* of a personal contract or chattel, previous to the assignment, while he remained the sole proprietor, and where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer. In such case, he is bound by the previous admissions of the assignor, in disparagement of his own apparent title. But this is true only where there is an identity of interest between the assignor and assignee; and such identity is deemed to exist not only where the latter is expressly the mere agent and representative of the former, but also where the assignee has acquired a title with actual notice of the true state of that of the assignor, as qualified by the admissions in question, or where he has purchased a de-

[1] Walker *v.* Broadstock, 1 Esp. 458; Doe *v.* Austin, 9 Bing. 41; Davies *v.* Pierce, 2 T. R. 53; Doe *v.* Rickarby, 5 Esp. 4; Doe *v.* Jones, 1 Campb. 367. Ancient maps, books of survey, &c., though mere private documents, are frequently admissible on this ground, where there is a privity in estate between the former proprietor, under whose direction they were made, and the present claimant, against whom they are offered. Bull. N. P. 283; Brigman *v.* Jennings, 1 Ld. Raym. 734; [*supra*, § 145, note.] So, as to receipts for rent, by a former grantor, under whom both parties claimed. Doe *v.* Seaton, 2 Ad. & El. 171.

[2] Crease *v.* Barrett, 1 Crompt. Mees. & R. 919, 932. See also Doe *v.* Cole, 6 C. & P. 359, that a letter written by a former vicar, respecting the property of the vicarage, is evidence against his successor, in an ejectment for the same property, in right of his vicarage. The receipts, also, of a vicar's lessee, it seems, are admissible against the vicar, in proof of a *modus*, by reason of the privity between them. Jones *v.* Carrington, 1 C. & P. 329, 330, n.; Maddison *v.* Nuttal, 6 Bing. 226. So, the answer of a former rector. De Whelpdale *v.* Milburn, 5 Price, 485. An answer in chancery is also admissible in evidence against any person actually claiming under the party who put it in; and it has been held *primâ facie* evidence against persons generally reputed to claim under him, at least so far as to call upon them to show another title from a stranger. Earl of Sussex *v.* Temple, 1 Ld. Raym. 310; Countess of Dartmouth *v.* Roberts, 16 East, 334, 339, 340. So, of other declarations of the former party in possession, which would have been good against himself, and were made while he was in possession. Jackson *v.* Bard, 4 Johns. 230, 234; Norton *v.* Pettibone, 7 Conn. 319; Weidman *v.* Kohr, 4 Serg. & R. 174; *supra*, §§ 23, 24. [* The declarations of the intestate are evidence against his administrator, as a privy by representation, upon the question of having made a *donatio mortis causa*. Smith *v.* Maine, 25 Barb. 33.]

mand already stale, or otherwise infected with circumstances of suspicion.[1] Thus, the declarations of a former holder of a promissory note, negotiated before it was overdue, showing that it was given without consideration, though made while he held the note, are not admissible against the indorsee; for, as was subsequently observed by *Parke*, J., "the right of a person, holding by a good title, is not to be cut down by the acknowledgment of a former holder, that he had no title."[2] But in an action by the indorsee of a bill or note dishonored before it was negotiated, the declarations of the indorser, made while the interest was in him, are admissible in evidence for the defendant.[3]

[1] Harrison *v.* Vallance, 1 Bing. 38; Bayley on Bills, by Phillips and Sewall, pp. 502, 503, and notes (2d Am. edit.); Gibblehouse *v.* Strong, 3 Rawle, 437; Hatch *v.* Dennis, 1 Fairf. 244; Snelgrove *v.* Martin, 2 McCord, 241, 243. [The declarations and admissions of an assignor of personal property, as a patent right, made after he has parted with his interest in it, are inadmissible either to show a want of title in him, or to affect the quality of the article, or to impair the right of the purchaser in any respect. By Nelson, J., Many *v.* Jagger, 1 Blatchf. C. C. R. 372, 376.]

[2] Barough *v.* White, 4 B. & C. 325, explained in Woolway *v.* Rowe, 1 Ad. & El. 114, 116; Shaw *v.* Broom, 4 D. & R. 730; Smith *v.* De Wruitz, Ry. & M. 212; Beauchamp *v.* Parry, 1 B. & Ad. 89; Hackett *v.* Martin, 8 Greenl. 77; Parker *v.* Grout, 11 Mass. 157, n.; Jones *v.* Winter, 13 Mass. 304; Dunn *v.* Snell, 15 Mass. 481; Paige *v.* Cagwin, 7 Hill, N. Y. R. 361. In *Connecticut*, it seems to have been held otherwise. Johnson *v.* Blackman, 11 Conn. 342; Woodruff *v.* Westcott, 12 Conn. 134. So, in *Vermont*, Sargeant *v.* Sargeant, 3 Washb. 371. [The statements of an insolvent debtor, whether made before or after a sale, alleged to be fraudulent, as to the value of the property sold, and of his other property, are inadmissible against his assignee in insolvency, to show that the sale was in good faith in a suit by the assignee against the purchaser of said property to recover its value. Heywood *v.* Reed, 4 Gray, 574. See also Jones *v.* Church, &c., 21 Barb. 161.] [* As a general rule the declarations of the assignor in the case of an alleged fraudulent sale, are not admissible evidence against the assignee, unless made before the assignment, and with a view to show its purpose, so as to form part of the *res gestæ*. But if made while the assignor remained in possession, although after the execution of the assignment, they are held competent to characterize the transaction. Adams *v.* Davidson, 10 N. Y. Ct. App. 309. And where a combination between the assignor and assignee is previously established, the declarations of the assignor will be evidence against the assignee to the fullest extent, although made after the assignment. Cuyler *v.* McCartney, 33 Barb. 165.]

[3] Bayley on Bills, 502, 503, and notes (2d. Am. ed. by Phillips & Sewall), Pocock *v.* Billings, Ry. & M. 127. See also Story on Bills, § 220; Chitty on Bills, 650 (8th edit.); Hatch *v.* Dennis, 1 Fairf. 249; Shirley *v.* Todd, 9 Greenl. 83. [In a suit against the maker of a promissory note by one who took it when overdue, the declarations of a prior holder, made while he held the note, after it was due, are admissible in evidence to show payment to such prior holder, or any right of set-off which the maker had against him. But such declarations, made by such holder before he took the note are inadmissible. So such declarations, made by such holder after assigning the note to one from whom the plaintiff since took it, are inadmissible unless such assignment was conditioned to be void upon the payment to the assignor of a less sum than the amount due on the note, in which case such declarations are admissible in evidence for the defendant to the extent of the interest remaining in such prior holder. Bond *v.* Fitzpatrick, 4 Gray, 89, 92; Sylvester *v.* Crapo, 15 Pick. 92; Fisher *v.* True, 38 Maine, 534; McLanathan *v.* Patten, 39 Ib. 142; Scammon *v.* Scammon, 33 N. H. 52, 58; Criddle *v.* Criddle, 21 Mis. 522.] [* See Jermain *v.* Denniston, 6 N. Y. Ct. App. 276; Booth *v.* Swezey, 8 Id. 276; Tousley *v.* Barry, 16 Id. 497. The practice in the different states, in regard to admitting the declarations of the owner of

§ 191. These admissions by third persons, as they derive their value and legal force from the relation of the party making them to the property in question, and are taken as parts of the *res gestæ*, may be *proved by any competent witness* who heard them, without calling the party by whom they were made. The question is, whether he made the admission, and not merely, whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive (and it seldom is so), may be controverted by other testimony; even by calling the party himself, when competent; but it is not necessary to produce him, his declarations, when admissible at all, being admissible as original evidence, and not as hearsay.[1]

§ 192. We are next to consider the *time and circumstances of the admission*. And here it is to be observed, that confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly stated to be made without prejudice, are excluded on grounds of public policy.[2] For without this protective rule, it would often be difficult to take any step towards an amicable compromise or adjustment. A distinction is taken between the admission of particular facts, and an offer of a sum of money to buy peace. For, as Lord Mansfield observed,

a *chose in action*, while holding the same, it not being negotiable, or if so, being at the time overdue, to the effect that the same had been paid, or is otherwise invalid, and this as against a subsequent *bonâ fide* owner, is not uniform. See Miller *v.* Bingham, 29 Vt. R. 82, where such declarations were held admissible. The cases cited above from New York show that such declarations are not there admissible. The English rule seems in favor of receiving such declarations, as to the title of all personalty. Harrison *v.* Vallance, 1 Bing. 45; Shaw *v.* Broom, 4 Dow. & Ry. 730; Pocock *v.* Billing, 2 Bing. 269. But see Carpenter *v.* Hollister, 13 Vt. R. 552, where the question, as to real estate, is fully discussed.]

[1] *Supra*, §§ 101, 113, 114, and cases there cited; Clark *v.* Hougham, 2 B. & C. 149; Mountstephen *v.* Brooke, 3 B. & Ald. 141; Woolway *v.* Rowe, 1 Ad. & El. 114; Payson *v.* Good, 3 Kerr, 272.

[2] Cory *v.* Bretton, 4 C. & P. 462; Healey *v.* Thatcher, 8 C. & P. 388. Communications between the clerk of the plaintiff's attorney, and the attorney of the defendant, with a view to a compromise, have been held privileged, under this rule. Jardine *v.* Sheridan, 2 C. & K. 24.

[In Jones *v.* Foxall, 13 Eng. Law & Eq. 140, 145, Sir John Romilly, Master of the Rolls, said: "I shall, as far as I am able, in all cases, endeavor to suppress a practice which, when I was first acquainted with the profession, was rarely, if ever, ventured upon; but which, according to my experience, has been common of late, namely, that of attempting to convert offers of compromise into admissions and acts prejudicial to the parties making them. If this were permitted, the effect would be, that no attempt to compromise a suit would ever be made. If no reservation of the parties who make an offer of compromise could prevent that offer and the letters from being afterwards given in evidence, and made use of against them, it is obvious that no such letters would be written or offers made. In my opinion, such letters and offers are admissible for one purpose only, *i.e.*, to show that an attempt has been made to compromise the suit, which may be sometimes necessary; as, for instance, in order to account for lapse of time, but never to fix the persons making them with admissions contained in such letters, and I shall do all I can to discourage this, which I consider to be a very injurious practice."]

it must be permitted to men to buy their peace without prejudice to them, if the offer should not succeed; and such offers are made to stop litigation, without regard to the question whether any thing is due or not. If, therefore, the defendant, being sued for £100, should offer the plaintiff £20, this is not admissible in evidence, for it is irrelevant to the issue; it neither admits nor ascertains any debt; and is no more than saying, he would give £20 to be rid of the action.[1] But in order to exclude distinct admissions of facts, it must appear, either that they were expressly made without prejudice, or at least, that they were made under the faith of a pending treaty, and into which the party might have been led by the confidence of a compromise taking place. But if the admission be of a collateral or indifferent fact, such as the handwriting of the party, capable of easy proof by other means, and not connected with the merits of the cause, it is receivable, though made under a pending treaty.[2] It is the condition, tacit or express, that no advantage shall be taken of the admission, it being made with a view to, and in furtherance of, an amicable adjustment, that operates to exclude it. But if it is an independent admission of a fact, merely because it is a fact, it will be received; and even an offer of a sum, by way of compromise of a claim tacitly admitted, is receivable, unless accompanied with a caution that the offer is confidential.[3]

[1] Bull. N. P. 236; Gregory *v.* Howard, 3 Esp. 113, Ld. Kenyon; Marsh *v.* Gold, 2 Pick. 290; Gerrish *v.* Sweetser, 4 Pick. 374, 377; Wayman *v.* Hilliard, 7 Bing. 101; Cumming *v.* French, 2 Camph. 106, n.; Glassford on Evid. p. 336. See Molyneaux *v.* Collier, 13 Georgia R. 406. But an offer of compromise is admissible, where it is only one step in the proof that a compromise has actually been made. Collier *v.* Nokes, 2 C. & K. 1012.

[2] Waldridge *v.* Kenison, 1 Esp. 143, per Lord Kenyon. The American courts have gone farther, and held, that evidence of the admission of any independent fact is receivable, though made during a treaty of compromise. See Mount *v.* Bogert, Anthon's Rep. 190, per Thompson, C. J.; Murray *v.* Coster, 4 Cowen, 635; Fuller *v.* Hampton, 5 Conn. 416, 426; Sanborn *v.* Neilson, 4 New Hamp. R. 501, 508, 509; Delogny *v.* Rentoul, 1 Martin, 175; Marvin *v.* Richmond, 3 Den. 58; Cole *v.* Cole, 34 Maine, 542; [Harrington *v.* Lincoln, 4 Gray, 563, 567; Corinth *v.* Lincoln, 34 Maine, 310.] Lord Kenyon afterwards relaxed his own rule, saying that in future he should receive evidence of all admissions, such as the party would be obliged to make in answer to a bill in equity; rejecting none but such as are merely concessions for the sake of making peace and getting rid of a suit. Slack *v.* Buchanan, Peake's Cas. 5, 6; Tait on Evid. p. 293. A letter written by the adverse party, "without prejudice," is inadmissible. Healey *v.* Thatcher, 8 C. & P. 388. [* But the writer of such a letter is not precluded from using it in his own favor. Williams *v.* Thomas, 2 Drew. & Sm. 29.]

[3] Wallace *v.* Small, 1 M. & M. 446; Watts *v.* Lawson, Id. 447, n.; Dickinson *v.* Dickinson, 9 Met. 471; Thompson *v.* Austen, 2 Dowl. & Ry. 358. In this case Bayley, J., remarked that the essence of an offer to compromise was, that the party making it was willing to submit to a sacrifice, and to make a concession. Hartford Bridge Co. *v.* Granger, 4 Conn. 148; Gerrish *v.* Sweetser, 4 Pick. 374, 377; Murray *v.* Coster, 4 Cowen, 617, 635. Admissions made before an arbitrator are receivable

§ 193. In regard to *admissions made under* circumstances of *constraint*, a distinction is taken between civil and criminal cases; and it has been considered, that on the trial of civil actions, admissions are receivable in evidence, provided the compulsion under which they are given is legal, and the party was not imposed upon, or under duress.[1] Thus, in the trial of *Collett* v. *Ld. Keith*, for taking the plaintiff's ship, the testimony of the defendant, given as a witness in an action between other parties, in which he admitted the taking of the ship, was allowed to be proved against him; though it appeared that, in giving his evidence, when he was proceeding to state his reasons for taking the ship, Lord Kenyon had stopped him by saying, it was unnecessary for him to vindicate his conduct.[2] The rule extends also to answers voluntarily given to questions improperly asked, and to which the witness might successfully have objected. So, the voluntary answers of a bankrupt before the commissioners, are evidence in a subsequent action against the party himself, though he might have demurred to the questions, or the whole examination was irregular;[3] unless it was obtained by imposition or duress.[4]

§ 194. There is no difference, in regard to the admissibility of this sort of evidence, between *direct admissions* and those which are *incidental*, or made in some other connection, or involved in the admission of some other fact. Thus, where in an action against the acceptor of a bill, his attorney gave notice to the plaintiff to produce at the trial all papers, &c., which had been received by him relating to a certain bill of exchange (describing it), which "was accepted by the said defendant;" this was held

in a subsequent trial of the cause, the reference having proved ineffectual. Slack *v.* Buchannan, Peake's Cas. 5. See also Gregory *v.* Howard, 3 Esp. 113. Collier *v.* Nokes, 2 C. & K. 1012. [Where a party sued on a note offered to pay one half in cash, and one half by a new note with an indorser, and admitted at the same time that he owed the note, it was held that the admission might be used against him. Snow *v.* Batchelder, 8 Cush. 513.]

[1] [The rule excluding confessions made under undue influence applies only to the confessions of a person on trial in a criminal case. Newhall *v.* Jenkins, 2 Gray, 562.]

[2] Collett *v.* Ld. Keith, 4 Esp. 212, per Le Blanc, J.; who remarked, that the manner in which the evidence had been obtained might be matter of observation to the jury; but that, if what was said bore in any way on the issue, he was bound to receive it as evidence of the fact itself. See also Milward *v.* Forbes, 4 Esp. 171.

[3] Stockfleth *v.* De Tastet, 4 Campb. 10; Smith *v.* Beadnell, 1 Campb. 30. If the commission has been perverted to improper purposes, the remedy is by an application to have the examination taken from the files and cancelled. 4 Campb. 11, per Ld. Ellenborough; Milward *v.* Forbes, 4 Esp. 171; 2 Stark. Evid. 22.

[4] Robson *v.* Alexander, 1 Moore & P. 448; Tucker *v.* Barrow, 7 B. & C. 623. But a legal necessity to answer the questions, under peril of punishment for contempt, it seems, is a valid objection to the admission of the answers in evidence, in a criminal prosecution. Rex *v.* Britton, 1

primâ facie evidence, by admission that he accepted the bill.[1] So, in an action by the assignees of a bankrupt, against an auctioneer, to recover the proceeds of sales of a bankrupt's goods, the defendant's advertisement of the sale, in which he described the goods as "the property of D., a bankrupt," was held a conclusive admission of the fact of bankruptcy, and that the defendant was acting under his assignees.[2] So, also, an undertaking by an attorney, "to appear for T. and R., joint owners of the sloop 'Arundel,'" was held sufficient *primâ facie* evidence of ownership.[3]

§ 195. Other admissions are *implied from assumed character, language, and conduct*, which, though heretofore adverted to,[4] may deserve further consideration in this place. Where the existence of any domestic, social, or official relation is in issue, it is quite clear that any recognition, in fact, of that relation, is *primâ facie* evidence against the person making such recognition, that the relation exists.[5] This general rule is more frequently applied against a person who has thus recognized the character or office of another; but it is conceived to embrace, in its principle, any representations or language in regard to himself. Thus, where one has assumed to act in an official character, this is an admission of his appointment or title to the office, so far as to render him liable, even criminally, for misconduct or neglect in such office.[6] So, where one has recognized the official character of another, by treating with him in such character, or otherwise, this is at least *primâ facie* evidence of his title, against the party thus recognizing it.[7] So, the allegations in the declaration or plead-

M. & Rob. 297. The case of Rex. *v.* Merceron, 2 Stark. R. 366, which seems to the contrary, is questioned and explained by Lord Tenterden, in Rex *v.* Gilham, 1 Mood. Cr. Cas. 203. See *infra*, §§ 225, 451; Regina *v.* Garbett, 1 Denis. C. C. 236.

[1] Holt *v.* Squire, Ry. & M. 282.

[2] Maltby *v.* Christie, 1 Esp. 342, as expounded by Lord Ellenborough, in Rankin *v.* Horner, 16 East, 193.

[3] Marshall *v.* Cliff, 4 Campb. 133, per Ld. Ellenborough.

[4] *Supra*, § 27.

[5] Dickinson *v.* Coward, 1 B. & A. 677, 679, per Ld. Ellenborough; Radford, q. t. *v.* McIntosh, 3 T. R. 632.

[6] Bevan *v.* Williams, 3 T. R. 635, per Ld. Mansfield, in an action against a clergyman, for non-residence; Rex *v.* Gardner, 2 Campb. 513, against a military officer, for returning false musters; Rex *v.* Kerne, 2 St. Tr. 957, 960; Rex *v.* Brommick, Id. 961, 962; Rex *v.* Atkins, Id. 964, which were indictments for high treason, being popish priests, and remaining forty days within the kingdom; Rex *v.* Borrett, 6 C. & P. 124, an indictment against a letter-carrier, for embezzlement; Trowbridge *v.* Baker, 1 Cowen, 251, against a toll-gatherer, for penalties; Lister *v.* Priestley, Wightw. 67, against a collector, for penalties. See also Cross *v.* Kaye, 6 T. R. 663; Lipscombe *v.* Holmes, 2 Campb. 441; Radford *v.* McIntosh, 3 T. R. 632.

[7] Peacock *v.* Harris, 10 East, 104, by a renter of turnpike tolls, for arrearages of tolls due; Radford *v.* McIntosh, 3 T. R. 632, by a farmer-general of the post-horse duties, against a letter of horses, for certain statute penalties; Pritchard *v.* Walker,

ings in a suit at law have been held receivable in evidence against the party, in a subsequent suit between him and a stranger, as his solemn admission of the truth of the facts recited, or of his understanding of the meaning of an instrument; though the judgment could not be made available as an estoppel, unless between the same parties, or others in privity with them.[1]

§ 196. Admissions implied from the *conduct* of the party are governed by the same principles. Thus, the suppression of documents is an admission that their contents are deemed unfavorable to the party suppressing them.[2] The entry of a charge to a particular person, in a tradesman's book, or the making-out of a bill of parcels in his name, is an admission that they were furnished on his credit.[3] The omission of a claim by an insolvent, in a schedule of the debts due to him, is an admission that it is not due.[4] Payment of money is an admission against the payer, that the receiver is the proper person to receive it; but not against the receiver, that the payer was the person who was bound to pay it; for the party receiving payment of a just demand may well assume, without inquiry, that the person tendering the money was the person legally bound to pay it.[5] Acting as a bankrupt, under a commission of bankruptcy, is an admission that it was duly issued.[6] Asking time for the payment of a note or bill is an admission of

3 C. & P. 212, by the clerk of the trustees of a turnpike road, against one of the trustees; Dickinson *v.* Coward, 1 B. & A. 677, by the assignee of a bankrupt, against a debtor, who had made the assignee a partial payment. In Berryman *v.* Wise, 4 T. R. 366, which was an action by an attorney for slander, in charging him with swindling, and threatening to have him struck off the roll of attorneys, the court held that this threat imported an admission that the plaintiff was an attorney. Cummin *v.* Smith, 2 Serg. & R. 440. But see Smith *v.* Taylor, 1 New R. 196, in which the learned judges were equally divided upon a point somewhat similar, in the case of a physician; but in the former case, the *roll* of attorneys was expressly mentioned, while in the latter, the plaintiff was merely spoken of as "Doctor S.," and the defendant had been employed as his apothecary. If, however, the slander relates to the want of qualification, it was held by Mansfield, C. J., that the plaintiff must prove it; but not where it was confined to mere misconduct. 1 New R. 207. See to this point, Moises *v.* Thornton, 8 T. R. 303; Wilson *v.* Carnegie, 1 Ad. & El. 695, 703, per Ld. Denman, C. J. See further, Divoll *v.* Leadbetter, 4 Pick. 220; Crofton *v.* Poole, 1 B. & Ad. 568; Rex *v.* Barnes, 1 Stark. R. 243; Phil. & Am. on Evid. 369, 370, 371; 1 Phil. Evid. 351, 352.

[1] Tiley *v.* Cowling, 1 Ld. Raym. 744; Bull. N. P. 243, s. c. See *supra*, §§ 171, 194; *infra*, §§ 205, 210, 527*a*, 555; Robinson *v.* Swett, 3 Greenl. 316; Wells *v.* Compton, 3 Rob. Louis. R. 171; Parsons *v.* Copeland, 33 Maine, 370; [Williams *v.* Cheney, 3 Gray, 215; Judd *v.* Gibbs, Ib. 539. See Church *v.* Shelton, 2 Curtis, C. C. 271; State *v.* Littlefield, 3 R. I. 124.]

[2] James *v.* Biou, 2 Sim. & Stu. 600, 606; Owen *v.* Flack, Id. 606.

[3] Storr *et al. v.* Scott, 6 C. & P. 241; Thompson *v.* Davenport, 9 B. & C. 78, 86, 90, 91.

[4] Nicholls *v.* Downes, 1 M. & Rob. 13; Hart *v.* Newman, 3 Campb. 13. See also Tilghman *v.* Fisher, 9 Watts, 441.

[5] James *v.* Biou, 2 Sim. & Stu. 600, 606; Chapman *v.* Beard, 3 Anstr. 942.

[6] Like *v.* Howe, 6 Esp. 20; Clark *v.* Clark, Ib. 61.

the holder's title, and of the signature of the party requesting the favor; and the indorsement or acceptance of a note or bill is an admission of the truth of all the facts which are recited in it.[1]

§ 197. Admissions may also be implied from the *acquiescence* of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party.[2] And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply, from men similarly situated.[3] Thus, where a landlord quietly suffers a tenant to expend money in making alterations and improvements on the premises, it is evidence of his consent to the alterations.[4] If the tenant personally receives notice to quit at a particular day, without objection, it is an admission that his tenancy expires on that day.[5] Thus, also, among merchants, it is regarded as the allowance of an account rendered, if it is not objected to, without unnecessary delay.[6] A trader being inquired for and hearing himself denied, may thereby commit an act of

[1] Helmsley *v.* Loader, 2 Campb. 450; Critchlow *v.* Parry, Id. 182; Wilkinson *v.* Ludwidge, 1 Stra. 648; Robinson *v.* Yarrow, 7 Taunt. 455; Taylor *v.* Croker, 4 Esp. 187; Bass *v.* Clive, 4 M. & S. 13. See further, Bayley on Bills, by Phillips & Sewall, p. 496–506; Phil. & Am. on Evid. 383, n. (2); 1 Phil. Evid. 364, n. (1), and cases there cited.

[2] Allen *v.* McKeen, 1 Sumn. 314; Carter *v.* Bennett, 4 Flor. Rep. 340.

[3] To affect a party with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence; for if they were given in evidence in a judicial proceeding, he is not at liberty to interpose when and how he pleases, though a party; and therefore is not concluded. Melen *v.* Andrews, 1 M. & M. 336. See also Allen *v.* McKeen, 1 Sumn. 217, 313, 314; Jones *v.* Morrell, 1 Car. & Kir. 266; Neile *v.* Jakle, 2 Car. & Kir. 709; Peele *v.* Merch. Ins. Co. 3 Mason, R. 81; Hudson *v.* Harrison, 3 B. & B. 97; *infra*, §§ 201, 215, 287. If letters are offered against a party, it seems he may read his immediate replies. Roe *v.* Day, 7 C. & P. 705. So, it seems, he may prove a previous conversation with the party, to show the motive and intention in writing them. Reay *v.* Richardson, 2 C. M. & R. 422; [Commonwealth *v.* Harvey, 1 Gray, 487, 489; Boston & W. R. R. Corp. *v.* Dana, Ib. 83, 104; Commonwealth *v.* Kenney, 12 Met. 235; Brainard *v.* Buck, 25 Vt. 573; Corser *v.* Paul, 41 N. H. 24.]

[4] Doe *v.* Allen, 3 Taunt. 78, 80; Doe *v.* Pye, 1 Esp. 366; Neale *v.* Parkin, 1 Esp. 229. See also Stanley *v.* White, 14 East, 332.

[5] Doe *v.* Biggs, 2 Taunt. 109; Thomas *v.* Thomas, 2 Campb 647; Doe *v.* Foster, 13 East, 405; Oakapple *v.* Copous, 4 T. R. 361; Doe *v.* Woombwell, 2 Campb. 559.

[6] Sherman *v.* Sherman, 2 Verm. 276. Hutchins, Ld. Com., mentioned "a second or third post," as the ultimate period of objection. But Lord Hardwicke said, that if the person to whom it was sent kept the account "for any length of time, without making any objection," it became a

bankruptcy.[1] And generally, where one knowingly avails himself of another's acts, done for his benefit, this will be held an admission of his obligation to pay a reasonable compensation.[2]

[*§ 197*a*. The former rule of evidence, that one's silence shall be construed as a virtual assent to all that is said in his presence, is susceptible of great abuse, and calls for a course of conduct, which prudent and quiet men do not generally adopt. If that rule be sound to the full extent, as laid down in some of the early cases, it would be in the power of any evil-disposed person to always ruin his adversary's case, by drawing him into a compulsory altercation in the presence of chosen listeners, who would be sure to misrepresent what he said. Nothing could be more unjust or unreasonable. Hence, in more recent cases, the rule, in some states, has undergone very important qualifications. The mere silence of one, when facts are asserted in his presence, is no ground of presuming his acquiescence, unless the conversation were addressed to him, under such circumstances as to call for a reply. The person must be in a position to require the information, and he must ask it in good faith, and in a manner fairly entitling him to expect it, in order to justify any inference from the mere silence of the party addressed. If the occasion, or the nature of this demand, or the manner of making it, will reasonably justify silence, in a discreet and prudent man, no unfavorable inference therefrom should, on that account, be made against the party. And whether the silence be any ground of presumption against the party will always be a question of law, unless there is conflict in the proof of the attending circumstances.[3] The same

stated account. Willis *v.* Jernegan, 2 Atk. 252. See also Freeland *v.* Heron, 7 Cranch, 147, 151; Murray *v.* Tolland, 3 Johns. Ch. 575; Tickel *v.* Short, 2 Ves. 239. Daily entries in a book, constantly open to the party's inspection, are admissions against him of the matters therein stated. Alderson *v.* Clay, 1 Stark. R. 405; Wiltzie *v.* Adamson, 1 Phil. Evid. 357. See further, Coe *v.* Hutton, 1 Serg. & R. 398; McBride *v.* Watts, 1 McCord, 384; Corps *v.* Robinson, 2 Wash. C. C. R. 388. So, the members of a company are chargeable with knowledge of the entries in their books, made by their agent in the course of his business, and with their true meaning, as understood by the agent. Allen *v.* Coit, 6 Hill (N. Y.), R. 218.

[1] Key *v.* Shaw, 8 Bing. 320.

[2] Morris *v.* Burdett, 1 Campb. 218, where a candidate made use of the hustings erected for an election; Abbott *v.* Inhabitants of Hermon, 7 Greenl. 118, where a schoolhouse was used by the school district; Hayden *v.* Inhabitants of Madison, Id. 76, a case of partial payment for making a road.

[3] [*Mattocks *v.* Lyman, 16 Vt. R. 113; Vail *v.* Strong, 10 Id. 457; Gale *v.* Lincoln, 11 Vt. 152. *Post*, § 199. Where a person is inquired of as to a matter which may affect his pecuniary interests, he has the right to know whether the party making the inquiry is entitled to make it as affecting any interest which he represents, and for the protection of which he requires the information sought. And unless he is

rule obtains as to letters addressed to the party.[1] But if the party consent to give any explanation it becomes evidence, although drawn from him by a false suggestion.[2] And even a plea of "guilty," in a criminal proceeding against the party for assault and battery, will be evidence against him in a civil action for the same.[3] But as a general rule, admissions in the pleadings in one suit will not be evidence against the party in another suit, unless signed by him personally, in which case there is no reason why they should not be so regarded, to the same extent as any other admissions.[4] Admissions in the same action for one purpose may be used for another, or where in assumpsit against two, upon a joint promise, both pleaded non-assumpsit and one infancy. The plaintiff admitted the infancy of one defendant upon the record and discontinued as to that defendant. Held, that he could not recover against the other, since his admission showed conclusively that there was no joint promise.[5] The American practice, however, is different upon this point. It is here held that the plaintiff may discontinue as to the infant, and proceed against the other joint contractors to judgment.[6]]

§ 198. The *possession of documents*, also, or the fact of constant access to them, sometimes affords ground for affecting parties with an implied admission of the statements contained in them. Thus, the rules of a club, contained in a book kept by the proper officer, and accessible to the members;[7] charges against a club, entered by the servants of the house, in a book kept for that purpose, open in the club-room;[8] the possession of letters,[9] and the like; are circumstances from which admissions by acquiescence may be inferred. Upon the same ground, the shipping list at Lloyd's,

fairly informed upon these points, he is not bound to give information, and will not be affected in his pecuniary interests in consequence of refusal. Hackett *v.* Callender, 32 Vt. R. 97.]

[1] [* Commonwealth *v.* Jeffreys, 7 Allen, 548; Same *v.* Eastman, 1 Cush. 189.

[2] Higgins *v.* Dellinger, 22 Mis. 397.

[3] Birchard *v.* Booth, 4 Wis. 67.

[4] Marianski *v.* Cairns, 1 Macq. Ho. Lds. Cas. 212.

[5] Boyle *v.* Webster, 17 Q. B. 950.

[6] Hartness *v.* Thompson, 5 Johns. 160; Tappan *v.* Abbott, cited Pick. 502; Woodward *v.* Newhall, Id. 500; Allen *v.* Butler, 9 Vt. R. 122.]

[7] Raggett *v.* Musgrave, 2 C. & P. 556.

[8] Alderson *v.* Clay, 1 Stark. R. 405; Wiltzie *v.* Adamson, 1 Phil. Evid. 357.

[9] Hewitt *v.* Piggott, 5 C. & P. 75; Rex *v.* Watson, 2 Stark. R. 140; Horne Tooke's case, 25 St. Tr. 120. But the possession of unanswered letters seems not to be, of itself, evidence of acquiescence in their contents; and, therefore, a notice to produce such letters will not entitle the adverse party to give evidence of their entire contents, but only of so much as on other grounds would be admissible. Fairlee *v.* Denton, 3 C. & P. 103. And a letter found on the prisoner was held to be no evidence against him of the facts stated in it, in Rex *v.* Plumer, Rus. & Ry. C. C. 264; [People *v.* Green, 1 Parker, C. R. 11.]

stating the time of a vessel's sailing, is held to be *primâ facie* evidence against an underwriter, as to what it contains.[1]

§ 199. But, in regard to admissions inferred from *acquiescence in the verbal statements of others*, the maxim, *Qui tacet consentire videtur*, is to be applied with careful discrimination. "Nothing," it is said, "can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradiction; some assertion made to the party with respect to his right, which, by his silence, he acquiesces in."[2] A distinction has accordingly been taken between declarations made by a party interested and a stranger; and it has been held, that, while what one party declares to the other, without contradiction, is admissible evidence, what is said by a third person may not be so. It may be impertinent, and best rebuked by silence; but if it receives a reply, the reply is evidence. Therefore, what the magistrate, before whom the assault and battery was investigated, said to the parties, was held inadmissible, in a subsequent civil action for the same assault.[3] If the declarations are those of third persons, the circumstances must be such as called on the party to interfere, or at least such as would not render it impertinent in him to do so. Therefore, where, in a real action upon a view of the premises by a jury, one of the chainbearers was the owner of a neighboring close, respecting the bounds of which the litigating parties had much altercation, their declarations in his presence were held not to be admissible against him, in a subsequent action respecting his own close.[4] But the silence of the party, even where the declarations are addressed to himself, is worth very little as evidence, where he has no means of knowing the truth or falsehood of the statement.[5]

[1] Macintosh *v.* Marshall, 11 M. & W. 116.

[2] 14 Serg. & R. 393, per Duncan, C. J.; 2 C. & P. 193, per Best, C. J. And see McClenkan *v.* McMillan, 6 Barr, 366, where this maxim is expounded and applied. See also Commonwealth *v.* Call, 21 Pick. 515; [Commonwealth *v.* Kenney, 12 Met. 235, 237; *supra*, § 197.]

[3] Child *v.* Grace, 2 C. & P. 193.

[4] Moore *v.* Smith, 14 Serg. & R. 388. Where A & B were charged with a joint felony, what A stated before the examining magistrate, respecting B's participation in the crime, is not admissible evidence against B. Rex *v.* Appleby, 3 Stark. R. 33. Nor is a deposition, given in the person's presence, in a cause to which he was not a party, admissible against him. Melen *v.* Andrews, 1 M. & M. 336. See also Fairlie *v.* Denton, 3 C. & P. 103, per Lord Tenterden; Tait on Evidence, p. 293. So in the Roman law, "Confessio facta seu præsumpta ex taciturnitate, in aliquo judicio, non nocebit in alio." Mascardus De Probat. vol. I, concl. 348, n. 31 [Larry *v.* Sherburne, 2 Allen, 35; Hildreth *v.* Martin, 3 Allen, 371; Fenno *v.* Weston, 31 Vt. 345.]

[5] Hayslep *v.* Gymer, 1 Ad. & El. 162,

§ 200. With respect to all *verbal admissions*, it may be observed that they ought to be *received with great caution*. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say.[1] But where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature.[2] [* In a somewhat extended experience of jury trials, we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party, and especially where they purport to have been made during the pendency of the action, or after the parties were in a state of controversy. It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it; and in some instances it will appear, that the witness deposes to the statements of one party as coming from the other, and it is not very uncommon to find witnesses of the best intentions repeating the declarations of the party in his own favor as the fullest admissions of the utter falsity of his claim. When we reflect upon the inaccuracy of many witnesess, in their original comprehension of a conversation; their extreme liability to mingle subsequent facts and occurrences with the original transactions; and the impossibility of recollecting the precise terms used by the party or of translating them by exact

165, per Parke, J. See further on the subject of tacit admissions, The State *v.* Rawls, 2 Nott & McCord, 301; Batturs *v.* Sellers, 5 Harr. & J. 117, 119.

[1] Earle *v.* Picken, 5 C. & P. 542, note, per Parke, J; Rex *v.* Simons, 6 C. & P. 510, per Alderson, B.; Williams *v.* Williams, 1 Hagg. Consist. R. 304, per Sir William Scott; Hope *v.* Evans, 1 Sm. & M. Ch. R. 195. Alciatus expresses the sense of the civilians to the same effect, where, after speaking of the weight of judicial admissions, "propter majorem certitudinem, quam in se habet," he adds — "Quæ ratio non habet locum, quando ista confessio probaretur per testes; imo est *minus certa cæteris probationibus*," &c. Alciat. de Præsump. Pars. Secund. Col. 682, n. 6. See *supra*, §§ 96, 97; 2 Poth. on Obl. by Evans, App. No. 16, § 13; Malin *v.* Malin, 1 Wend. 625, 652; Lench *v.* Lench, 10 Ves. 517, 518, cited with approbation in 6 Johns. Ch. 412, and in Smith *v.* Burnham, 3 Sumn. 438; Stone *v.* Ramsey, 4 Monroe, 236, 239; Myers *v.* Baker, Hardin, 544, 549; Perry *v.* Gerbeau, 5 Martin, N. S. 18, 19. Law *v.* Merrils, 6 Wend. 268, 277. It is also well settled that verbal admissions, hastily and inadvertently made without investigation, are not binding. Salem Bank *v.* Gloucester Bank, 17 Mass. 27; Barber *v.* Gingell, 3 Esp. 60. See also Smith *v.* Burnham, 3 Sumn. 435, 438, 439; Cleveland *v.* Burton, 11 Vermont, R. 138; Stephens *v.* Vroman, 18 Barb. 250; Printup *v.* Mitchell, 17 Geo. 558.

[2] Rigg *v.* Curgenven, 2 Wils. 395, 399; Glassford on Evid. 326; Commonwealth *v.* Knapp, 9 Pick. 507, 508, per Putnam, J.

equivalents, we must conclude there is no substantial reliance upon this class of testimony. The fact, too, that in the final trial of open questions of fact, both sides are largely supported by evidence of this character, in the majority of instances, must lead all cautious triers of fact greatly to distrust its reliability.]

§ 201. We are next to consider the effect of admissions, when proved. And here it is first to be observed, that the *whole admission is to be taken together;* for though some part of it may contain matter favorable to the party, and the object is only to ascertain that which he has conceded against himself, for it is to this only that the reason for admitting his own declarations applies, namely, the great probability that they are true; yet, unless the whole is received and considered, the true meaning and import of the part, which is good evidence against him, cannot be ascertained. But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him.[1]

[1] Smith *v.* Blandy, Ry. & M. 257, per Best, J.; Cray *v.* Halls, *Ib. cit.* per Abbott, C. J.; Bernon *v.* Woodbridge, 2 Doug. 788; Rex *v.* Clewes, 4 C. & P. 221, per Littledale, J.; McClenkan *v.* McMillan, 6 Barr, 366; Mattocks *v.* Lyman, 3 Washb. 98; Wilson *v.* Calvert, 8 Ala. 757; Yarborough *v.* Moss, 9 Ala. 382. See *supra*, § 152; Dorlan *v.* Douglass, 6 Barb. s. c. R. 451. A similar rule prevails in chancery. Gresley on Evid. 13. [*The party, by reading from an answer in the case to prove the admission of having endorsed a promissory note, renders all that portion of the answer evidence, although embracing obligations of defence. Gildersleeve *v.* Mahoney, 5 Duer, 383. And it has been said, that the party against whom an answer in chancery is produced, may claim to have the whole bill as well as the answer read as part of his adversary's case, upon the same ground, that, where one proves answers in conversation against a party, he may insist upon having the questions to which he made the replies put in evidence. Pennell *v.* Meyer, 2 M. & Rob. 98, by Tindal, Ch. J.; s. c. 8, C. & P. 470. But the rule in equity does not extend to putting in evidence matters wholly distinct from those read by the adversary, although found in the same answer and pleadings, and the rule is practically the same at law, as when the adversary reads one entry in a book, it will not justify reading the entire book, unless in some way connected with the entry read. Abbott, Ch. J., in Catt. *v.* Howard, 3 Stark. N. P. C. 3. Nor can the party read distinct and disconnected paragraphs in a newspaper, because one has been read by his adversary. Darby *v.* Onseley, 1 H. & N. 1; or a series of copies of letters inserted in a copy book, because one has been read. Sturge *v.* Buchanan, 2 M. & Rob. 90.] See also the Queen's case, 2 Brod. & Bing. 298, per Abbott, C. J.; Randle *v.* Blackburn, 5 Taunt. 245; Thompson *v.* Austen, 2 D. & R. 358; Fletcher *v.* Froggart, 3 C. & P. 569; Yates *v.* Carnsew, 3 C. & P. 99, per Lord Tenterden; Cooper *v.* Smith, 15 East, 103, 107; Whitwell *v.* Wyer, 11 Mass. 6, 10; Garey *v.* Nicholson, 24 Wend. 350; Kelsey *v.* Bush, 2 Hill, R. 440; *infra*, §§ 215, 218, and cases there cited. Where letters in correspondence between the plaintiff and defendant were offered in evidence by the former, it was held that

§ 202. Where the admission, whether oral or in writing, contains matters *stated as mere hearsay*, it has been made a question whether such matters of hearsay are to be received in evidence. Mr. Justice Chambre, in the case of an answer in chancery, read against the party in a subsequent suit at law, thought that portion of it not admissible; "for," he added, "it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts, which may happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for a discovery."[1] But where the answer is offered as the admission of the party against whom it is read, it seems reasonable that the whole admission should be read to the jury, for the purpose of showing under what impressions that admission was made, though some parts of it be only stated from hearsay and belief. And what may or may not be read, as the context of the admission, depends not upon the grammatical structure, but upon the sense and connection in fact. But whether the party, against whom the answer is read, is entitled to have such parts of it as are not expressly sworn to left to the jury as evidence, however slight, of any fact, does not yet appear to have been expressly decided.[2]

§ 203. It is further to be observed on this head, that the *parol admission* of a party, made *en pais*, is *competent evidence* only of those facts which may lawfully be established by parol evidence; it cannot be received either to contradict documentary proof, or to supply the place of existing evidence by matter of record. Thus, a written receipt of money from one as the agent of a corporation, or even an express admission of indebtment to the corporation itself, is not competent proof of the legal authority and capacity of the corporation to act as such.[3] Nor is a parol admission of having

the latter might read his answer to the plaintiff's last letter, dated the day previous. Roe *v.* Day, 7 C. & P. 705. And where one party produces the letter of another, purporting to be in reply to a previous letter from himself, he is bound to call for and put in the letter to which it was an answer, as part of his own evidence. Watson *v.* Moore, 1 C. & Kir. 626; [Reynolds *v.* Manning, 15 Md. 510.] [* It seems to be settled, in the English practice, that where the party admits letters to be in his handwriting, in order to save the expense of proof at the trial, this will preclude all objection to the authenticity of any portion of such letters, although obviously in a different handwriting. Hawk *v.* Freund, 1 F. & F. 294.

[1] Roe *v.* Ferras, 2 Bos. & Pul. 548.

[2] 2 Bos. & Pul. 548, note; Gresley on Evid. 13.

[3] Welland Canal Co. *v.* Hathaway, 8

been discharged under an insolvent act sufficient proof of that fact, without the production of the record.[1] The reasons on which this rule is founded having been already stated, it is unnecessary to consider them further in this place.[2] The rule, however, does not go to the utter exclusion of parol admissions of this nature, but only to their effect; for in general, as was observed by Mr. Justice Parke,[3] what a party says is evidence against himself, whether it relate to the contents of a written instrument, or any thing else. Therefore, in replevin of goods distrained, the admissions of the plaintiff have been received, to show the terms upon which he held the premises, though he held under an agreement in writing, which was not produced.[4] Nor does the rule affect the admissibility of such evidence as secondary proof, after showing the loss of the instrument in question.

§ 204. With regard, then, to the *conclusiveness* of admissions, it is first to be considered, that the genius and policy of the law favor the investigation of truth by all expedient and convenient methods; and that the doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule, founded on convenience, and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded.[5] It is also to be observed, that estoppels bind only parties and privies, and not strangers. Hence it follows, that though a stranger may often show matters in evidence, which parties or privies might have specially pleaded by way of estoppel, yet, in his case, it is only matter of evidence, to be considered by the jury.[6] It is, however,

Wend. 480; National Bank of St. Charles *v.* De Bernales, 1 C. & P. 569; Jenner *v.* Joliffe, 6 Johns. 9.

[1] Scott *v.* Clare, 3 Campb. 236; Summersett *v.* Adamson, 1 Bing. 73, per Parke, J.

[2] See *supra*, §§ 96, 97.

[3] In Earle *v.* Picken, 5 C. & P. 542; Newhall *v.* Holt, Id. 662; Slatterie *v.* Pooley, 6 M. & W. 664; Pritchard *v.* Bagshawe, 11 Common Bench R. 459. [Oral statements and admissions are admissible in evidence against the party making them, though they involve what must necessarily be contained in some writing, deed, or record. Smith *v.* Palmer, 6 Cush. 513, 520.]

[4] Howard *v.* Smith, 3 Scott, N. R. 574.

[5] See *supra*, § 22–26.

[6] This subject was very clearly illustrated by Mr. Justice Bayley, in delivering the judgment of the court, in Heane *v.* Rogers, 9 B. & C. 577, 586. It was an action of trover, brought by a person, against whom a commission of bankruptcy had issued, against his assignees, to recover the value of goods, which, as assignees, they had sold; and it appeared that he had assisted the assignees, by giving directions as to the sale of the goods; and that, after the issuing of the commission, he gave notice to the lessors of a farm which he held, that he had become bankrupt, and was willing to give up the lease, which the lessors thereupon accepted, and took possession of the premises. And the question was, whether he was precluded, by this surrender, from disputing the commission in the present suit. On this point the language of the learned judge was as follows: "There is no doubt but that the express admissions of a party to

in such cases, material to consider, whether the admission is made independently, and because it is true, or is merely conventional, entered into between the parties from other causes than a conviction of its truth, and only as a convenient assumption for the particular purpose in hand. For in the latter case, it may be doubtful whether a stranger can give it in evidence at all.[1] Verbal admissions, as such, do not seem capable, in general, of being pleaded as estoppels even between parties or privies; but if, being

the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case, the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons, he is not bound. It is a well-established rule of law, that estoppels bind parties and privies, not strangers. (Co. Lit. 352a; Com. Dig. Estoppel, C.) The offer of surrender made in this case was to a stranger to this suit; and though the bankrupt may have been bound by his representation that he was a bankrupt, and his acting as such, as between him and that stranger, to whom that representation was made, and who acted upon it, he is not bound as between him and the defendant, who did not act on the faith of that representation at all. The bankrupt would, probably, not have been permitted, as against his landlords, — whom he had induced to accept the lease, without a formal surrender in writing, and to take possession, upon the supposition that he was a bankrupt, and entitled under 6 Geo. IV., c. 16, § 75, to give it up, — to say afterwards that he was not a bankrupt, and bring an action of trover for the lease, or an ejectment for the estate. To that extent he would have been bound, probably no further, and certainly not as to any other persons than those landlords. This appears to us to be the rule of law, and we are of opinion that the bankrupt was not by law, by his notice and offer to surrender, estopped; and indeed it would be a great hardship if he were precluded by such an act. It is admitted that his surrender to his commissioners is no estoppel, because it would be very perilous to a bankrupt to dispute it, and try its validity by refusing to do so. (See Flower *v.* Herbert, 2 Ves. 326.) A similar observation, though not to the same extent, applies to this act; for whilst his commission disables him from carrying on his business, and deprives him, for the present, of the means of occupying his farm with advantage, it would be a great loss to the bankrupt to continue to do so; paying a rent and remaining liable to the covenants of the lease, and deriving no adequate benefit; and it cannot be expected that he should incur such a loss, in order to be enabled to dispute his commission with effect. It is reasonable that he should do the best for himself, in the unfortunate situation in which he is placed. It is not necessary to refer particularly to the cases in which a bankrupt has been precluded from disputing his commission, and which were cited in argument. The earlier cases fall within the principle above laid down. In Clark *v.* Clark, 6 Esp. 61, the bankrupt was not permitted to call that sale a conversion, which he himself had procured and sanctioned; in Like *v.* Howe, 6 Esp. 20, he was precluded from contesting the title of persons to be assignees, whom he by his conduct had procured to become so; and the last case on this subject, Watson *v.* Wace, 5 B. & C. 153, is distinguishable from the present, because Wace, one of the defendants, was the person from whose suit the plaintiff had been discharged, and therefore, perhaps, he might be estopped with respect to that person by his conduct towards him. See also Welland Canal Co. *v.* Hathaway, 8 Wend. 483; Jennings *v.* Whittaker, 4 Monroe, 50; Grant *v.* Jackson, Peake's Cas. 203; Ashmore *v.* Hardy, 7 C. & P. 501; Carter *v.* Bennett, 4 Flor. Rep. 343.

[1] Phil. & Am. on Evid. 388; 1 Phil. Evid. 368. In Slaney *v.* Wade, 1 Mylne & Craig, 388, and Fort *v.* Clark, 1 Russ. 601, 604, the recitals in certain deeds were held inadmissible, in favor of strangers, as evidence of pedigree. But it is to be noted that the parties to those deeds were strangers to the persons whose pedigree they undertook to recite.

unexplained or avoided in evidence, the jury should wholly disregard them, the remedy would be by setting aside the verdict. And when they are held conclusive, they are rendered effectually so by not permitting the party to give any evidence against them. Parol or verbal admissions, which have been held conclusive against the party, seem for the most part to be those on the faith of which a court of justice has been led to adopt a particular course of proceeding, or on which another person has been induced to alter his condition.[1] To these may be added a few cases of fraud and crime, and some admissions on oath, which will be considered hereafter, where the party is estopped on other grounds.

§ 205. *Judicial admissions*, or those made in court by the party's attorney, generally appear either of record, as in *pleading*, or in the solemn admission of the attorney, made for the purpose of being used as a *substitute for the regular legal evidence* of the fact at the trial, or in a *case stated* for the opinion of the court. Both these have been already considered in the preceding pages.[2] There is still another class of judicial admissions, made by the *payment of money into court*, upon a rule granted for that purpose. Here, it is obvious, the defendant conclusively admits that he owes the amount thus tendered in payment;[3] that it is due for the cause mentioned in the declaration;[4] that the plaintiff is entitled to claim it in the character in which he sues;[5] that the court has jurisdiction of the matter;[6] that the contract described is rightly set forth, and was duly executed;[7] that it has been broken in the manner and to the extent declared;[8] and if it was a case of goods sold by sample, that they agreed with the sample.[9] In other words,

[1] Phil. & Am. on Evid. 378; 1 Phil. Evid. 360. The general doctrine of estoppels is thus stated by Ld. Denman. "Where one, by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Pickard *v.* Sears, 6 Ad. & El. 469, 475. The whole doctrine is ably discussed by Mr. Smith, and by Messrs. Hare and Wallace in their notes to the case of Trevivan *v.* Lawrence. See 2 Smith's Leading Cases, pp. 430–479 (Am. edit.).

[2] See *supra*, § 22–26, 186.

[3] Blackburn *v.* Scholes, 2 Campb. 341; Rucker *v.* Palsgrave, 1 Campb. 558; 1 Taunt. 419, s. c.; Boyden *v.* Moore, 5 Mass. 365, 369.

[4] Seaton *v.* Benedict, 5 Bing. 28, 32; Bennett *v.* Francis, 2 B. & P. 550; Jones *v.* Hoar, 5 Pick. 285; Huntington *v.* The American Bank, 6 Pick. 340.

[5] Lipscombe *v.* Holmes, 2 Campb. 441.

[6] Miller *v.* Williams, 5 Esp. 19, 21.

[7] Gutteridge *v.* Smith, 2 H. Bl. 374; Israel *v.* Benjamin, 3 Campb. 40; Middleton *v.* Brewer, Peake's Cas. 15; Randall *v.* Lynch, 1 Campb. 352, 357; Cox *v.* Brain, 3 Taunt. 95.

[8] Dyer *v.* Ashton, 1 B. & C. 3.

[9] Leggatt *v.* Cooper, 2 Stark. R. 103.

the payment of money into court admits conclusively every fact which the plaintiff would be obliged to prove in order to recover that money.[1] But it admits nothing beyond that. If, therefore, the contract is illegal, or invalid, the payment of money into court gives it no validity; and if the payment is general, and there are several counts, or contracts, some of which are legal and others not, the court will apply it to the former.[2] So, if there are two inconsistent counts, on the latter of which the money is paid into court, which is taken out by the plaintiff, the defendant is not entitled to show this to the jury, in order to negative any allegation in the first count.[3] The service of a summons to show cause why the party should not be permitted to pay a certain sum into court, and *à fortiori*, the entry of a rule or order for that purpose, is also an admission that so much is due.[4]

§ 206. It is only necessary here to add, that where judicial admissions have been *made improvidently, and by mistake*, the court will, in its discretion, relieve the party from the consequences of his error, by ordering a repleader, or by discharging the case stated, or the rule, or agreement, if made in court.[5] Agreements made out of court, between attorneys, concerning the course of proceedings in court, are equally under its control, in effect, by means of its coercive power over the attorney in all matters relating to professional character and conduct. But, in all these admissions, unless a clear case of mistake is made out, entitling the party to relief, he is held to the admission; which the court will proceed to act upon, not as truth in the abstract, but as

[1] Dyer *v.* Ashton, 1 B. & C. 3; Stapleton *v.* Nowell, 6 M. & W. 9; Archer *v.* English, 2 Scott, N. S. 156; Archer *v.* Walker, 9 Dowl. 21. And see Story *v.* Finnis, 3 Eng. L. & Eq. R. 548; Schreger *v.* Carden, 16 Jur. 568; [Bacon *v.* Charlton, 7 Cush. 581, 583. And where the declaration contains more than one count, and a part only of the sum demanded is paid into court, without specification as to which of the counts is to be applied, such payment is an admission only that the defendant owes the plaintiff the sum so paid on some one, or several of the counts, but it is not an admission of any indebtedness under any one count, nor of a liability on all of them. Hubbard *v.* Knous, 7 Cush. 556, 559; Kingham *v.* Robins, 5 Mees. & Welsb. 94; Archer *v.* English, 1 M. & G. 873.]

[2] Ribbans *v.* Crickett, 1 B. & P. 264; Hitchcock *v.* Tyson, 2 Esp. 481, note.

[3] Gould *v.* Oliver, 2 M. & Gr. 208, 233, 234; Montgomery *v.* Richardson, 5 C. & P. 247.

[4] Williamson *v.* Henley, 6 Bing. 299.

[5] "Non fatetur, qui errat, nisi jus ignoravit." Dig. lib. 42, tit. 2, l. 2. "Si vero per errorem fuerit facta ipsa confessio (scil. ab advocato), clienti concessum est, errore probato, usque ad sententiam revocare." Mascard. De Probat. vol. 1, Quæst. 7, n. 63; Id. n. 19, 20, 21, 22; Id. vol. I, Concl. 348, per tot. See Kohn *v.* Marsh, 3 Rob. Louis. R. 48. The principle, on which a party is relieved against judicial admissions made improvidently and by mistake is equally applicable to admissions *en pais*. Accordingly, where a legal liability was thus admitted, it was

a *formula* for the solution of the particular problem before it, namely, the case in judgment, without injury to the general administration of justice.[1]

§ 207. Admissions, whether of law or of fact, which have been *acted upon by others*, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced.[2] It is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party. For, in the latter case, the implied declaration may be considered as addressed to every one in particular, who may have occasion to act upon it. In such cases the party is estopped, on grounds of public policy and good faith, from repudiating his own representations.[3] This rule is familiarly illustrated by the case of a man cohabiting with a woman, and treating her in the face of the world as his wife, to whom in fact he is not married. Here, though he thereby acquires no rights against others, yet they may against him; and therefore, if she is supplied with goods during such cohabitation, and the reputed husband is sued for them, he will not be permitted to disprove or deny the marriage.[4] So, if the lands of such woman are taken in execution for the reputed husband's debt, as his own freehold in her right, he is estopped, by the relation *de facto* of husband and wife, from saying that he held them as her ser-

held that the jury were at liberty to consider all the circumstances, and the mistaken view under which it was made; that the party might show that the admission made by him arose from a mistake as to the law; and that he was not estopped by such admission, unless the other party had been induced by it to alter his condition. Newton *v.* Belcher, 13 Jur. 253; 18 Law J. 53, Q. B.; 12 Ad. & El. 921, N. S.; Newton *v.* Liddiard, Id. 925; Solomon *v.* Solomon, 2 Kelly, 18.

[1] See Gresley on Evid. in Equity, p. 349–358. The Roman Law was administered in the same spirit. "Si is, cum quo Lege Aquilia agitur, confessus est servum occidisse, licet non occiderit, si tamen occisus sit homo, ex confesso tenetur." Dig. lib. 42, tit. 2, l. 4; Id. l. 6. See also Van Leeuwen's Comm. b. v. ch. 21; Everhardi Concil. 155, n. 3. "Confessus pro judicato est." Dig. *ub. sup.* l. 1.

[2] See *supra*, § 27; Commercial Bank of Natchez *v.* King, 3 Rob. Louis. R. 243; Kinney *v.* Farnsworth, 17 Conn. R. 355; Newton *v.* Belcher, 13 Jur. 253; 12 Ad. & El. 921, N. S. Newton *v.* Liddiard, Id. 925; [Tompkins *v.* Phillips, 12 Geo. 52. But when a party applies to another for information, on which he intends to act, and which may affect the interests of the other, he ought to disclose these circumstances, and if he does not, the statements made by the other will not be conclusive upon him. Hackett *v.* Callender, 32 Vt. 99.]

[3] See *supra*, §§ 195, 196; Quick *v.* Staines, 1 B. & P. 203; Graves *v.* Key, 3 B. & Ad. 318; Straton *v.* Rastall, 2 T. R. 366; Wyatt *v.* Ld. Hertford, 3 East, 147.

[4] Watson *v.* Threlkeld, 2 Esp. 637; Robinson *v.* Nahor, 1 Campb. 245; Munro *v.* De Chamant, 4 Campb. 215; Ryan *v.* Sams, 12 Ad. & El. 460, N. S.; *supra*, § 27. But where such representation has not been acted upon, namely, in other transactions of the supposed husband, or wife, they are competent witnesses for each other. Bathews *v.* Galindo, 4 Bing. 610; Wells *v.* Fletcher, 5 C. & P. 12; Tufts *v.* Hayes, 5 New Hamp. 452.

vant.[1] So, if a party has taken advantage of, or voluntarily acted under the bankrupt or insolvent laws, he shall not be permitted, as against persons, parties to the same proceedings, to deny their regularity.[2] So also where one knowingly permits his name to be used as one of the parties in a trading firm, under such circumstances of publicity as to satisfy a jury that a stranger knew it, and believed him to be a partner, he is liable to such stranger in all transactions in which the latter engaged, and gave credit upon the faith of his being such partner.[3] On the same principle it is, that, where one has assumed to act in an official or professional character, it is conclusive evidence against him that he possesses that character, even to the rendering him subject to the penalties attached to it.[4] So, also, a tenant who has paid rent, and acted as such, is not permitted to set up a superior title of a third person against his lessor, in bar of an ejectment brought by him; for he derived the possession from him as his tenant, and shall not be received to repudiate that relation.[5] But this rule does not preclude the tenant, who did not receive the possession from the adverse party, but has only attorned or paid rent to him, from showing that this was done by mistake.[6] This doctrine is also applied to the relation of bailor and bailee, the cases being in principle the same;[7] and also to that of principle and

[1] Divoll *v.* Leadbetter, 4 Pick. 220.

[2] Like *v.* Howe, 6 Esp. 20; Clarke *v.* Clarke, Id. 61; Goldie *v.* Gunston, 4 Campb. 381; Watson *v.* Wace, 5 B. & C. 153, explained in Heane *v.* Rogers, 9 B. & C. 587; Mercer *v.* Wise, 3 Esp. 219; Harmer *v.* Davis, 7 Taunt. 577; Flower *v.* Herbert, 2 Ves. 326.

[3] Per Parke, J., in Dickinson *v.* Valpy, 10 B. & C. 128, 140, 141; Fox *v.* Clifton, 6 Bing. 779, 794, per Tindal, C. J. See also Kell *v.* Nainby, 10 B. & C. 20; Guidon *v.* Robson, 2 Campb. 302.

[4] See *supra*, § 195, and cases cited in note.

[5] Doe *v.* Pegge, 1 T. R. 759, note, per Ld. Mansfield; Cook *v.* Loxley, 5 T. R. 4; Hudson *v.* Sharpe, 10 East, 350, 352, 353, per Ld. Ellenborough; Phipps *v.* Sculthorpe, 1 B. & A. 50, 53; Cornish *v.* Searell, 8 B. & C. 471, per Bayley, J.; Doe *v.* Smythe, 4 M. & S. 347; Doe *v.* Austin, 9 Bing. 41; Fleaming *v.* Gooding, 10 Bing. 549; Jackson *v.* Reynolds, 1 Caines, 444; Jackson *v.* Scissan, 3 Johns, 499, 504; Jackson *v.* Dobbin, Id. 223; Jackson *v.* Smith, 7 Cowen, 717; Jackson *v.* Spear, 7 Wend. 401. See 1 Phil. on Evid. 107.

[6] Williams *v.* Bartholomew, 1 B. & P. 326; Rogers *v.* Pitcher, 6 Taunt. 202, 208; [*supra*, § 25, and notes; Elliott *v.* Smith, 23 Penn. St. R. 131; Watson *v.* Lane, 34 Eng. Law & Eq. R. 532.]

[7] Gosling *v.* Birnie, 7 Bing. 339; Phillips *v.* Hall, 8 Wend. 610; Drown *v.* Smith, 3 N. Hamp. 299; Eastman *v.* Tuttle, 1 Cowen, 248; McNeil *v.* Phillip, 1 McCord, R. 392; Hawes *v.* Watson, 2 B. & C. 540; Stonard *v.* Dunkin, 2 Campb. 344; Chapman *v.* Searle, 3 Pick. 38, 44; Dixon *v.* Hamond, 2 B. & Ald. 310; Jewett *v.* Torry, 11 Mass. 219; Lyman *v.* Lyman, Id. 317; Story on Bailments, § 102; Kieran *v.* Sanders, 6 Ad. & El. 515. But where the bailor was but a trustee, and is no longer liable over to the *cestui que trust*, a delivery to the latter is a good defence for the bailee against the bailor. This principle is familiarly applied to the case of goods attached by the sheriff, and delivered for safe keeping to a person who delivers them over to the debtor. After the lien of the sheriff is dissolved, he can have no action against his bailee. Whittier *v.* Smith, 11 Mass. 211; Cooper *v.* Mowry, 16 Mass. 8; Jenny *v.* Rodman, Id. 464. So, if the goods did not belong

agent.[1] Thus, where goods in the possession of a debtor were attached as his goods, whereas they were the goods of another person, who received them of the sheriff, in bailment for safe custody, as the goods of the debtor, without giving any notice of his own title, the debtor then possessing other goods, which might have been attached; it was held, that the bailee was estopped to set up his own title in bar of an action by the sheriff for the goods.[2] The acceptance of a bill of exchange is also deemed a conclusive admission, against the acceptor, of the genuineness of the signature of the drawer, though not of the indorsers, and of the authority of the agent, where it was drawn by procuration, as well as of the legal capacity of the preceding parties to make the contract. The indorsement, also, of a bill of exchange, or promissory note, is a conclusive admission of the genuineness of the preceding signatures, as well as of the authority of the agent, in cases of procuration, and of the capacity of the parties. So, the assignment of a replevin bond by the sheriff is an admission of its due execution and validity as a bond.[3] So, where land has been dedicated to public use, and enjoyed as such, and private rights have been acquired with reference to it, the original owner is precluded from revoking it.[4] And these admissions may be pleaded by way of estoppel *en pais*.[5]

§ 208. It makes *no difference* in the operation of this rule, whether the thing admitted was *true or false;* it being the fact that it has been acted upon that renders it conclusive. Thus, where two brokers, instructed to effect insurance, wrote in reply

to the debtor, and the bailee has delivered them to the true owner. Learned *v.* Bryant, 13 Mass. 224; Fisher *v.* Bartlett, 8 Greenl. 122. Ogle *v.* Atkinson, 5 Taunt. 749, which seems to contradict the text, has been overruled, as to this point, by Gosling *v.* Birnie, *supra*. See also Story on Agency, § 217, note.

[1] Story on Agency, § 217, and cases there cited. The agent, however, is not estopped to set up the *jus tertii* in any case where the title of the principal was acquired by fraud; and the same principle seems to apply to other cases of bailment. Hardman *v.* Wilcock, 9 Bing. 382, note.

[2] Dewey *v.* Field, 4 Met. 381. See also Pitt *v.* Chappelow, 8 M. & W. 616; Sanderson *v.* Collman, 4 Scott, N. R. 638; Heane *v.* Rogers, 9 B. & C. 577; Dezell *v.* Odell, 3 Hill, 215. [But it has been held that a defendant in an action of trover, who induced the plaintiff to believe, when demanding the property, that it was in his possession and control, is not thereby estopped in law from proving the contrary. Jackson *v.* Pixley, 9 Cush. 490, 492.]

[3] Scott *v.* Waithman, 3 Stark. 168; Barnes *v.* Lucas, Ry. & M. 264; Plumer *v.* Briscoe, 12 Jur. 351; 11 Ad. & El. 46, N. S.

[4] Cincinnati *v.* White, 6 Pet. 439; Hobbs *v.* Lowell, 19 Pick. 405.

[5] Story on Bills of Exchange, §§ 262, 263; Sanderson *v.* Collman, 4 Scott, N. R. 638; Pitt *v.* Chappelow, 8 M. & W. 616; Taylor *v.* Croker, 4 Esp. 187; Drayton *v.* Dale, 2 B. & C. 293; Haly *v.* Lane, 2 Atk. 181; Bass. *v.* Clive, 4 M. & S. 13; *supra*, §§ 195, 196, 197; Weakley *v.* Bell, 9 Watts, 273.

that they had got two policies effected, which was false; in an action of trover against them by the assured for the two policies, Lord Mansfield held them estopped to deny the existence of the policies, and said he should consider them as the actual insurers.[1] This principle has also been applied to the case of a sheriff, who falsely returned that he had taken bail.[2]

§ 209. On the other hand, verbal admissions which have *not been acted upon*, and which the party may controvert, without any breach of good faith or evasion of public justice, though admissible in evidence, are not held conclusive against him. Of this sort is the admission that his trade was a nuisance, by one indicted for setting it up in another place;[3] the admission by the defendant, in an action for criminal conversation, that the female in question was the wife of the plaintiff;[4] the omission by an insolvent, in his schedule of debts, of a particular claim, which he afterwards sought to enforce by suit.[5] In these, and the like cases, no wrong is done to the other party, by receiving any legal evidence showing that the admission was erroneous, and leaving the whole evidence, including the admission, to be weighed by the jury.

§ 210. In some other cases, connected with the administration of public justice and of government, the admission is held conclusive, on grounds of *public policy*. Thus, in an action on the statute against bribery, it was held that a man who had given money to another for his vote should not be admitted to say that such other person had no right to vote.[6] So, one who has officiously intermeddled with the goods of another recently deceased, is, in favor of creditors, estopped to deny that he is executor.[7]

[1] Harding *v.* Carter, Park on Ins. p. 4. See also Salem *v.* Williams, 8 Wend. 483; 9 Wend. 147, s. c.; Chapman *v.* Searle, 3 Pick. 38, 44; Hall *v.* White, 3 C. & P. 136; Den *v.* Oliver, 3 Hawkes, R. 479; Doe *v.* Lambly, 2 Esp. 635; 1 B. & A. 650, per Lord Ellenborough; Price *v.* Harwood, 3 Campb. 108; Stables *v.* Eley, 1 C. & P. 614; Howard *v.* Tucker, 1 B. & Ad. 712. If it is a case of innocent mistake, still, if it has been acted upon by another, it is conclusive in his favor. As, where the supposed maker of a forged note innocently paid it to a *bonâ fide* holder, he shall be estopped to recover back the money. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 27.

[2] Simmons *v.* Bradford, 15 Mass. 82; Eaton *v.* Ogier, 2 Greenl. 46.

[3] Rex *v.* Neville, Peake's Cas. 91.

[4] Morris *v.* Miller, 4 Burr. 2057, further explained in 2 Wils. 399; 1 Doug. 174; and Bull. N. P. 28.

[5] Nichols *v.* Downes, 1 Mood. & R. 13; Hart *v.* Newman, 3 Campb. 13.

[6] Combe *v.* Pitt, 3 Burr. 1586, 1590; Rigg *v.* Curgenven, 2 Wils. 395.

[7] Reade's case, 5 Co. 33, 34; Toller's Law of Ex'rs, 37–41. See also Quick *v.* Staines, 1 B. & P. 293. Where the owners of a stage-coach took up more passengers than were allowed by statute, and an injury was laid to have arisen from overloading, the excess beyond the statute number was held by Lord Ellenborough to be conclusive evidence that the accident arose from that cause. Israel *v.* Clark, 4 Esp. 259.

Thus, also, where a ship-owner, whose ship had been seized as forfeited for breach of the revenue laws, applied to the Secretary of the Treasury for a remission of forfeiture, on the ground that it was incurred by the master ignorantly, and without fraud, and upon making oath to the application, in the usual course, the ship was given up; he was not permitted afterwards to gainsay it, and prove the misconduct of the master, in an action by the latter against the owner, for his wages, on the same voyage, even by showing that the fraud had subsequently come to his knowledge.[1] The mere fact that an admission was made under oath, does not seem alone to render it conclusive against the party, but it adds vastly to the weight of the testimony; throwing upon him the burden of showing that it was a case of clear and innocent mistake. Thus, in a prosecution under the game laws, proof of the defendant's oath, taken under the income act, that the yearly value of his estate was less than £100, was held not quite conclusive against him, though very strong evidence of the fact.[2] And even the defendant's belief of a fact, sworn to in an answer in chancery, is admissible at law, as evidence against him of the fact, though not conclusive.[3]

§ 211. Admissions *in deeds* have already been considered, in regard to parties and privies,[4] between whom they are generally conclusive; and when not technically so, they are entitled to great weight from the solemnity of their nature. But when offered in evidence by a stranger, or, as it seems, even by a party against a stranger, the adverse party is not estopped, but may

[1] Freeman *v.* Walker, 6 Greenl. 68. But a sworn entry at the custom-house of certain premises, as being rented by A, B, and C, as partners, for the sale of beer, though conclusive in favor of the crown, is not conclusive evidence of the partnership, in a civil suit, in favor of a stranger. Ellis *v.* Watson, 2 Stark. R. 453. The difference between this case and that in the text may be, that in the latter the party gained an advantage to himself, which was not the case in the entry of partnership; it being only incidental to the principal object, namely, the designation of a place where an excisable commodity was sold.

[2] Rex *v.* Clarke, 8 T. R. 220. It is observable, that the matter sworn to was rather a matter of judgment than of certainty in fact. But in Thornes *v.* White, 1 Tyrwh. & Grang. 110, the party had sworn positively to matter of fact in his own knowledge; but it was held not conclusive in law against him, though deserving of much weight with the jury. And see Carter *v.* Bennett, 4 Flor. Rep. 343.

[3] Doe *v.* Steel, 3 Campb. 115. Answers in chancery are always admissible at law against the party, but do not seem to be held strictly conclusive, merely because they are sworn to. See Bull. N. P. 236, 237; 1 Stark. Evid. 284; Cameron *v.* Lightfoot, 2 W. Bl. 1190; Grant *v.* Jackson, Peake's Cas. 203; Studdy *v.* Saunders, 2 D. & R. 347; De Whelpdale *v.* Milburn, 5 Price, 485.

[4] *Supra*, §§ 22, 23, 24, 189, 204. But if the deed has not been delivered, the party is not conclusively bound. Robinson *v.* Cushman, 2 Denio, 149.

repel their effect, in the same manner as though they were only parol admissions.[1] [*It is scarcely necessary to say, that all estoppels in deed must be mutual, *i.e.*, must bind both parties. Hence recitals in a deed may bind a party, in one relation or capacity, and not in another.[2] And writers of authority affirm, that "it is now clearly settled, that a party is not estopped from avoiding his deed by proving that it was entered into from a fraudulent, illegal, or immoral purpose."[3] So the tenant is so estopped to deny the title of his landlord, that he cannot take advantage of any formal defect therein, which appears in the course of the trial in a suit for use and occupation.[4]]

§ 212. Other admissions, though in writing, not having been acted upon by another to his prejudice, nor falling within the reasons before mentioned for estopping the party to gainsay them, are not conclusive against him, but are left at large, to be weighed with other evidence by the jury. Of this sort are *receipts*, or mere acknowledgments, given for goods on money, whether on separate papers, or indorsed on deeds or on negotiable securities;[5] the *adjustment of a loss*, on a policy of insurance, made without full knowledge of all the circumstances, or under a mistake of fact, or under any other invalidating circumstances;[6] and *accounts rendered*, such as an attorney's bill,[7] and the like. So, of a bill in chancery, which is evidence against the plaintiff of the admissions it contains, though very feeble evidence, so far it may be taken as the suggestion of counsel.[8]

[1] Bowman *v.* Rostron, 2 Ad. & El. 295, n.; Woodward *v.* Larkin, 3 Esp. 286; Mayor of Carlisle *v.* Blamire, 8 East, 487, 492, 493.

[2] [*2 Smith's Lead. Cas. 442; Taylor's Evid. § 82.

[3] Taylor's Evid. § 80.

[4] Dolby *v.* Iles, 11 Ad. & El. 335.]

[5] Skaife *v.* Jackson, 3 B. & C. 421; Graves *v.* Key, 3 B. & A. 313; Straton *v.* Rastall, 2 T. R. 366; Fairmaner *v.* Budd, 7 Bing. 574; Lampon *v.* Corke, 5 B. & Ald. 606, 611, per Holroyd, J.; Harden *v.* Gordon, 2 Mason, 541, 561; Fuller *v.* Crittenden, 9 Conn. 401; Ensign *v.* Webster, 1 Johns. Cas. 145; Putnam *v.* Lewis, 8 Johns. 389; Stackpole *v.* Arnold, 11 Mass. 27; Tucker *v.* Maxwell, Id. 143; Wilkinson *v.* Scott, 17 Mass. 249; [*infra*, § 305.] [*The acknowledgment of the receipt of the purchase-money in a deed of land is no evidence of the fact against a stranger. Lloyd *v.* Lynch, 28 Penn. St. 419. The receipt of the mortgagee, it has been held, is not evidence of a payment by the mortgagor, at the date of the receipt as against the assignee of the mortgage whose title dates subsequent to the date of the receipt. Foster *v.* Beals, 21 N. Y. Ct. of App. 247 (three judges dissenting).]

[6] Rayner *v.* Hall, 7 Taunt. 725; Shepherd *v.* Chewter, 1 Campb. 274, 276, note by the reporter; Adams *v.* Sanders, 1 M. & M. 373; Christian *v.* Coombe, 2 Esp. 469; Bilbie *v.* Lumley, 2 East, 469; Elting *v.* Scott, 2 Johns. 157.

[7] Lovebridge *v.* Botham, 1 B. & P. 49.

[8] Bull. N. P. 235; Doe *v.* Sybourn, 7 T. R. 3. See vol. 3, § 276.

CHAPTER XII.

OF CONFESSIONS.

§ 213. The only remaining topic, under the general head of admissions, is that of *confessions* of guilt in criminal prosecutions, which we now propose to consider. It has already been observed, that the rules of evidence, in regard to the voluntary admissions of the party, are the same in criminal as in civil cases. But, as this applies only to admissions brought home to the party, it is obvious that the whole subject of admissions made by agents and third persons, together with a portion of that of implied admis-

sions, can of course have very little direct application to confessions of crime, or of guilty intention. In treating this subject, however, we shall follow the convenient course pursued by other writers, distributing this branch of evidence into two classes; namely, *first*, the *direct confessions of guilt;* and, *secondly*, the *indirect confessions*, or those which, in civil cases, are usually termed "implied admissions."

§ 214. But here, also, as we have before remarked in regard to admissions,[1] the evidence of verbal confessions of guilt is to be *received with great caution.* For, besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession.[2] The zeal, too, which so generally prevails, to detect

[1] *Supra*, § 200.

[2] Hawk. P. C., B. 2, ch. 46, § 3, n. (2); McNally's Evid. 42, 43, 44; Vaughan *v.* Hann, 6 B. Monr. 341; [Brister *v.* State, 26 Ala. 107.] Of this character was the remarkable case of the two Boorns, convicted in the Supreme Court of Vermont, in Bennington County, in September term, 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of a weak and not perpectly sound mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a violent quarrel broke out between them; and that one of them struck him a severe blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time that he was murdered; which were increased by the finding of his hat in the same field a few months afterwards. These suspicions in process of time subsided; but in 1819, one of the neighbors having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Under strict search, the pocket knife of Colvin, and a button of his clothes, were found in an old open cellar in the same field, and in a hollow stump, not many rods from it, were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death to that of perpetual imprisonment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home, in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised by some misjudging friends, that, as they would certainly be convicted, upon the circumstances proved, their only chance for life was by commutation of punishment, and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. This case, of which there is a report in the Law Library of Harvard University, is critically examined in a learned and elaborate article in the North American Review, vol. 10, pp. 418–429. [* Within the last few years we had opportunity to examine, at length, the original minutes of the testimony in this remarkable case, taken by Chief Justice Chase, who presided at the trial, and we have these minutes still in our possession. We have been absolutely amazed at the character of the evidence upon which the conviction was had. It did not seem to us sufficient to put the prisoners

offenders, especially in cases of aggravated guilt, and the strong disposition, in the persons engaged in pursuit of evidence, to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, where, in civil actions, it would have been received.[1] The weighty observation of Mr. Justice Foster is also to be kept in mind, that "this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is, confronted."

§ 215. Subject to these cautions in receiving and weighing them, it is generally agreed, that *deliberate confessions of guilt* are

upon their defence. Our impression is, from recollection, without referring to the minutes, that the confession of the prisoners was made subsequent to the conviction, and with a view to influence the legislature to commute the sentence. But whenever made, it was confessedly in answer to urgent solicitations, and positive assurances that it would alone procure favorable action upon the case, with the view of saving the lives of the accused, and was not therefore competent evidence against them. But there was no doubt a full confession of guilt made, when in fact the prisoners were innocent of the actual crime, which shows how cautiously such confessions should be received and weighed.] For other cases of false confessions, see Wills on Circumstantial Evidence, p. 88; Phil. & Am. on Evid. 419; 1 Phil. Evid. 397, n.; Warickshall's case, 1 Leach, Cr. Cas. 299, n. Mr. Chitty mentions the case of an innocent person making a false constructive confession, in order to fix suspicion on himself alone, that his guilty brothers might have time to escape; a stratagem which was completely successful; after which he proved an *alibi* in the most satisfactory manner. 1 Chitty's Crim. Law, p. 85; 1 Dickins, Just. 629, note. See also Joy on Confessions, &c. pp. 100–109. The civilians placed little reliance on naked confessions of guilt, not corroborated by other testimony. Carpzovius, after citing the opinions of Severus to that effect, and enumerating the various kinds of misery which tempt its wretched victims to this mode of suicide, adds: "quorum omnium ex his fontibus contra se emissa pronunciatio, non tam delicti confessione firmati quam vox *doloris*, vel *insanientis* oratio est." B. Carpzov. Pract. Rerum. Criminal. Pars. III. Quæst. 114, p. 160. The just value of these instances of false confessions of crime has been happily stated by one of the most accomplished of modern jurists, and is best expressed in his own language: "Whilst such anomalous cases ought to render courts and juries, at all times, extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked, or so urged by the accused's counsel, as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic; and should be regarded as offensive to the intelligence both of the court and jury." "Confessions and circumstantial evidence are entitled to a known and fixed standing in the law; and while it behooves students and lawyers to examine and carefully weigh their just force, and, as far as practicable, to define their proper limits, the advocate should never be induced, by professional zeal or a less worthy motive, to argue against their existence, be they respectively invoked, either in favor of, or against the accused." Hoffman's Course of Legal Study, vol. I. pp. 367, 368. See also The (London) Law Magazine, vol. 4, p. 317, New Series.

[1] Foster's Disc. p. 243. See also Lench *v.* Lench, 10 Ves. 518; Smith *v.* Burnham, 3 Sumn. 438.

among the most effectual proofs in the law.[1] Their value depends on the supposition, that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received in evidence, as among proofs of guilt.[2] Confessions, too, like admissions, may be inferred from the conduct of the prisoner, and from his silent acquiescence in the statements of others, respecting himself, and made in his presence; provided they were not made under circumstances which prevented him from replying to them.[3] The degree of credit due to them is to be estimated by the jury, under the circumstances of each case.[4] Confessions made before the examining magistrate, or during imprisonment, are affected by additional considerations.

§ 216. Confessions are divided into two classes, namely, *judicial* and *extrajudicial*. *Judicial confessions* are those which are made before the magistrate, or in court, in the due course of legal proceedings; and it is essential that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations, taken in writing by the magistrate, pursuant to statutes; and the plea of "guilty" made in open court, to an indictment. Either of these is sufficient to found a conviction, even if to be followed by sentence of death, they being deliberately made, under the deepest solemnities, with the advice of counsel, and the protecting caution and oversight of the judge. Such was the rule of the Roman law; "*Confessos in jure, pro judicatis haberi placet;*" and it may be deemed a rule of universal jurisprudence.[5] *Extrajudicial confessions* are those which are made by the

[1] Dig. lib. 42, tit. 2, De Confess.; Van Leeuwen's Comm. b. 5, ch. 21, § 1; 2 Poth. on Obl. (by Evans,) App. Num. xvi. § 13; 1 Gilb. Evid. by Loffi, 216; Hawk, P. C., b. 2, ch. 46, § 3, n. (1); Mortimer *v.* Mortimer, 2 Hagg. Con. R. 315; Harris *v.* Harris, 2 Hagg. Eccl. R. 409.

[2] Lambe's case, 2 Leach, Cr. Cas. 625, 629, per Grose, J.; Warickshall's case, 1 Leach, Cr. Cas. 298; McNally's Evid. 42, 47.

[3] *Supra*, § 197; Rex *v.* Bartlett, 7 C. & P. 832; Rex *v.* Smithie, 5 C. & P. 332; Rex *v.* Appleby, 3 Stark. R. 33; Joy on Confessions, &c., 77–80; Jones *v.* Morrell, 1 Car. & Kir. 266.

[4] *Supra*, § 201; Coon *v.* The State, 13 Sm. & M. 246; McCann *v.* The State, Id. 471.

[5] Cod. lib. 7, tit. 59; 1 Poth. on Obl. Part 4, ch. 3, § 1, numb. 798; Van Leeuwen's Comm. b. 5, ch. 21, § 2; Mascard. De Probat. vol. 1, Concl. 344; *supra*, § 179.

party elsewhere than before a magistrate, or in court; this term embracing not only explicit and *express* confessions of crime, but all those admissions of the accused, from which guilt may be *implied*. All confessions of this kind are receivable in evidence, being proved like other facts, to be weighed by the jury.

§ 217. Whether *extrajudicial confessions uncorroborated* by any other proof of the *corpus delicti*, are of themselves sufficient to found a conviction of the prisoner, has been gravely doubted. In the Roman law, such naked confessions amounted only to a *semiplena probatio*, upon which alone no judgment could be founded; and at most the party could only in proper cases be put to the torture. But if voluntarily made, in the presence of the injured party, or, if reiterated at different times in his absence, and persisted in, they were received as plenary proof.[1] In each of the English cases usually cited in favor of the sufficiency of this evidence, there was some corroborating circumstance.[2] In the United States, the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases;

[1] N. Everhard. Concil. xix. 8, lxxii. 5, cxxxi. 1, clxv. 1, 2, 3, clxxxvi. 2, 3, 11; Mascard. De Probat. vol. 1, Concl. 347, 349; Van Leeuwen's Comm. b. 5, ch. 21, §§ 4, 5; B. Carpzov. Practic. Rerum Criminal. Pars II. Quæst. n. 8.

[2] Wheeling's case, 1 Leach, Cr. Cas. 349, n., seems to be an exception; but it is too briefly reported to be relied on. It is in these words: "But in the case of *John Wheeling*, tried before Lord Kenyon, at the Summer Assizes at Salisbury, 1789, it was determined that a prisoner may be convicted on his own confession, when proved by legal testimony, though it is totally uncorroborated by any other evidence." But in Eldridge's case, Russ. & Ry. 440, who was indicted for larceny of a horse, the beast was found in his possession, and he had sold it for £12, after asking £35, which last was its fair value. In the case of Falkner and Bond, Id. 481, the person robbed was *called upon his recognizance*, and it was proved that one of the prisoners had endeavored to send a message to him to keep him from appearing. In White's case, Id. 508, there was strong circumstantial evidence, both of the larceny of the oats from the prosecutor's stable, and of the prisoner's guilt; part of which evidence was also given in Tippet's case, Id. 509, who was indicted for the same larceny; and there was the additional proof, that he was an under hostler in the same stable. And in all these cases, except that of Falkner and Bond, the confessions were solemnly made before the examining magistrate, and taken down in due form of law. In the case of Falkner and Bond, the confessions were repeated, once to the officer who apprehended them, and afterwards on hearing the depositions read over, which contained the charge. In Stone's case, Dyer, 215, pl. 50, which is a brief note, it does not appear that the *corpus delicti* was not otherwise proved; on the contrary, the natural inference from the report is, that it was. In Francia's case, 6 State Tr. 58, there was much corroborative evidence; but the prisoner was acquitted; and the opinion of the judges went only to the sufficiency of a confession solemnly made, upon the arraignment of the party for high treason, and this only upon the particular language of the statutes of Edw. VI. See Foster, Disc. pp. 240, 241, 242.

and it seems countenanced by approved writers on this branch of the law.[1]

§ 218. In the proof of confessions, as in the case of admissions in civil cases, *the whole of what the prisoner said* on the subject, at the time of making the confession, should be taken together.[2] This rule is the dictate of reason, as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that the entire proposition, with all its limitations, was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation. As in other cases the meaning and intent of the parties are collected from the whole writing taken together, and all the instruments, executed at one time by the parties, and relating to the same matter, are equally resorted to for that purpose; so here, if one part of a conversation is relied on, as proof of a confession of the crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion, relative to the subject-matter in issue.[3] For, as has been already observed respecting admissions,[4] unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained. But if, after the whole statement of the prisoner is given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so; and then the whole testimony is left to the jury for their consideration, precisely as in other cases, where one part of the evidence is contradictory to another.[5] For it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing.[6] If

[1] Guild's case, 5 Halst. 163, 185; Long's case, 1 Hayw. 524, (455); Hawk. P. C., b. 2, ch. 46, § 18. [*Brown *v.* State, 32 Miss. 433. Bergen *v.* The People, 17 Ill. 426.]

[2] The evidence must be confined to his confessions in regard to the particular offence of which he is indicted. If it relates to another and distinct crime, it is inadmissible. Regina *v.* Butler, 2 Car. & Kir. 221.

[3] Per Lord C. J. Abbott, in the Queen's case, 2 B. & B. 297, 298; Rex *v.* Paine, 5 Mod. 165; Hawk. P. C., b. 2, ch. 46, § 5; Rex *v.* Jones, 2 C. & P. 629; Rex *v.* Higgins, 2 C. & P. 603; Rex *v.* Hearne, 4 C. & P. 215; Rex *v.* Clewes, Id. 221; Rex *v.* Steptoe, Id. 397; Brown's case, 9 Leigh, 633.

[4] *Supra*, § 201, and cases there cited.

[5] Rex *v.* Jones, 2 C. & P. 629.

[6] Rex *v.* Higgins, 3 C. & P. 603; Rex

what he said in his own favor is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case. And if the confession implicates other persons by name, yet it must be proved as it was made, not omitting the names; but the judge will instruct the jury that it is not evidence against any but the prisoner who made it.[1]

§ 219. Before any confession can be received in evidence in a criminal case, it must be shown that it was *voluntary*. The course of practice is, to inquire of the witness whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess, or whether language to that effect had been addressed to him.[2] "A free and voluntary confession," said Eyre, C. B.,[3] "is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."[4] The material inquiry, therefore, is, whether the confession has been obtained by the influence of hope or fear, applied by a third person to the prisoner's mind. The evidence to this point, being in its nature preliminary, is addressed

v. Steptoe, 4 C. & P. 397; Rex *v.* Clewes, 4 C. & P. 221; Respublica *v.* McCarty, 2 Dall. 86, 88; Bower *v.* The State, 5 Miss. 364; *supra*, §§ 201, 215; [State *v.* Mahon, 32 Vt. 241.]

[1] Rex *v.* Hearne, 4 C. & P. 215; Rex *v.* Clewes, Id. 221, per Littledale, J., who said he had considered this point very much, and was of opinion that the names ought not to be left out. It may be added, that the credit to be given to the confession may depend much on the probability that the persons named were likely to engage in such a transaction. See also Rex *v.* Fletcher, Id. 250. The point was decided in the same way, in Rex *v.* Walker, 6 C. & P. 175, by Gurney, B., who said it had been much considered by the judges. Mr. Justice Parke thought otherwise. Barstow's case, Lewin's Cr. Cas. 110.

[2] 1 Phil. on Evid. 401; 2 East, P. C. 659. The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess. Rex *v.* Tyler, 1 C. & P. 129; Rex *v.* Enoch, 5 C. & P. 539. See further, as to the object of the rule, Rex *v.* Court, 7 C. & P. 486, per Littledale, J.; The People *v.* Ward, 15 Wend. 231.

[3] In Warickshall's case, 1 Leach's Cr. Cas. 299; McNally's Evid. 47; Knapp's case, 10 Pick. 489, 490; Chabbock's case, 1 Mass. 144.

[4] In Scotland, this distinction between voluntary confessions and those which have been extorted by fear or elicited by promises is not recognized, but all confessions, obtained in either mode, are admissible at the discretion of the judge. In strong cases of undue influence, the course is to reject them; otherwise, the credibility of the evidence is left to the jury. See Alison's Criminal Law of Scotland, pp. 581, 582.

to the judge, who admits the proof of the confession to the jury, or rejects it, as he may or may not find it to have been drawn from the prisoner, by the application of those motives.[1] This matter resting wholly in the discretion of the judge, upon all the circumstances of the case, it is difficult to lay down particular rules, *à priori*, for the government of that discretion. The rule of law, applicable to all cases, only demands that the confession shall have been made voluntary, without the appliances of hope or fear, by any other person; and whether it was so made or not is for him to determine, upon consideration of the age, situation, and character of the prisoner, and the circumstances under which it was made.[2] Language addressed by others, and sufficient to overcome the mind of one, may have no effect upon that of another; a consideration which may serve to reconcile some contradictory decisions, where the principal facts appear similar in the reports, but the lesser circumstances, though often very material in such preliminary inquiries, are omitted. But it cannot be denied that this rule has been sometimes extended quite too far, and been applied to cases where there could be no reason to suppose that the inducement had any influence upon the mind of the prisoner.[3]

[1] Boyd *v.* The State, 2 Humphreys, R. 37; Regina *v.* Martin, 1 Armstr. Macartn. & Ogle, R. 197; The State *v.* Grant, 9 Shepl. 171; United States *v.* Nott, 1 McLean, 499; The State *v.* Harman, 3 Harringt. 567. The burden of proof, to show that an inducement has been held out, or improper influence used, is on the prisoner. Reg. *v.* Garner, 12 Jur. 944; 2 C. & K. 920.

[2] McNally's Evid. 43; Nute's case, 6 Petersdorf's Abr. 82; Knapp's case, 10 Pick. 496; United States *v.* Nott, 1 McLean, 499; *supra*, § 49; Guild's case, 5 Halst. 163, 180; Drew's case, 8 C. & P. 140; Rex *v.* Thomas, 7 C. & P. 345; Rex *v.* Court, Id. 486.

[3] (The cases on this subject have recently been very fully reviewed in Reg. *v.* Baldry, 16 Jur. 599, [decided in the Court of Criminal Appeal, April 24, 1852, 12 Eng. Law & Eq. R. 590.] In that case, the constable who apprehended the prisoner, having told him the nature of the charge, said: "He need not say any thing to criminate himself; what he did say would be taken down, and used as evidence against him;" and the prisoner thereupon having made a confession, the court held the confession admissible. *Parke*, B., said: "By the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary; and there is no doubt that any inducement, in the nature of a promise or of a threat, held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way. Whether it would not have been better to have left the whole to go to the jury, it is now too late to inquire; but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation, — that the rule has been extended quite too far, and that justice and common sense have too frequently been sacrificed at the shrine of mercy." Lord Campbell, C. J., stated the rule to be, that "if there be any worldly advantage held out, or any harm threatened, the confession must be excluded;" in which the other judge concurred.) [In State *v.* Grant, 22 Maine, 171, the general rule is thus stated: "To exclude the confession, there must appear to have been held out some fear of personal injury, or hope of personal benefit, of a temporal nature;" and this rule was said

§ 220. The rule under consideration has been illustrated in a variety of cases. Thus, where the prosecutor said to the prisoner, "Unless you give me a more satisfactory account, I will take you before a magistrate," evidence of the confession thereupon made was rejected.[1] It was also rejected, where the language used by the prosecutor was, "If you will tell me where my goods are, I will be favorable to you;"[2] where the constable who arrested the prisoner, said, "It is of no use for you to deny it, for there are the man and boy who will swear they saw you do it;"[3] where the prosecutor said, "He only wanted his money, and if the prisoner gave him that he might go to the devil, if he pleased;"[4] — and where he said he should be obliged to the prisoner, if he would tell all he knew about it, adding, "If you will not, of course we can do nothing," meaning nothing for the prisoner.[5] So where the prisoner's superior officer in the police said to him, "Now be cautious in the answers you give me to the questions I am going to put to you about this watch;" the confession was held inadmissible.[6] There is more difficulty in ascertaining what is such a *threat*, as will exclude a confession; though the principle is equally clear, that a confession induced by threats is not voluntary, and therefore cannot be received.[7]

to be "well expressed" in Commonwealth *v.* Morey, 5 Cush. 461, 463. See also Spears *v.* Ohio, 2 Ohio, N. S. 583.] [*See also Fife *v.* Commonwealth, 29 Penn. St. 429.]

[1] Thompson's case, 1 Leach's Cr. Cas. 325. See also Commonwealth *v.* Harman, 4 Barr, 269; The State *v.* Cowan, 7 Ired. 239.

[2] Cass's case, 1 Leach's Cr. Cas. 328, note; Boyd *v.* The State, 2 Humph. R. 37.

[3] Rex *v.* Mills, 6 C. & P. 146.

[4] Rex *v.* Jones, Russ. & Ry. 152. See also Griffin's case, Id. 151.

[5] Rex *v.* Patridge, 7 C. & P. 551. See also Guild's case, 5 Halst. 163.

[6] Regina *v.* Fleming, 1 Armst. Macartn. & Ogle, R. 330. But where the examining magistrate said to the prisoner, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial," the statement thereupon made was held admissible. Reg. *v.* Holmes, 1 C. & K. 248; Reg. *v.* Atwood, 5 Cox, C. C. 322, S. P. [One under arrest for stealing was visited in jail by the prosecutor, who said to him, that if he wished for any conversation he could have a chance; the prisoner made no reply for a minute or two; the prosecutor then told the prisoner he thought it was better for all concerned in all cases for the guilty to confess; the prisoner then said he supposed he should have to stay there whether he confessed or not; the prosecutor replied that he supposed he would, and in his opinion it would made no difference as to legal proceedings, and that it was considered honorable in all cases if a person was guilty, to confess. Immediately after this, the prisoner made confession, and it was held admissible. Commonwealth *v.* Morey, 1 Gray, 461.]

[7] Thornton's case, 1 Mood. Cr. Cas. 27; Long's case, 6 C. & P. 179; Roscoe's Crim. Evid. 34; Dillon's case, 4 Dall. 116. Where the prisoner's superior in the post-office said to the prisoner's wife, while her husband was in custody for opening and detaining a letter, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;" the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated this to the prisoner. Regina *v.* Harding, 1 Armst. Macartn. & Ogle, R. 340. Where a girl, thirteen years old, was charged

§ 220*a*. It is extremely difficult to reconcile these and similar cases with the spirit of the rule, as expounded by Chief Baron Eyre, whose language is quoted in a preceding section. The difference is between confessions made voluntarily, and those "*forced* from the mind by the flattery of hope, or by the torture of fear." If the party has made his own calculation of the advantages to be derived from confessing, and thereupon has confessed the crime, there is no reason to say that it is not a voluntary confession. It seems that, in order to exclude a confession, the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the court, so far to overcome the mind of the prisoner, as to render the confession unworthy of credit.[1]

§ 221. But though promises or threats have been used, yet if it appears to the satisfaction of the judge, that their *influence was totally done away* before the confession was made, the evidence will be received. Thus, where a magistrate, who was also a clergyman, told the prisoner that if he was not the man who struck the fatal blow, and would disclose all he knew respecting the murder, he would use all his endeavors and influence to prevent any ill consequences from falling on him; and he accordingly wrote to the Secretary of State, and received an answer, that mercy could not be extended to the prisoner; which answer he communicated to the prisoner, who afterwards made a confession to the coroner; it was held, that the confession was clearly voluntary, and as such it was admitted.[2] So, where the prisoner had

with administering poison to her mistress, with intent to murder; and the surgeon in attendance had told her, "it would be better for her to speak the truth;" it was held that her confession, thereupon made, was not admissible. Reg. *v.* Garner, 12 Jur. 943; 1 Denison's Cr. Cas. R. 329. [A confession made after the inducement of a threat held out by A when B was present was held to be the same thing as if B had used the threat; and as B was the person likely to prosecute (he being the owner of the property in connection with which the offence was committed), he was a person in authority, so that the confession made after the inducement held out in his presence was not admissible in evidence. Regina *v.* Luckhurst, 22 Eng. Law and Eq. 604.]

[1] See Regina *v.* Baldry, 16 Jur. 599; 12 Eng. Law and Eq. R. 590; where this subject was very fully discussed, and the true principle recognized as above quoted from Ch. Baron Eyre. [*Some of the American states have relaxed the rule of the former English practice excluding confessions, upon the slightest suspicion of any influence brought to bear upon the mind of the accused. Hence if the prisoner is told that confession of guilt could not put him in any worse condition, and he had better tell the truth at all times, his confession is still admissible. Fouts *v.* The State, 8 Ohio, N. S. 98. And when the prisoner was told that it was of no use to deny his guilt; that the gold pieces were found where he passed them, and he had better own up, it was held not to amount to a threat, but only to an inducement, and so was admissible under the statute of Indiana. State *v.* Freeman, 12 Ind. 100.

[2] Rex *v.* Clewes, 4 C. & P. 221. [See State *v.* Vaigneur, 5 Rich. 391.]

been induced, by promises of favor, to make a confession, which was for that cause excluded, but about five months afterwards, and after having been solemnly warned by two magistrates that he must expect death and prepare to meet it, he again made a full confession, this latter confession was admitted in evidence.[1] In this case, upon much consideration, the rule was stated to be, that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, if the court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled.[2] In the absence of any such circumstances, the influence of the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence; and the confession will therefore be rejected.[3] Accordingly, where an inducement has been held out by an officer, or a prosecutor, but the prisoner is subsequently warned by the magistrate, that what he may say will be evidence against himself, or that a confession will be of no benefit to him, or he is simply cautioned by the magistrate not to say any thing against himself, his confession, afterwards made, will be received as a voluntary confession.[4]

[1] Guild's case, 5 Halst. 163, 168.

[2] Guild's case, 5 Halst. 180. But otherwise the evidence of a subsequent confession, made on the basis of a prior one unduly obtained, will be rejected. Commonwealth *v.* Harman, 4 Barr, 269; The State *v.* Roberts, 1 Dev. 259.

[3] Robert's case, 1 Devereux, R. 259, 264; Maynell's case, 2 Lewins, Cr. Cas. 122; Sherrington's case, Id. 123; Rex *v.* Cooper, 5 C. & P. 535.

[4] Rex *v.* Howes, 6 C. & P. 404; Rex *v.* Richards, 5 C. & P. 318; Nute's case, 2 Russ. on Crimes, 648; Joy on the Admissibility of Confessions, pp. 27, 28, 69–75; Rex *v.* Bryan, Jebb's Cr. Cas. 157. If the inducement was held out by a person of superior authority, and the confession was afterwards made to one of inferior authority, as a turnkey, it seems inadmissible, unless the prisoner was first cautioned by the latter. Rex *v.* Cooper, 5 C. & P. 535. In the United States *v.* Chapman, 4 Am. Law Jour. 410, N. S., the prisoner had made a confession to the high constable who had him under arrest, upon express promises of favor by the officer. After being detained forty-four hours in the watch-house, he was brought before the Mayor, in the *same apartment* where he had made the confession, and his examination was taken in *presence of the same high constable*. The mayor knew nothing of the previous confession; and gave the prisoner no more than the usual caution not to answer any questions unless he pleased, and telling him that he was not bound to criminate himself. In this examination, the same confession was repeated; but the judge rejected it, as inadmissible; being of opinion that, being made in the same room where it was first made, and under the eye of the same police-officer to whom it was made, there was "strong reason to infer that the last examination was but intended to put in due form of law the first confession, and that the promise of favor continued as first made." The legal presumption, he said, was, that the influence, which induced the confession to the officer, continued when it was made to the mayor;

§ 222. In regard *to the person by whom the inducements were offered*, it is very clear, that if they were offered by the prosecutor,[1] or by his wife, the prisoner being his servant,[2] or by an officer having the prisoner in custody,[3] or by a magistrate,[4] or, indeed, by *any one having authority* over him, or over the prosecution itself,[5] or by a private person in the presence of one in authority,[6] the confession will not be deemed voluntary and will be rejected. The authority, known to be possessed by those persons, may well be supposed both to animate the prisoner's hopes of favor, on the one hand, and on the other to inspire him with awe, and in some degree to overcome the powers of his mind. It has been argued, that a confession made upon the promises or threats of a person, erroneously believed by the prisoner to possess such authority, the person assuming to act in the capacity of an officer or magistrate, ought, upon the same principle, to be excluded. The principle itself would seem to require such exclusion; but the point is not known to have received any judicial consideration.

§ 223. But whether a confession, *made to a person who has no authority*, upon an inducement held out by that person, is receivable, is a question upon which learned judges are known to entertain opposite opinions.[7] In one case, it was laid down as a settled

and this presumption it was the duty of the prosecutor to repel.

[1] Thompson's case, 1 Leach's Cr. Cas. 325; Cass's case, Id. 328, n.; Rex *v.* Jones, Russ. & R. 152; Rex *v.* Griffin, Id. 151; Chabbock's case, 1 Mass. 144; Rex *v.* Gibbons, 1 C. & P. 97, note (a); Rex *v.* Partridge, 7 C. & P. 551; Robert's case, 1 Dever. 259; Rex *v.* Jenkins, Russ. & Ry. 492; Regina *v.* Hearn, 1 Car. & Marsh. 109. See also Phil. & Am. on Evid. 430, 431.

[2] Rex *v.* Upchurch, 1 Mood. Cr. Cas. 465; Regina *v.* Hewett, 1 Car. & Marshm. 534; Rex *v.* Taylor, 8 C. & P. 733. In Rex *v.* Simpson, 1 Mood. Cr. Cas. 410, the inducements were held out by the mother-in-law of the prosecutor, in his house, and in the presence of his wife, who was very deaf; and the confessions thus obtained were held inadmissible. See Mr. Joy's Treatise on the Admissibility of Confessions, pp. 5–10.

[3] Rex *v.* Swatkins, 4 C. & P. 548; Rex *v.* Mills, 6 C. & P. 146; Rex *v.* Sextons, 6 Petersd. Abr. 84; Rex *v.* Shepherd, 7 C. & P. 579. See also Rex *v.* Thornton, 1 Mood. Cr. Cas. 27. But see Commonwealth *v.* Mosler, 4 Barr, 264.

[4] Rudd's case, 1 Leach's Cr. Cas. 135; Guild's case, 5 Halst. 163.

[5] Rex *v.* Parratt, 4 C. & P. 570, which was a confession by a sailor to his captain, who threatened him with prison, on a charge of stealing a watch. Rex *v.* Enoch, 5 C. & P. 539, was a confession made to a woman, in whose custody the prisoner, who was a female, had been left by the officer. The official character of the person to whom the confession is made does not affect its admissibility, provided no inducements were employed. Joy on Confessions, &c., pp. 59–61; Rex *v.* Gibbons, 1 C. & P. 97, note (a); Knapp's case, 10 Pick. 477; Mosler's case, 6 Penn. Law Journ. 90; 4 Barr, 264.

[6] Robert's case, 1 Dever. 259; Rex *v.* Pountney, 7 C. & P. 302; Reg. *v.* Laugher, 2 C. & K. 225; [Reg. *v.* Luckhurst, 22 Eng. Law & Eq. R. 604.]

[7] So stated by Parke, B., in Rex *v.* Spencer, 7 C. & P. 776. See also Rex *v.* Pountney, Id. 302, per Alderson, B.; Rex *v.* Row, Russ. & R. 153, per Chambre, J. [Shaw, C. J., in giving the opinion of the court in Commonwealth *v.* Morey, 1 Gray, 461, 463, said, "Of

rule, that *any* person telling a prisoner that it would be better for him to confess, will *always* exclude any confession made to that person.[1] And this rule has been applied in a variety of cases, both early and more recent.[2] On the other hand, it has been held, that a promise made by an indifferent person, who interfered officiously, without any kind of authority, and promised, without the means of performance, can scarcely be deemed sufficient to produce any effect, even on the weakest mind, as an inducement to confess; and, accordingly, confessions made under such circumstances have been admitted in evidence.[3] The difficulty experienced in this matter seems to have arisen from the endeavor to define and settle, *as a rule of law*, the facts and circumstances which shall be deemed, *in all cases*, to have influenced the mind of the prisoner, in making the confession. In regard to persons in authority, there is not much room to doubt. Public policy, also, requires the exclusion of confessions, obtained by means of inducements held out by such persons. Yet even here, the age, experience, intelligence, and constitution, both physical and mental, of prisoners, are so various, and the power of performance so different, in the different persons promising, and under different circumstances of the prosecution, that the rule will necessarily sometimes fail of meeting the truth of the case. But as it is thought to succeed in a large majority of instances, it is wisely adopted as a rule of law applicable to them all. Promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law, that the confession must be voluntary, being strictly adhered to, and the question, whether the promises or threats of the private individuals

course, such inducement must be held out to the accused by some one who has, or who is supposed by the accused to to have, some power or authority to assure to him the promised good, or cause or influence the threatened injury." And to support this, he cites Commonwealth *v.* Taylor, 5 Cush. 606.]

[1] Rex *v.* Dunn, 4 C. & P. 543, per Bosanquet, J.; Rex *v.* Slaughter, 8 C. & P. 734.

[2] See, accordingly, Rex *v.* Kingston, 4 C. & P. 387; Rex *v.* Clewes, Id. 231; Rex *v.* Walkley, 6 C. & P. 175; Guild's case, 5 Halst. 163; Knapp's case, 9 Pick. 496, 500–510; Rex *v.* Thomas, 6 C. & P. 533.

[3] Rex *v.* Hardwick, 6 Petersd. Abr. 84, per Wood, B.; Rex *v.* Taylor, 8 C. & P. 734. See accordingly Rex *v.* Gibbons, 1 C. & P. 97; Rex *v.* Tyler, Id. 129; Rex *v.* Lingate, 6 Petersd. Abr. 84; 2 Lewin's Cr. Cas. 125, note. In Rex *v.* Wild, 1 Mood. Cr. Cas. 452, the prisoner, a boy under fourteen, was required to kneel, and was solemnly adjured to tell the truth. The conviction upon his confession thus made, was held right, but the mode of obtaining the confession was very much disapproved. Rex *v.* Row, Russ. & Ry. 153; [Commonwealth *v.* Horne, 2 Allen, 153.]

who employed them, were sufficient to overcome the mind of the prisoner, being left to the discretion of the judge, under all the circumstances of the case.[1]

§ 224. The same rule, that the confession must be voluntary,

[1] In Scotland, it is left to the jury. See Alison's Criminal Law of Scotland, pp. 581, 582; *supra*, § 219, n. Mr. Joy maintains the *unqualified* proposition, that "a confession is admissible in evidence, although an inducement is held out, if such inducement proceeds from a person not in authority over the prisoner;" and it is strongly supported by the authorities he cites, which are also cited in the notes to this section. See Joy on the Admissibility of Confessions, sec. 2, pp. 23–33. His work has been published since the first edition of this book; but upon a deliberate revision of the point, I have concluded to leave it, where the learned judges have stated it to stand, as one on which they were divided in opinion.

In a recent case, in England, the rule stated in the text is admitted to be the best rule, though the learned judges felt themselves restricted from adopting it by reason of previous decisions. It was a prosecution against a female servant, for concealing the death of her bastard child; and the question was upon the admissibility of a confession made to her mistress, who told her "she had better speak the truth." The judgment of the court was delivered by Parke, B., as follows: "The cases on this subject have gone quite far enough, and ought not to to be extended. It is admitted that the confessions ought to be excluded unless voluntary, and *the judge*, not the jury, ought to determine whether they are so. One element in the consideration of the question as to their being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that *the judge* was to decide whether the confession was voluntary) that in all cases he was to decide that point upon his own view of *all* the circumstances, including the nature of the threat or inducement, and the character of the person holding it out, together; not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down in different precedents by which we are bound, and that is, if the threat or inducement is held out, actually or constructively, by a person *in authority*, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. The authorities are collected in Mr. Joy's very able treatise on Confessions and Challenges, p. 23. But, in referring to the cases where the *master* and *mistress* have been held to be persons in authority, it is only when the offence concerns the master or mistress that their holding out the threat or promise renders the confession inadmissible. In Rex *v.* Upchurch (Ry. & M. 865), the offence was arson of the dwelling-house, in the management of which the mistress *took a part*. Reg. *v.* Taylor (8 Car. & P. 733) is to the like effect. So Rex *v.* Carrington (Id. 109), and Rex *v.* Howell (Id. 534). So where the threat was used by the master of a ship to one of the crew, and the offence committed on board the ship by one of the crew towards another; and in that case also the master of the ship threatened to apprehend him; and, the offence being a felony, and a felony actually committed, would have a power to do so on reasonable suspicion that the prisoner was guilty. In Rex *v.* Warringham, tried before me at the Surrey Spring Assizes, 1851, the confession was in consequence of what was said by the mistress of the prisoner, she being in the habit of managing the shop, and the offence being larceny from the shop. This appears from my note. In the present case, the offence of the prisoner in killing her child, or concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence. In practice, the prosecution is always the result of a coroner's inquest. Therefore we are clearly of opinion that her confession was properly received." See Reg. *v.* Moore, 16 Jur. 622; 12 Eng. L. & Eq. R. 583.

In *South Carolina* it has been held, that where the prisoner, after due warning of all the consequences, and the allowance of sufficient time for reflection, confesses his guilt to a private person, who has no control over his person or the prosecution; the confession is admissible in evidence, although the person may have influence and ability to aid him. The State *v.* Kirby, 1 Strobhart, 155.

is applied in cases where the prisoner has been *examined before a magistrate*, in the course of which examination the confession is made. The practice of examining the accused was familiar in the Roman jurisprudence, and is still continued in continental Europe;[1] but the maxim of the common law was, *Nemo tenetur prodere seipsum;* and therefore no examination of the prisoner himself was permitted in England, until the passage of the statutes of Philip and Mary.[2] By these statutes, the main features of which have been adopted in several of the United States,[3] the justices, before whom any person shall be brought, charged with any of the crimes therein mentioned, shall take the examination of the prisoner, as well as that of the witnesses, in writing, which the magistrate shall subscribe, and deliver to the proper officer of the court where the trial is to be had. The signature of the prisoner, when not specially required by statute, is not necessary; though it is expedient, and therefore is usually obtained.[4] The certificate of the magistrate, as will be hereafter shown in its proper place,[5] is conclusive evidence of the manner in which the examination was conducted; and, therefore, where he had certified that the prisoner was examined under oath, parol evidence to show that in fact no oath had been administered to the prisoner

[1] The course of proceeding, in such cases, is fully detailed in B. Carpzov. Practicæ Rerum Criminal. Pars III., *Quæst.* 113, per tot.

[2] 1 & 2 Phil. & M. c. 13; 2 & 3 Phil. & M. c. 10; 7 Geo. IV., c. 64; 4 Bl. Comm. 295. The object of these statutes, it is said, is to enable the judge to see whether the offence is bailable, and that both the judge and jury may see whether the witnesses are consistent or contradictory, in their accounts of the transaction. The prisoner should only be asked, whether he wishes to say any thing in anwer to the charge, when he had heard all that the witnesses in support of it had to say against him. See Joy on Confessions, &c., pp. 92–91; Rex *v.* Saunders, 2 Leach's Cr. Cas. 652; Rex *v.* Fagg, 4 C. & P. 567. But if he is called upon to make his answer to the charge, before he is put in possession of all the evidence against him, this irregularity is not sufficient to exclude the evidence of his confession. Rex *v.* Bell, 5 C. & P. 163. His statement is not an answer to the depositions, but to the charge. He is not entitled to have the depositions first read, as a matter of right. But if his examination refers to any particular depositions, he is entitled to have them read at the trial, by way of explanation. Dennis's case, 2 Lew. Cr. Cas. 261. See further, Rowland *v.* Ashby, Ry. & M. 231, per Best, C. J.; Rex *v.* Simons, 6 C. & P. 540; Regina *v.* Arnold, 8 C. & P. 621.

[3] See *New York* Revised Statutes, Part 4, c. 2, tit. 2, §§ 14, 15, 16, 26; Bellinger's case, 8 Wend. 595, 599; Elmer's Laws of *New Jersey*, p. 450, § 6; Laws of *Alabama*, (Toulmin's Digest,) tit. 17, c. 3, § 2, p. 219; Laws of *Tennessee* (Carruthers and Nicholson's Digest), p. 426; *North Carolina*, Rev. St. c. 35, § 1; Laws of *Mississippi* (Alden and Van Hoesen's Digest), c. 70, § 5, p. 532; Hutchinson's Dig. c. 50, art. 2, § 5; Laws of *Delaware* (Revised Code of 1829), p. 63; Brevard's Laws of *South Carolina*, vol. 1, p. 460; Laws of *Missouri* (Revision of 1835), p. 476; Id. Rev. Stat. 1845, c. 138, § 15–17. See also *Massachusetts* Rev. Stat. c. 85, § 25; Respublica *v.* McCarty, 2 Dall. 87, per McKean, C. J.

[4] 1 Chitty's Crim. Law, 87; Lambe's case, 2 Leach's Cr. Cas. 625.

[5] *Infra*, § 227.

was held inadmissible.[1] But the examination cannot be given in evidence until its identity is proved.[2] If the prisoner has signed it with his name, this implies that he can read, and it is admitted on proof of his signature; but if he has signed it with his mark only, or has not signed it at all, the magistrate or his clerk must be called to identify the writing, and prove that it was truly read to the prisoner, who assented to its correctness.[3]

§ 225. The *manner of examination* is, therefore, particularly regarded; and if it appears that the prisoner had not been left wholly free, and did not consider himself to be so, in what he was called upon to say, or did not feel himself at liberty wholly to decline any explanation or declaration whatever, the examination is not held to have been voluntary.[4] In such cases, not only is the written evidence rejected, but oral evidence will not be received of what the prisoner said on that occasion.[5] The prisoner, therefore, must not be sworn.[6] But where, being mistaken for a witness, he was sworn, and afterwards, the mistake being discovered, the deposition was destroyed; and the prisoner, after having been cautioned by the magistrate, subsequently made a statement; this latter statement was held admissible.[7] It may, at first view, appear unreasonable to refuse evidence of confession, merely because it was made under oath, thus having in favor of its truth, one of the highest sanctions known in the law. But it is to be

[1] Rex *v.* Smith & Hornage, 1 Stark. R. 242; Rex *v.* Rivers, 7 C. & P. 177; Regina *v.* Pikesley, 9 C. & P. 124.

[2] Hawk. P. C., b. 2, c. 46, § 3, note (1).

[3] Rex *v.* Chappel, 1 M. & Rob. 395.

[4] The proper course to be pursued in these cases, by the examining magistrate, is thus laid down by Gurney, B., in Rex *v.* Greene, 5 C. & P. 312: "To dissuade a prisoner was wrong. A prisoner ought to be told that his confessing will not operate at all in his favor; and that he must not expect any favor because he makes a confession; and that, if any one has told him that it will be better for him to confess, or worse for him if he does not, he must pay no attention to it; and that any thing he says to criminate himself will be used as evidence against him on his trial. After that admonition, it ought to be left entirely to himself, whether he will make any statement or not; but he ought not to be dissuaded from making a perfectly voluntary confession, because that is shutting one of the sources of justice." The same course, in substance, was recommended by Lord Denman, in Regina *v.* Arnold, 8 C. & P. 622. The omission of this course, however, will not alone render the confession inadmissible.

[5] Rex *v.* Rivers, 7 C. & P. 177; Rex *v.* Smith *et al.* 1 Stark. R. 242; Harman's case, 6 Pennsyl. Law Journ. 120. But an examination, by way of question and answer, is now held good, if it appears free from any other objection. Rex *v.* Ellis, Ry. & M. 432; 2 Stark. Evid. 29, note (*g*); though formerly it was held otherwise, in Wilson's case, Holt, R. 597. See *acc.* Jones's case, 2 Russ. 658, n.; Roscoe's Crim. Evid. 44. So, if the questions were put by a police-officer, Rex *v.* Thornton, 1 Mood. Cr. Cas. 27; or, by a fellow-prisoner, Rex *v.* Shaw, 6 C. & P. 372, they are not, on that account, objectionable. See also Rex *v.* Wild, 1 Mood. Cr. Cas. 452; *infra*, § 229.

[6] Bull. N. P. 242; Hawk. P. C., b. 2, ch. 46, § 3.

[7] Rex *v.* Webb, 4 C. & P. 564.

observed, that none but voluntary confessions are admissible; and that if to the perplexities and embarrassments of the prisoner's situation are added the danger of perjury, and the dread of additional penalties, the confession can scarcely be regarded as voluntary; but, on the contrary, it seems to be made under the very influences which the law is particularly solicitous to avoid. But where the prisoner, having been examined as a witness, in a prosecution against another person, answered questions to which he might have demurred, as tending to criminate himself, and which, therefore, he was not bound to answer, his answers are deemed voluntary, and, as such, may be subsequently used against himself, for all purposes;[1] though where his answers are compulsory, and under the peril of punishment for contempt, they are not received.[2]

§ 226. Thus, also, where several persons, among whom was the prisoner, was summoned before a committing magistrate, upon an investigation touching a felony, there being at that time no specific charge against any person; and the prisoner, being sworn with the others, made a statement, and at the conclusion of the examination he was committed for trial; it was held, that the statement so made was not admissible in evidence against the prisoner.[3] This case may seem, at the first view, to be at variance with what has been just stated as the general principle, in regard to testimony given in another case; but the difference lies in the different natures of the two proceedings. In the former case, the mind of the witness is not disturbed by a criminal charge, and, moreover,

[1] 2 Stark. Evid. 28; Wheater's case, 2 Lew. Cr. Cas. 157; 2 Mood. Cr. Cas. 45, s. c.; Joy on Confessions, &c., pp. 62–66; Hawarth's case, Roscoe's Crim. Evid. 45; Rex *v.* Tuby, 5 C. & P. 530, cited and agreed in Rex *v.* Lewis, 6 C. & P. 161; Rex *v.* Walker, cited by Gurney, B., in the same case. But see Rex *v.* Davis, 6 C. & P. 177, contra. [See also Hendrickson *v.* The People, 6 Selden, (N. Y.) 13.] [* Commonwealth *v.* King, 8 Gray, 501.]

[2] *Supra*, § 193, note; *infra*, § 451; Regina *v.* Garbett, 2 C. & K. 474. But where one was examined before the grand-jury as a witness, on a complaint against another person, and was afterwards himself indicted for that same offence, it was held that his testimony before the grand-jury was admissible in evidence against him. The State *v.* Broughton, 7 Ired. 96. [* In a somewhat recent case, People *v.* McMahon, 15 N. Y. Ct. App. 384, it was held, that where one arrested, without warrant, upon suspicion of being guilty of murder, was examined before the coroner, at the inquest, upon oath as a witness, that his statements, so made, could not be given in evidence against him on his trial for murder. But in a somewhat similar state of facts, the decision was different in Schoeffler *v.* State, 3 Wis. 823. It would seem that, upon principle, if the witness volunteered to give evidence, with the full understanding that he was at liberty to decline, and that what he said would be liable to be used as evidence against him, he could not object to it being so used.]

[3] Rex *v.* Lewis, 6 C. & P. 161, per Gurney, B.; Regina *v.* Wheeley, 8 C. & P. 250; Regina *v.* Owen, 9 C. & P. 238.

he is generally aided and protected by the presence of the counsel in the cause; but in the latter case, being a prisoner, subjected to an inquisitorial examination, and himself at least in danger of an accusation, his mind is brought under the full influence of those disturbing forces against which it is the policy of the law to protect him.[1]

§ 227. As the statutes require that the magistrate shall reduce to writing the whole examination, or so much thereof as shall be material, the law *conclusively presumes*, that if any thing was taken down in writing, the magistrate performed all his duty by taking down all that was material.[2] In such case, no parol evidence of what the prisoner may have said on that occasion can be received.[3] But if it is shown that the examination was not reduced to writing; or if the written examination is wholly inadmissible, by reason of irregularity; parol evidence is admissible to prove what he voluntarily disclosed.[4] And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected.[5] A written examination, however, will not exclude parol evidence of a confession previously and extrajudicially made;[6] nor of something incidentally said by the prisoner during

[1] It has been thought, on the authority of Britton's case, 1 M. & Rob. 297, that the balance-sheet of a bankrupt, rendered in his examination under the commission, was not admissible in evidence against him on a subsequent criminal charge, because it was rendered upon compulsion. But the ground of this decision was afterwards declared by the learned judge who pronounced it, to be only this, that there was no previous evidence of the issuing of the commission; and, therefore, no foundation had been laid for introducing the balance-sheet at all. See Wheater's case, 2 Mood. Cr. Cas. 45, 51.

[2] Mr. Joy, in his Treatise on Confessions, &c., pp. 89–92, 237, dissents from this proposition, so far as regards the *conclusive* character of the presumption; which, he thinks, is neither "supported by the authorities," nor "reconcilable with the object with which examinations are taken." See *supra*, § 224, note. But upon a careful review of the authorities, and with deference to the opinion of that learned writer, I am constrained to leave the text unaltered. See *infra*, § 275–277.

[3] Rex *v.* Weller, 2 Car. & Kir. 223. Whatever the prisoner voluntarily said, respecting the particular felony under examination, should be taken down, but not that which relates to another matter. Ib. And see Reg. *v.* Butler, 2 Car. & Kir. 221.

[4] Rex *v.* Fearshire, 1 Leach's Cr. Cas. 240; Rex *v.* Jacobs, Id. 347; Irwin's case, 1 Hayw. 112; Rex *v.* Bell, 5 C. & P. 162; Rex *v.* Read, 1 M. & M. 403; Phillips *v.* Winburn, 4 C. & P. 273; [State *v.* Parish, Busbee, Law, 239.] If the magistrate returns, that the prisoner "declined to say any thing," parol evidence of statements made by him in the magistrate's presence, at the time of the examination, is not admissible. Rex *v.* Walter, 7 C. & P. 267. See also Rex *v.* Rivers, Id. 177; Regina *v.* Morse *et al.* 8 C. & P. 605; Leach *v.* Simpson, 7 Dowl. 513. Upon the same principle, where, on a preliminary hearing of a case, the magistrate's clerk wrote down what a witness said, but the writing was not signed, and therefore was inadmissible; oral evidence was held admissible to prove what the witness testified. Jeans *v.* Wheedon, 2 M. & Rob. 484.

[5] Hinxman's case, 1 Leach's Cr. Cas. 349, n.

[6] Rex *v.* Carty, McNally's Evid. p. 45.

his examination, but not taken down by the magistrate, provided it formed no part of the judicial inquiry, so as to make it the duty of the magistrate to take it down.[1] So where the prisoner was charged with several larcenies, and the magistrate took his confession in regard to the property of A, but omitted to write down what he confessed as to the goods of B, not remembering to have heard any thing said respecting them, it was held that parol evidence of the latter confession, being precise and distinct, was properly admitted.[2]

§ 228. It has already been stated, that the *signature of the prisoner is not necessary* to the admissibility of his examination, though it is usually obtained. But where it has been requested agreeably to the usage, and is absolutely refused by the prisoner, the examination has been held inadmissible, on the ground that it was to be considered as incomplete, and not a deliberate and distinct confession.[3] Yet where, in a similar case, the prisoner, on being required to sign the document said, "it is all true enough; but he would rather decline signing it," the examination was held complete, and was accordingly admitted.[4] And in the former case, which, however, is not easily reconcilable with those statutes, which require nothing more than the act of the magistrate, though the examination is excluded, yet parol evidence of what the prisoner voluntarily said is admissible. For though, as we have previously observed,[5] in certain cases where the examination is rejected, parol evidence of what was said on the same occasion is not received; yet the reason is, that in those cases the confession was not voluntary; whereas, in the case now stated, the confession is deemed voluntary, but the examination only is incomplete.[6] And wherever the examination is rejected as docu-

[1] Moore's case, Roscoe's Crim. Evid. 45, per Parke, J.; Rex *v.* Spilsbury, 7 C. & P. 188; Malony's case, Id. (otherwise Mulvey's case, Joy on Confessions, &c. p. 238), per Littledale, J. In Rowland *v.* Ashbny, Ry. & My. 221, Mr. Justice Best was of opinion, that "*upon clear and satisfactory evidence*, it would be admissible to prove something said by a prisoner, beyond what was taken down by the committing magistrate."

[2] Harris's case, 1 Mood. Cr. Cas. 338. See 2 Phil. Evid. 84, note, where the learned author has reviewed this case, and limited its application to confessions of other offences than the one for which the prisoner was on trial. But the case is more fully stated, and the view of Mr. Phillips dissented from, in 2 Russell on Crimes, pp. 876–878, note, by Mr. Greaves. See also Joy on Confessions, pp. 89–93.

[3] Rex *v.* Telicote, 2 Stark. R. 483; Bennett's case, 2 Leach's Cr. Cas. 627, n.; Rex *v.* Foster, 1 Lewin's Cr. Cas. 46; Rex *v.* Hirst, Ib.

[4] Lambe's case, 2 Leach's Cr. Cas. 625.

[5] *Supra*, § 225.

[6] Thomas's case, 2 Leach's Cr. Cas. 727; Dewhurst's case, 1 Lewin's Cr. Cas. 47; Rex *v.* Swatkins, 4 C. & P 548; Rex *v.* Read, 1 M. & M. 403.

mentary evidence, for informality, it may still be used as a writing, to refresh the memory of the witness who wrote it, when testifying to what the prisoner voluntarily confessed upon that occasion.[1]

§ 229. Though it is necessary to the admissibility of a confession that it should have been voluntarily made, that is, that it should have been made, as before shown, without the appliances of hope or fear from persons having authority; yet it is *not necessary* that it should have been the prisoner's own *spontaneous act*. It will be received, though it were induced by *spiritual exhortations*, whether of a clergyman,[2] or of any other person;[3] by a solemn *promise of secrecy*, even confirmed by an oath;[4] or by reason of the prisoner's having been made *drunken*;[5] or by a promise of some *collateral benefit or boon*, no hope or favor being held out in respect to the criminal charge against him;[6] or by any *deception* practised on the prisoner, or false representation made to him for that purpose, provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the main point to be considered.[7] So, a confession is admissible, though it is elicited by *questions*, whether put to the prisoner by a magistrate, officer, or private person; and the form of the question is immaterial to the admissibility, even though it assumes the prisoner's guilt.[8] In all these cases the evidence may be laid before the jury, however little it may weigh, under the circum-

[1] Layer's case, 16 Howell's St. Tr. 215; Rex *v.* Swatkins, 4 C. & P. 548, and note (a); Rex *v.* Tarrant, 6 C. & P. 182; Rex *v.* Pressly, Id. 183; *supra*, § 90; *infra*, § 436.

[2] Rex *v.* Gilham, 1 Mood. Cr. Cas. 186; more fully reported in Joy on Confessions, &c., pp. 52–56; Commonwealth *v.* Drake, 15 Mass. 161. In the Roman law it is otherwise; penitential confessions to the priest being encouraged, for the relief of the conscience, and the priest being bound to secrecy by the peril of punishment. "Confessio coram sacerdote, in pœnitentia facta, non probat in judicio; *quia censetur facta coram Deo;* imo, si sacerdos eam enunciat, incidit in pœnam." Mascardus, De Probat. vol. 1, Concl. 377. It was lawful, however, for the priest to testify in such cases to the fact that the party had made a penitential confession to him, as the Church requires, and that he had enjoined penance upon him; and, with the express consent of the penitent, he might lawfully testify to the substance of the confession itself. Ib. See further, *infra*, § 247.

[3] Rex *v.* Wild, 1 Mood. Cr. Cas. 452; Rex *v.* Court, 7 C. & P. 486; Joy on Confessions, &c., pp. 49, 51.

[4] Rex *v.* Shaw, 6 C. & P. 372; Commonwealth *v.* Knapp, 9 Pick. 496, 500–510. So, if it was overheard, whether said to himself or to another. Rex *v.* Simons, Id. 540.

[5] Rex *v.* Spilsbury, 7 C. & P. 187.

[6] Rex *v.* Green, 6 C. & P. 655; Rex *v.* Lloyd, Id. 393. [*State *v.* Wentworth, 37 N. H. 196.]

[7] Rex *v.* Derrington, 2 C. & P. 418; Burley's case, 2 Stark. Evid. 12, n. See Commonwealth *v.* Tuckerman, 10 Gray. 173.

[8] Rex *v.* Wild, 1 Mood. Cr. Cas. 452; Rex *v.* Thornton, Id. 27; Gibney's case, Jebb's Cr. Cas. 15; Kerr's case, 8 C. & P. 179. See Joy on Confessions, pp. 34–40, 42–44; Arnold's case, 8 C. & P. 622; *supra*, § 225, note (1).

stances, and however reprehensible may be the mode in which, in some of them, it was obtained. All persons, except counsellors and attorneys, are compellable at common law to reveal what they may have heard; and counsellors and attorneys are excepted, only because it is absolutely necessary, for the sake of their clients, and of remedial justice, that communications to them should be protected.[1] Neither is it necessary to the admissibility of any confession, to whomsoever it may have been made, that it should appear that the prisoner was *warned* that what he said would be used against him. On the contrary, if the confession was voluntary, it is sufficient, though it should appear that he was not so warned.[2] [*And it is no objection to the admissibility of confessions made by those accused of crime, that they were made by them while under arrest, whether to the officer or third persons, provided there was no promise, threat, or other inducement resorted to.[3]]

§ 230. It has been thought, that *illegal imprisonment* exerted such influence upon the mind of the prisoner as to justify the inference that his confessions, made during its continuance, were not voluntary; and therefore they have been rejected.[4] But this doctrine cannot yet be considered as satisfactorily established.[5]

§ 231. The object of all the care, which, as we have now seen, is taken to exclude confessions which were not voluntary, is to exclude testimony not probably true. But where, *in consequence of the information obtained from the prisoner*, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or *any other material fact is discovered*, it is competent to show that such discovery was made conformably to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire, whether the prisoner stated that the thing would be found by searching a particular place, and to prove

[1] Per Patteson, J., in Rex *v.* Shaw, 6 C. & P. 372. Physicians and clergymen, by statutes. [*Infra*, §§ 247, 248, and notes.]

[2] Gibney's case, Jebb's Cr. Cas. 15; Rex *v.* Magill, cited in McNally's Evid. 38; Regina *v.* Arnold, 8 C. & P. 622; Joy on Confessions, pp. 45–48.

[3] [*People *v.* Rogers, 18 N. Y. Ct. App. 9.]

[4] Per Holroyd, J., in Ackroyd and Warburton's case, 1 Lewin's Cr. Cas. 49.

[5] Rex *v.* Thornton, 1 Mood. Cr. Cas. 27.

that it was accordingly so found; but it would not be competent to inquire, whether he confessed that he had concealed it there.[1] This limitation of the rule was distinctly laid down by Lord Eldon, who said, that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal; unless the fact itself proved would have been sufficient to warrant a conviction, without any confession leading to it.[2]

§ 232. If the *prisoner himself produces the goods stolen*, and delivers them up to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess, held out by the latter, there seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery, and explanatory of its character and design, though they may amount to a confession of guilt;[3] but whatever he may have said at the same time, not qualifying or explaining the act of delivery, is to be rejected. And if, in consequence of the confession of the prisoner, thus improperly induced, and of the information by him given, *the search* for the property or person in question, *proves wholly ineffectual*, no proof of either will be received. The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon; and the acts and information of the prisoner, under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession may also produce groundless conduct.[4]

§ 233. As to the prisoner's liability to be affected by *the confessions of others*, it may be remarked, in general, that the principle of the law in civil and criminal cases, is the same. In civil cases, as we have already seen,[5] when once the fact of agency or partnership is established, every act and declaration of one, in furtherance of the common business, and until its completion, is deemed the act of all. And so, in cases of conspiracy, riot, or other crime, perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one

[1] 1 Phil. Evid. 411; Warickshall's case, 1 Leach's Cr. Cas. 298; Mosey's case, Id. 301, n.; Commonwealth *v.* Knapp, 9 Pick. 496, 511; Regina *v.* Gould, 9 C. & P. 364; Rex *v.* Harris, 1 Mood. Cr. Cas. 338.

[2] 2 East, P. C. 657; Harvey's case, Id. 658; Lockhart's case, 1 Leach's Cr. Cas. 430.

[3] Rex *v.* Griffin, Russ. & Ry. 151; Rex *v.* Jones, Id. 152.

[4] Rex *v.* Jenkins, Russ. & Ry. 492; Regina *v.* Hearn, 1 Car. & Marsh. 109.

[5] *Supra*, §§ 112, 113, 114, 174, 176, 177.

conspirator, or accomplice, in the prosecution of the enterprise, is considered the act of all, and is evidence against all.[1] Each is deemed to assent to, or command what is done by any other, in furtherance of the common object.[2] Thus, in an indictment against the owner of a ship, for violation of the statutes against the slave-trade, testimony of the declarations of the master, being part of the *res gestæ*, connected with acts in furtherance of the voyage, and within the scope of his authority, as an agent of the owner, in the conduct of the guilty enterprise, is admissible against the owner.[3] But after the common enterprise is at an end, whether by accomplishment or abandonment, is not material, no one is permitted, by any subsequent act or declaration of his own, to affect the others. His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such, against any but himself.[4] If it were made in the presence of another, and addressed to him, it might, in certain circumstances, be receivable, on the ground of assent, or implied admission. In fine, the declarations of a conspirator or accomplice are receivable against his fellows, only when they are either in themselves acts, or accompany and explain acts, for which the others are responsible; but not when they are in the nature of narratives, descriptions, or subsequent confessions.[5]

§ 234. The same principle prevails in cases of *agency*. In general, no person is answerable criminally for the acts of his servants or agents, whether he be the prosecutor or the accused, unless a criminal design is brought home to him. The act of the

[1] So is the Roman Law. "Confessio unius non probat in præjudicium alterius; quia aliàs esset in manu confitentis dicere quod vellet, et sic jus alteri quæsitum auferre, quando omninò jure prohibent; — etiamsi talis confitens esset omni exceptione major. Sed limitabis, *quando inter partes convenit parere confessioni et dicto unius alterius.*" Mascard. De Probat. Concl. 486, vol. 1, p. 409.

[2] Per Story, J., in United States *v.* Gooding, 12 Wheat. 469. And see *supra*, § 111, and cases there cited. The American Fur Company *v.* The United States, 2 Peters, 358; Commonwealth *v.* Eberle *et al.*, 3 S. & R. 9; Wilbur *v.* Strickland, 1 Rawle, 458; Reitenback *v.* Reitenback, Id. 362; 2 Stark. Evid. 232-237; The State *v.* Soper, 4 Shepl. 293.

[3] United States *v.* Gooding, 12 Wheat. 460.

[4] Rex *v.* Turner, 1 Mood. Cr. Cas. 347; Rex *v.* Appleby, 3 Stark. R. 33. And see Melen *v.* Andrews, 1 M. & M. 336, per Parke, J.; Regina *v.* Hinks, 1 Den. Cr. Cas. 84; 1 Phil. Evid. 199 (9th edit.); Regina *v.* Blake, 6 Ad. & El. 126, N. S.

[5] 1 Phil. on Evid. 414; 4 Hawk. P. C., b. 2, ch. 46, § 34; Tong's case, Sir J. Kelyng's R. 18, 5th Res. In a case of piracy, where the persons who made the confessions were not identified, but the evidence was only that *some* did confess, it was held that, though such confessions could not be applied to any one of the prisoners, as proof of his personal guilt, yet the jury might consider them, so far as they went to identify the piratical vessel. United States *v.* Gibert, 2 Sumn. 16. [* State *v.* Thibeau, 30 Vt. R. 100.]

agent or servant may be shown in evidence, as proof that such an act was so done; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal, as distinguished from civil justice, how the principal may be affected by the fact, when so established.[1] Where it was proposed to show that an agent of the prosecutor, not called as a witness, offered a bribe to a witness, who also was not called, the evidence was held inadmissible; though the general doctrine, as above stated, was recognized.[2]

§ 235. It was formerly doubted whether the *confession* of the prisoner, indicted for *high treason*, could be received in evidence, unless it were made upon his arraignment, in open court, and in answer to the indictment; the statutes on this subject requiring the testimony of two witnesses to some overt act of treason.[3] But it was afterwards settled, and it is now agreed, that though, by those statutes, no confession could operate conclusively, and without other proof, to convict the party of treason, unless it were judicially made in open court upon the arraignment; yet that, in all cases, the confession of a criminal might be given in evidence against him; and that in cases of treason, if such confession be proved by two witnesses, it is proper evidence to be left to a jury.[4] And in regard to collateral facts, which do not conduce to the proof of any overt acts of treason, they may be proved as at common law, by any evidence competent in other criminal cases.[5]

[1] Ld. Melville's case, 29 Howell's St. Tr. 764; The Queen's case, 2 B. & B. 306, 307; *supra*, § 170.

[2] The Queen's case, 2 B. & B. 302, 306, 307, 308, 309. To the rule, thus generally laid down, there is an apparent exception, in the case of the proprietor of a newspaper, who is, *primâ facie*, criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge. But Lord Tenterden considered this case as falling strictly within the principle of the rule; for "surely," said he, "a person who derives profit from, and who furnishes means for carrying on the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, though you cannot show that he was individually concerned in the particular publication." Rex *v.* Gutch, 1 M. & M. 433, 437. See also Story on Agency, §§ 452, 453, 455; Rex *v.* Almon, 5 Burr. 2686; Rex *v.* Walter, 3 Esp. 21; Southwick *v.* Stephens, 10 Johns. 443.

[3] Foster's Disc. 1, § 8, pp. 232–244; 1 East's P. C. 131, 132, 133. Under the Stat. 1 Ed. VI. c. 12, and 5 Ed. VI. c. 11, requiring two witnesses to convict of treason, it has been held sufficient, if one witness prove one overt act, and another prove another, if both acts conduce to the perpetration of the same species of treason charged upon the prisoner. Lord Stafford's case, T. Raym. 407; 3 St. Tr. 204, 205; 1 East's P. C. 129; 1 Burr's Trial, 196.

[4] Francia's case, 1 East's P. C. 133, 134, 135.

[5] Smith's case, Fost. Disc. p. 242; 1 East's P. C. 130. See *infra*, §§ 254, 255.

CHAPTER XIII.

OF EVIDENCE EXCLUDED FROM PUBLIC POLICY.

[*§ 236. Evidence sometimes rejected upon grounds of policy.
237. This embraces communications between attorney or counsel and client.
238. This is done out of regard to the rights of clients and the course of justice.
239. The privilege extends to all grades in the profession, their agents, interpreters, and personal representatives.
239*a*. Summary of the recent American cases.
240. It embraces all legal proceedings, *in esse*, or in contemplation.
240*a*. Communications after dispute privileged, but not those in matters wholly distinct and anterior.
241. Other incidents of the privilege. Counsel may prove the existence, but not contents, of deeds.
242. The privilege only attaches to facts obtained solely through professional confidence.
243. The obligation of secrecy is perpetual.
244–245. Instances where counsel may testify to facts learned in the course of professional employment and otherwise.
246. The court will inspect documents to determine whether they shall be produced. *Sed quære.*
247. Christian ministers not privileged to withhold confidences.
248. Nor is a physician, or agent, or steward so privileged.
249. Judges, jurors, and arbitrators not bound to disclose the ground of their judgments.
250. State secrets, and of the detective police, are privileged.
251. This will embrace communications to the President, Governors, and other high officers of state.
252. Grand jurors and other officers required to keep proceedings secret.
252*a*. Petit jurors not allowed to disclose what passes in jury-room.
253. Facts offensive to public decency not allowed to be proved, except from strict necessity.
254. Confidential communications between husband and wife held inviolable.
254*a*. Papers illegally obtained sometimes allowed to be used in evidence.]

§ 236. THERE are some kinds of evidence which the law *excludes*, or dispenses with, *on grounds of public policy;* because greater mischiefs would properly result from requiring or permitting its admission, than from wholly rejecting it. The principle of this rule of the law has respect, in some cases, to the person testifying, and in others, to the matters concerning which he is interrogated; thus including the case of the party himself,

and that of the husband or wife of the party, on the one hand, and on the other, the subject of *professional communications*, *awards*, *secrets of state*, and some others. The two former of these belong more properly to the head of the Competency of witnesses, under which they will accordingly be hereafter treated.[1] The latter we shall now proceed briefly to consider.

§ 237. And in the *first* place, in regard to *professional communications*, the reason of public policy, which excludes them, applies solely, as we shall presently show, to those between a client and his legal adviser; and the rule is clear and well settled, that the *confidential counsellor*, *solicitor*, or *attorney*, of the party, cannot be compelled to disclose papers delivered, or communications made to him, or letters or entries made by him, in that capacity.[2] "This protection," said Lord Chancellor Brougham, "is not qualified by any reference to proceedings pending, or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any court of law or equity, either as party or as witness."[3]

§ 238. "The *foundation* of this rule," he adds, "is not on account of any particular importance which the law attributes

[1] [*Infra*,] § 326–429.

[2] In Greenough *v.* Gaskell, 1 My. & K. 101. In this decision, the Lord Chancellor was assisted by consultation with Lord Lyndhurst, Tindal, C. J., and Parke, J., 4 B. & Ad. 876. And it is mentioned, as one in which all the authorities have been reviewed, in 2 M. & W. 100, per Lord Abinger, and is cited in Russell *v.* Jackson, 15 Jur. 1117, as settling the law on this subject. See also, 16 Jur. 30, 41–43, where the cases on this subject are reviewed. The earliest reported case on this subject is that of Berd *v.* Lovelace, 19 Eliz., in chancery, Cary's R. 88. See also Austen *v.* Vesey, Id. 89; Kelway *v.* Kelway, Id. 127; Dennis *v.* Codrington, Id. 143; all which are stated at large by Mr. Metcalf, in his notes to 2 Stark. Evid. 395 (1st Am. edit.). See also 12 Vin. Abr. Evid. B. a; Wilson *v.* Rastall, 4 T. R. 753; Rex *v.* Withers, 2 Campb. 578; Wilson *v.* Troup, 7 Johns. Ch. 25; 2 Cowen, 195; Mills *v.* Oddy, 6 C. & P. 728; Anon. 8 Mass. 370; Walker *v.* Wildman, 6 Madd. R. 47; Story's Eq. Pl. 458–461; Jackson *v.* Burtis, 14 Johns. 391; Foster *v.* Hall, 12 Pick. 89; Chirac *v.* Reinicker, 11 Wheat. 295; Rex *v.* Shaw, 6 C. & P. 372; Granger *v.* Warrington, 3 Gilm. 299; Wheeler *v.* Hill, 4 Shepl. 329.

[3] Greenough *v.* Gaskell, 1 My. & K. 102, 103. The privilege is held to extend to every communication made by a client to his attorney, though made under a mistaken belief of its being necessary to his case. Cleave *v.* Jones, 8 Eng. Law & Eq. R. 554, per Martin, B. And see Aikin *v.* Kilburne, 14 Shepl. 252.

to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings."[1] If such communications were not protected, no man, as the same learned judge remarked in another case, would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a court, either to obtain redress, or to defend himself.[2]

§ 239. In regard to the *persons*, to whom the communications must have been made, in order to be thus protected, they must have been made to the *counsel*, *attorney*, or *solicitor*, acting, for the time being, in the character of *legal adviser*.[3] For the reason

[1] ["It is to be remembered whenever a question of this kind arises, that communications to attorneys and counsel are not protected from disclosure in court for the reason that they are made confidentially; for no such protection is given to confidential communications made to members of other professions. 'The principle of the rule, which applies to attorneys and counsel,' says Chief Justice Shaw, in Hatton *v.* Robinson, 14 Pick. 422, 'is, that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sustain this confidence, by requiring that on such facts the mouth of the attorney shall be for ever sealed.'" By Metcalf, J., in Barnes *v.* Harris, 7 Cush. 576, 578.]

[2] Bolton *v.* The Corporation of Liverpool, 1 My. & K. 94, 95. "This rule seems to be correlative with that which governs the summary jurisdiction of the courts over attorneys. In *Ex parte* Aiken (4 B. & Ald. 49; see also *Ex parte* Yeatman, 4 Dowl. P. C. 309), that rule is laid down thus: — 'Where an attorney is employed in a matter, wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise this jurisdiction.' So, where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure." Per Alderson, J., in Tirquand *v.* Knight, 2 M. & W. 101. The Roman Law rejected the evidence of the procurator and the advocate, in nearly the same cases in which the common law holds them incompetent to testify; but not for the same reasons; the latter regarding the general interest of the community, as stated in the text, while the former seems to consider them as not credible, because of the identity of their interest, opinions, and prejudices, with those of their clients. Mascard. de Probat, vol. 1, Concl. 66, vol. 3, Concl. 1239; P. Farinacii Opera, tom. 2, tit. 6, Quæst. 60, Illat. 5, 6.

[3] If the party has been requested to act as solicitor, and the communication is made under the impression that the request has been acceded to, it is privileged. Smith *v.* Fell, 2 Curt. 667; [Sargent *v.*

of the rule, having respect solely to the free and unembarrassed administration of justice, and to security in the enjoyment of civil rights, does not extend to things confidentially communicated to other persons, nor even to those which come to the knowledge of counsel, when not standing in that relation to the party. Whether he be called as a witness, or be made defendant, and a discovery sought from him, as such, by bill in chancery, whatever he has learned, as counsel, solicitor, or attorney, he is not obliged nor permitted to disclose.[1] And this protection extends also to all the necessary organs of communication between the attorney and his client; an *interpreter*[2] and an *agent*[3] being considered as standing in precisely the same situation as the attorney himself, and under the same obligation of secrecy. It extends also to a case submitted to counsel in a *foreign country*, and his opinion thereon.[4] It was formerly thought that an *attorney's* or a *barrister's clerk* was not within the reason and exigency of the rule; but it is now considered otherwise, from the necessity they are under to employ clerks, being unable to transact all their business in person; and accordingly clerks are not compellable to disclose facts, coming to their knowledge in the course of their employment in that capacity, to which the attorney or barrister himself could not be interrogated.[5] And as the privilege is not personal to the attorney, but is a rule of law, for the protection of the client, the *executor of the attorney* seems to be within the rule, in regard to papers coming to his hands, as the personal representative of the attorney.[6]

Hampden, 38 Maine, 581; McLellan *v.* Longfellow, 32 Ib. 494.] See, as to consultation by the party's wife, Reg. *v.* Farley, 2 Car. & Kir. 313. One who is merely a real estate broker, agent, and conveyancer, is not a *legal adviser*. Matthews's Estate, 4 Amer. Law J. 356, N. S.

[1] Greenough *v.* Gaskell, 1 My. & K. 95; Wilson *v.* Rastall, 4 T. R. 753.

[2] Du Barre *v.* Livette, Peake's Cas. 77, explained in 4 T. R. 756; Jackson *v.* French, 3 Wend. 337; Andrews *v.* Solomon, 1 Pet. C. C. R. 356; Parker *v.* Carter, 4 Munf. 273.

[3] Perkins *v.* Hawkshaw, 2 Stark. R. 239; Tait on Evid. 385; Bunbury *v.* Bunbury, 2 Beav. 173; Steele *v.* Stewart, 1 Phil. Ch. R. 471; Carpmael *v.* Powis, 1 Phil. Ch. R. 687; 9 Beav. 16, S. C.

[4] Bunbury *v.* Bunbury, 2 Beav. 173.

[5] Taylor *v.* Foster, 2 C. & P. 195, per Best, J., cited and approved in 12 Pick. 93; Rex *v.* Upper Boddington, 8 Dow. & Ry. 726, per Bayley, J.; Foote *v.* Hayne, 1 C. & P. 545, per Abbott, C. J.; R. & M. 165, S. C.; Jackson *v.* French, 3 Wend. 337; Power *v.* Kent, 1 Cowen, 211; Bowman *v.* Norton, 5 C. & P. 177; Shore *v.* Bedford, 5 M. & Gr. 271; Jardine *v.* Sheridan, 2 C. & K. 24; [*Sibley *v.* Waffle, 16 N. Y. Ct. App. 180; Landsberger *v.* Gorham, 5 Cal. 450.] [Communications made while seeking legal advice in a consultation with a student at law in an attorney's office, he not being the agent or clerk of the attorney for any purpose, are not protected. Barnes *v.* Harris, 7 Cush. 576, 578. See also Holman *v.* Kimball, 22 Verm. 555.

[6] Fenwick *v.* Reed, 1 Meriv. 114, 120, arg.

[*§ 239*a*. The decisions upon this point are very numerous in the American States. It seems indispensable to the existence of the privilege, that the relation of counsel or attorney and client should exist, and that the communication be made in faith of the relation. And then the privilege of secrecy only extends to the parties to the relation and their necessary agents and assistants. Hence the privilege does not attach, if one is accidentally present;[1] or casually overhears the conversation;[2] or if the person be not a member of the profession, although supposed to be so by the client;[3] or if he was acting as a mere scrivener although of the legal profession.[4] And the privilege against disclosure extends to the client, as much, and to the same extent, as to his professional adviser.[5] Hence counsel may be compelled to produce any paper which the client might be required to do.[6] And facts coming to the knowledge of counsel, without communication from their clients, by being present merely, when a legal document is executed,[7] are not privileged. So also, that the testator was too imbecile to make communications to counsel, when they met, is not a privileged fact.[8] So communications made by the trustee to counsel, in regard to the trust, are not privileged from being proved by the counsel, in a suit between the *cestui que trust* and the trustee affecting the trust,[9] or when made by a nominal party, to a professional person, but not made professionally.[10] But it is not indispensable the communication should be made after the actual retainer, provided it be made in confidence of the professional character, and with a *bonâ fide* purpose of obtaining professional aid and direction.[11] But a communication made to counsel by two defendants is not privileged from disclosure in a subsequent suit between the two.[12] Counsel are not privileged from disclosing facts tending to establish a fraudulent combination between himself and his client, in order to prevent the court from compelling the production of important papers,[13] since neither counsel or client have any legal right to resort to any but legal means for obtaining a decision in their favor. And it is upon

[1] [* Goddard *v.* Gardner, 28 Conn. 172.
[2] Hoy *v.* Morris, 13 Gray, 519.
[3] Sample *v.* Frost, 10 Iowa, 266.
[4] De Wolf *v.* Strader, 26 Ill. 225; Borum *v.* Fouts, 15 Ind. 50; Coon *v.* Swan, 30 Vt. 6.
[5] Hemenway *v.* Smith, 28 Vt. 701.
[6] Andrews *v.* Ohio and Miss. R. R. Co., 14 Ind. 169; Durkee *v.* Leland, 4 Vt. 612.
[7] Patten *v.* Moor, 9 Foster, 163.
[8] Daniel *v.* Daniel, 39 Penn. St. 191.
[9] Shean *v.* Philips, 1 F. & F. 449.
[10] Allen *v.* Harrison, 30 Vt. 219; Marsh *v.* Howe, 36 Barb. 649.
[11] Sargent *v.* Hampden, 38 Me. 581.
[12] Rice *v.* Rice, 14 B. Mon. 417.
[13] People *v.* Sheriff of New York, 29 Barb. 622.

the same ground that counsel have been held not privileged from disclosing the fact of a payment made to the client, and communicated by him to the attorney, for the purpose of having the application made, the client having deceased, since this is not in any sense a professional confidence.[1]]

§ 240. This protection extends to every communication which the client makes to his legal adviser, for the *purpose of professional advice* or aid, upon the subject of his rights and liabilities.[2] Nor is it necessary that any judicial proceedings in particular should have been commenced or contemplated; it is enough if the matter in hand, like every other human transaction, may, by possibility, become the subject of judicial inquiry. "If," said Lord Chancellor Brougham, "the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions, as might eventually render any proceedings successful, or all proceedings superfluous."[3] Whether the party himself can be compelled, by a bill in chancery, to produce a case which he has laid before counsel, with the opinion given thereon, is not perfectly clear. At one time it was held by the House of Lords, that he might be compelled to produce the case which he had sent, but not the opinion which he had received.[4] This decision, however, was not satisfactory; and though it was silently followed in one case,[5] and reluctantly submitted to in another,[6] yet its principle has since been ably controverted and refuted.[7] The great object of the

[1] [* Clark *v.* Richards, 3 E. D. Smith, 89.]

[2] This general rule is limited to communications having a lawful object; for if the purpose contemplated be a violation of law, it has been deemed not to be within the rule of privileged communications; because it is not a solicitor's duty to contrive fraud, or to advise his client as to the means of evading the law. Russell *v.* Jackson, 15 Jur. 1117; Bank of Utica *v.* Mersereau, 3 Barb. Ch. R. 528.

[3] 1 M. & K. 102, 103; Carpmael *v.* Powis, 9 Beav. 16; 1 Phillips, 687; Penruddock *v.* Hammond, 11 Beav. 59. See also the observations of the learned judges, in Cromack *v.* Heathcote, 2 Brod. & B. 4, to the same effect; Gresley's Evid. 32, 33; Story's Eq. Pl. § 600; Moore *v.* Terrell, 4 B. & Ad. 870; Beltzhoover *v.* Blackstock, 3 Watts, 20; Taylor *v.* Blacklow, 3 Bing. N. C. 235; Foster *v.* Hall, 12 Pick. 89, 92, 99, where the English decisions on this subject are fully reviewed by the learned Chief Justice; Doe *v.* Harris, 5 C. & P. 592; Walker *v.* Wildman, 6 Madd. R. 47. There are some decisions which require that a suit be either pending or anticipated. See Williams *v.* Mundie, Ry. & M. 34; Broad *v.* Pitt, 3 C. & P. 518; Duffin *v.* Smith, Peake's Cas. 108. But these are now overruled. See Pearse *v.* Pearse, 11 Jur. 52; 1 De Gex & Smale, 12 s. c. The law of Scotland is the same in this matter as that of England. Tait on Evid. 384.

[4] Radcliffe *v.* Fursman, 2 Bro. P. C. 514.

[5] Preston *v.* Carr, 1 Y. & Jer. 175.

[6] Newton *v.* Beresford, 1 You. 376.

[7] In Bolton *v.* Corp. of Liverpool, 1 My. & K. 88, per Ld. Chancellor Brougham; and in Pearse *v.* Pearse, 11 Jur. 52, by Knight Bruce, V. C. In the following observations of this learned judge, we have the view at present taken of this vexed question in England. "That cases laid

rule seems plainly to require that the entire professional intercourse between client and attorney, whatever it may have consisted in, should be protected by profound secrecy.[1]

before counsel, on behalf of a client, stand upon the same footing as other professional communications from the client to the counsel and solicitor, or to either of them, may, I suppose, be assumed; and that, as far as any discovery by the solicitor or counsel is concerned, the question of the existence or non-existence of any suit, claim, or dispute, is immaterial — the law providing for the client's protection in each state of circumstances, and in each equally, is, I suppose, not a disputable point. I suppose Cromack *v.* Heathcote, (2 Brod. & Bing. 4,) to be now universally acceded to, and the doctrine of this court to have been correctly stated by Lord Lyndhurst, in Herring *v.* Clobery (1 Phil. 91), when he said, 'I lay down this rule with reference to this cause, that, where an attorney is employed by a client professionally to transact professional business, all the communications that pass between the client and the attorney, in the course and for the purpose of that business, are privileged communications, and that the privilege is the privilege of the client, and not of the attorney.' This I take to be not a peculiar, but a general rule of jurisprudence. The civil law, indeed, considered the advocate and client so identified or bound together, that the advocate was, I believe, generally not allowed to be a witness for the client. '*Ne patroni in causâ, cui patrocinium præstiterunt, testimonium dicant,*' says the Digest (Dig. lib. 22, tit. 5, l. 25). An old jurist, indeed, appears to have thought, that, by putting an advocate to the torture, he might have made a good witness for his client; but this seems not to have met with general approbation. Professors of the law, probably, were not disposed to encourage the dogma practically. Voet puts the communications between a client and an advocate on the footing of those between a penitent and his priest. He says: '*Non etiam advocatus aut procurator in eâ causâ, cui patrocinium præstitit aut procurationem, idoneus testis est, sive pro cliente sive contra eum producatur; saltem non ad id, ut pandere cogeretur ea, quæ non aliunde quam ex revelatione clientis, comperta habet; eo modo, quo, et sacerdoti revelare ea quæ ex auriculari didicit confessione, nefas est.*' Now, whether laying or not laying stress on the observations made by the late Lord Chief Baron, in Knight *v.* Lord Waterford (2 Y. & C. 40, 41), — observations, I need not say, well worthy of attention, — I confess myself at a loss to perceive any substantial difference, in point of reason, or principle, or convenience, between the liability of the client and that of his counsel or solicitor, to disclose the client's communications made in confidence professionally to either. True, the client is or may be compellable to disclose all, that, before he consulted the counsel or solicitor, he knew, believed, or had seen or heard; but the question is not, I apprehend, one as to the greater or less probability of more or less damage. The question is, I suppose, one of principle, — one that ought to be decided according to certain rules of jurisprudence; nor is the exemption of the solicitor or counsel from compulsory discovery confined to advice given, or opinions stated. It extends to facts communicated by the client. Lord Eldon has said (19 Ves. 267): 'The case might easily be put, that a most honest man, so changing his situation, might communicate a fact, appearing to him to have no connection with the case, and yet the whole title of his former client might depend on it. Though Sir John Strange's opinion was, that an attorney might, if he pleased, give evidence of his client's secrets, I take it to be clear, that no court would permit him to give such evidence, or would have any difficulty, if a solicitor, voluntarily changing his situation, was, in his new character, proceeding to communicate a material fact. A short way of preventing him would be, by striking him off the roll.' But as to damage: a man, having laid a case before counsel, may die, leaving all the rest of mankind ignorant of a blot on his title stated in the case, and not discoverable by any other means. The whole fortunes of his family may turn on the question, whether the case shall be discovered, and may be subverted by its discovery. Again, the client is certainly exempted from liability to discover communications between himself and his counsel or solicitor after litigation commenced, or after the commencement of a dispute ending in litigation; at least, if they relate to the dispute, or matter in

[1] Thus, what the attorney *saw*, namely, the destruction of an instrument, was held privileged. Robson *v.* Kemp, 5 Esp. 52.

§ 240*a*. In regard to the obligation of the party to discover and produce the opinion of counsel, various distinctions have been attempted to be set up, in favor of a discovery of communications

dispute. Upon this I need scarcely refer to a class of authorities, to which Hughes *v.* Biddulph (4 Russ. 160), Nias *v.* Northern and Eastern Railway Company (3 Myl. & Cr. 355), before the present Lord Chancellor, in his former chancellorship, and Holmes *v.* Baddeley (1 Phil. 476), decided by Lord Lyndhurst, belong. But what, for the purpose of discovery, is the distinction in point of reason, or principle, or justice, or convenience, between such communications and those which differ from them only in this, that they precede, instead of following, the actual arising, not of a cause for dispute, but of a dispute, I have never hitherto been able to perceive. A man is in possession of an estate as owner; he is not under any fiduciary obligation; he finds a flaw, or a supposed flaw, in his title, which it is not, in point of law or equity, his duty to disclose to any person; he believes that the flaw or supposed defect is not known to the only person, who, if it is a defect, is entitled to take advantage of it, but that this person may probably or possibly soon hear of it, and then institute a suit, or make a claim. Under this apprehension he consults a solicitor, and, through the solicitor, lays a case before counsel on the subject, and receives his opinion. Some time afterwards the apprehended adversary becomes an actual adversary, for, coming to the knowledge of the defect or supposed flaw in the title, he makes a claim, and, after a preliminary correspondence, commences a suit in equity to enforce it; but between the commencement of the correspondence and the actual institution of the suit, the man in possession again consults a solicitor, and through him again lays a case before counsel. According to the respondent's argument before me on this occasion, the defendant, in the instance that I have supposed, is as clearly bound to disclose the first consultation and the first case, as he is clearly exempted from discovering the second consultation and the second case. I have, I repeat, yet to learn that such a distinction has any foundation in reason or convenience. The discovery and vindication and establishment of truth, are main purposes, certainly, of the existence of courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly, or gained by unfair means — not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination, nor probably would the purpose of the mere disclosure of truth have been otherwise than advanced by a refusal, on the part of the Lord Chancellor in 1815, to act against the solicitor, who, in the cause between Lord Cholmondeley and Lord Clinton, had acted or proposed to act in the manner which Lord Eldon thought it right to prohibit. Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself." See 11 Jur. pp. 54, 55; 1 De Gex & Smale, 25–29. See also Gresley on Evid. 32, 33; Bp. of Meath *v.* Marq. of Winchester, 10 Bing. 330, 375, 454, 455; Nias *v.* The Northern, &c., Railway Co. 3 My. & C. 355, 357; Bunbury *v.* Bunbury, 2 Beav. 173; Herring *v.* Clobery, 1 Turn. & Phil. 91; Jones *v.* Pugh, Id. 96; Law Mag. (London), vol. 17, pp. 51–74; and vol. 30, pp. 107–123; Holmes *v.* Baddeley, 1 Phil. Ch. R. 476. Lord Langdale has held, that the privilege of a client, as to discovery, was not co-extensive with that of his solicitor; and therefore he compelled the son and heir to discover a case, which had been submitted to counsel by his father, and had come, with the estate, to his hands. Greenlaw *v.* King, 1 Beavan, R. 137. But his opinion, on the general question, whether the party is bound to discover a case submitted to his counsel, is known to be opposed to that of a majority of the English judges, though still retained by himself. See Crisp *v.* Platel, 6 Beav. 62; Reece *v.* Trye, 9 Beav. 316, 318, 319; Peile *v.* Stoddart, 13 Jur. 373. [* It should be borne in mind that no presumption of fact can be made against the party, upon the ground that he declines to allow his counsel to disclose existing confidences between them. Wentworth *v.* Lloyd, 10 Ho. Lds. Cas. 589; s. c. 10 Jur. n. s. 961; Bolton *v.* Corporation of Liverpool, *supra*.]

made before litigation, though in contemplation of, and with reference to such litigation, which afterwards took place; and again, in respect to communications which, though in fact made after the dispute between the parties, which was followed by litigation, were yet made neither in contemplation of, nor with reference to, such litigation; and again, in regard to communications of cases or statements of fact, made on behalf of a party by or for his solicitor or legal adviser, on the subject-matter in question, after litigation commenced, or in contemplation of litigation on the same subject with other persons, with the view of asserting the same right; but all these distinctions have been overruled, and the communications held to be within the privilege.[1] And where a *cestui que trust* filed a bill against his trustee, to set aside a purchase by the latter of the trust property, made thirty years back; and the trustee filed his cross-bill, alleging that the *cestui que trust* had long known his situation in respect to the property, and had acquiesced in the purchase, and in proof thereof that he had, fifteen years before, taken the opinion of counsel thereon, of which he prayed a discovery and production; it was held that the opinion, as it was taken after the dispute had arisen which was the subject of the original and cross-bill, and for the guidance of one of the parties in respect of that very dispute, was privileged at the time it was taken; and as the same dispute was still the subject of the litigation, the communication still retained its privilege.[2] But where a bill for the specific performance of a contract for the sale of an estate was brought by the assignees of a bankrupt who has sold it under their commission, and a cross-bill was filed against them for discovery, in aid of the defence, it was held that the privilege of protection did not extend to professional and confidential communications between the defendants and their counsel, respecting the property and before the sale, but only to such as had passed after the sale; and that it did not extend to communications between them in the relation of principal and agent; nor to those had by the defendants or their counsel with the insolvent, or his creditors, or the provisional assignee, or on behalf of the wife of the insolvent.[3]

[1] Ld. Walsingham *v.* Goodricke, 8 Hare, 122, 125; Hughes *v.* Biddulph, 4 Russ. 190; Vent *v.* Pacey, Id. 193; Claggett *v.* Phillips, 2 Y. & C. 82; Combe *v.* Corp. of Lond. 1 Y. & C. 631; Holmes *v.* Baddeley, 1 Phil. Ch. R. 476.

[2] Woods *v.* Woods, 9 Jur. 615, per Sir J. Wigram, V. C.

[3] Robinson *v.* Flight, 8 Jur. 888, per Ld. Langdale.

§ 241. Upon the foregoing principles it has been held, that the attorney is *not bound to produce title deeds*, or other documents, left with him by his client for professional advice; though he may be examined to the fact of their existence, in order to let in secondary evidence of their contents, which must be from some other source than himself.[1] But whether the object of leaving the documents with the attorney was for professional advice or for another purpose may be determined by the judge.[2] If he was consulted merely as a *conveyancer*, to draw deeds of conveyance, the communications made to him in that capacity are within the rule of protection,[3] even though he was employed as the mutual adviser and counsel of both parties; for it would be most mischievous, said the learned judges in the Common Pleas, if it could be doubted, whether or not an attorney, consulted upon a man's title to an estate, were at liberty to divulge a flaw.[4] Neither does the rule require any regular *retainer*, as counsel, nor any particular form of application or engagement, nor the payment of fees. It is enough that he was applied to for advice or aid in his professional character.[5] But this character must have been known to the applicant; for if a person should be consulted confidentially, on the supposition that he was an attorney, when in fact he was not one, he will be compelled to disclose the matters communicated.[6]

§ 242. This rule is limited to cases where the witness, or the

[1] Brard *v.* Ackerman, 5 Esp. 119; Doe *v.* Harris, 5 C. & P. 592; Jackson *v.* Burtis, 14 Johns. 391; Dale *v.* Livingston, 4 Wend. 558; Brandt *v.* Klein, 17 Johns. 335; Jackson *v.* McVey, 18 Johns. 330; Bevan *v.* Waters, 1 M. & M. 235; Eicke *v.* Nokes, Id. 303; Mills *v.* Oddy, 6 C. & P. 728; Marston *v.* Downes, Id. 381; 1 Ad. & El. 31, s. c.; explained in Hibbert *v.* Knight, 12 Jur. 162; Bate *v.* Kinsey, 1 C. M. & R. 38; Doe *v.* Gilbert, 7 M. & W. 102; Nixon *v.* Mayoh, 1 M. & Rob. 76. Davies *v.* Waters, 9 M. & W. 608; Coates *v.* Birch, 1 G. & D. 474; 1 Dowl. P. C. 540; Doe *v.* Langdon, 12 Ad. & El. 711, N. S.

[2] Reg. *v.* Jones, 1 Denis. Cr. Cas. 166.

[3] Cromack *v.* Heathcote, 2 B. & B. 4; Parker *v.* Carter, 4 Munf. 273; see also Wilson *v.* Troup, 7 Johns. Ch. 25. If he was employed as the conveyancer and mutual counsel of both parties, either of them may compel the production of the deeds and papers, in a subsequent suit between themselves. So it was held in chancery, in a suit by the wife against the husband, for specific performance of an agreement to charge certain estates with her jointure. Warde *v.* Warde, 15 Jur. 759.

[4] Cromack *v.* Heathcote, 2 B. & B. 4; Doe *v.* Seaton, 2 Ad. & El. 171; Clay *v.* Williams, 2 Munf. 105, 122; Doe *v.* Watkins, 3 Bing. N. C. 421.

[5] Foster *v.* Hall, 12 Pick. 89. See also Bean *v.* Quimby, 5 N. Hamp. 94. An application to an attorney or solicitor, to advance money on a mortgage of property described in a forged will, shown to him, is not a privileged communication as to the will. Reg. *v.* Farley, 1 Denison, 197. And see Reg. *v.* Jones, Id. 166. [*The mere fact of having retained counsel is not a privileged communication. Forshaw *v.* Lewis, 1 Jur. N. S. 263.]

[6] Fountain *v.* Young, 6 Esp. 113; [Barnes *v.* Harris, 7 Cush. 576, 578.]

defendant in a bill in chancery treated as such, and so called to discover, learned the matter in question only as counsel, solicitor, or attorney, and in no other way. If, therefore, he were a *party to the transaction*, and especially if he were party to the fraud (as, for example, if he turned informer, after being engaged in a conspiracy), or, in other words, if he were acting for himself, though he might also be employed for another, he would not be protected from disclosing; for in such a case his knowledge would not be acquired solely by his being employed professionally.[1]

§ 243. The protection given by the law to such communications does not cease with the termination of the suit, or other litigation or business, in which they were made; nor is it affected by the party's ceasing to employ the attorney, and retaining another; nor by any other change of relations between them; nor by the death of the client. The seal of the law, once fixed upon them, *remains for ever; unless removed by the party himself*, in whose favor it was there placed.[2] It is not removed without the client's consent, even though the interests of criminal justice may seem to require the production of the evidence.[3]

§ 244. This rule is further illustrated by reference to the cases, in which the attorney may be examined, and which are therefore

[1] Greenough *v.* Gaskell, 1 My. & K. 103, 104; Desborough *v.* Rawlins, 3 My. & Craig, 515, 521–523; Story on Eq. Pl. §§ 601, 602. In Duffin *v.* Smith, Peake's Cas. 108, Lord Kenyon recognized this principle, though he applied it to the case of an attorney preparing title deeds, treating him as thereby becoming a party to the transaction; but such are now held to be professional communications. [A communication to an attorney will not be protected, unless it appears that, at the time it was made, he was acting as legal adviser upon the very matter to which the communication referred. Branden *v.* Gowing, 7 Rich (s. c.), 459. Facts stated to an attorney, as reasons to show that the cause in which he is sought to be retained, does not conflict with the interests of a client for whom he is already employed, are not confidential communications. Heaton *v.* Findlay, 12 Penn. St. R. 304.]

[2] Wilson *v.* Rastall, 4 T. R. 759, per Buller, J.; Petrie's case, cited arg. 4 T. R. 756; Parker *v.* Yates, 12 Moore, 520; Merle *v.* Moore, R. & M. 390. And the client does not waive this privilege merely by calling the attorney as a witness, unless he also himself examines him in chief to the matter privileged. Vaillant *v.* Dodemead, 2 Atk. 524; Waldron *v.* Ward, Sty. 449. If several clients consult him respecting their common business, the consent of them all is necessary to enable him to testify; even in an action in which only one of them is a party. Bank of Utica *v.* Mersereau, 3 Barb. Ch. R. 528. Where the party's solicitor became trustee under a deed for the benefit of the client's creditors, it was held that communications subsequent to the deed were still privileged. Pritchard *v.* Foulkes, 1 Coop. 14.

[3] Rex *v.* Smith, Phil. & Am. on Evid. 182; Rex *v.* Dixon, 3 Burr. 1687; Anon. 8 Mass. 370; Petrie's case, *supra*. But see Regina *v.* Avery, 8 C. & P. 596, in which it was held that, where the same attorney acted for the mortgagee, in lending the money, and also for the prisoner, the mortgagor, in preparing the mortgage deed, and received from the prisoner, as part of his title deeds, a forged will, it was held, on a trial for forging the will, that it was not a privileged communication; and the attorney was held bound to produce it. See also Shore *v.* Bedford, 5 Man. & Grang. 271.

sometimes mentioned as *exceptions to the rule*. These apparent exceptions are, where the communication was made *before the attorney was employed* as such, or *after* his employment had *ceased;* — or where, though consulted by a friend, because he was an attorney, yet he refused to act as such, and was therefore only applied to *as a friend;* — or where there could not be said, in any correctness of speech, to be a communication at all; as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact *any* other *man*, if there, would have been *equally conusant* (and even this has been held privileged in some of the cases); — or where the matter communicated was *not in its nature private*, and could in no sense be termed the subject of a confidential disclosure; — or where the thing had *no reference to the professional employment*, though disclosed while the relation of attorney and client subsisted; — or where the attorney, having made himself a *subscribing witness*, and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the attorney is not called upon to disclose matters, which he can be said to have learned by communication with his client, or on his client's behalf, matters which were so committed to him, in his capacity of attorney, and matters which in that capacity alone, he had come to know.[1]

§ 245. Thus, the *attorney may be compelled* to disclose the name of the person by whom he was retained, in order to let in the confessions of the real party in interest;[2] — the character in which his client employed him, whether that of executor or trustee, or on his private account;[3] — the time when an instrument was

[1] Per Lord Brougham, in Greenough *v.* Gaskell, 1 My. & K. 104. See also Desborough *v.* Rawlins, 3 My. & Craig, 521, 522; Lord Walsingham *v.* Goodricke, 3 Hare, R. 122; Story's Eq. Pl. §§ 601, 602; Bolton *v.* Corporation of Liverpool, 1 My. & K. 88; Annesley *v.* E. of Anglesea, 17 Howell's St. Tr. 1239–1244; Gillard *v.* Bates, 6 M. & W. 547; Rex *v.* Brewer, 6 C. & P. 363; Levers *v.* Van Buskirk, 4 Barr, 309. Communications between the solicitor and one of his clients' witnesses, as to the evidence to be given by the witness, are not privileged. Mackenzie *v.* Yeo, 2 Curt. 866. It has also been held, that communication between a testator and the solicitor who prepared his will, respecting the will and the trusts thereof, are not privileged. Russell *v.* Jackson, 15 Jur. 1117.

[2] Levy *v.* Pope, 1 M. & M. 410; Brown *v.* Payson, 6 N. Hamp. 443; Chirac *v.* Reinicker, 11 Wheat. 280; Gower *v.* Emery, 6 Shepl. 79.

[3] Beckwith *v.* Benner, 6 C. & P. 681. But see Chirac *v.* Reinicker, 11 Wheat. 280, 295, where it was held, that counsel could not disclose whether they were employed to conduct an ejectment for their client *as landlord of the premises*.

put into his hands, but not its condition and appearance at that time, as, whether it were stamped or indorsed, or not;[1] — the fact of his paying over to his client moneys collected for him; — the execution of a deed by his client which he attested;[2] — a statement made by him to the adverse party.[3] He may also be called to prove the identity of his client;[4] — the fact of his having sworn to his answer in chancery, if he were then present;[5] — usury in a loan made by him as *broker*, as well as attorney to the lender;[6] — the fact that he or his client is in possession of a certain document of his client's, for the purpose of letting in secondary evidence of its contents;[7] — and his client's handwriting.[8] But in all cases of this sort, the privilege of secrecy is carefully extended to all the matters professionally disclosed, and which he would not have known but from his being consulted professionally by his client.

§ 246. Where an attorney is *called upon* whether by *subpœna duces tecum*, or otherwise, *to produce* deeds or papers belonging to his client, who is *not a party* to the suit, the *court will inspect the documents*, and pronounce upon their admissibility, according as their production may appear to be prejudicial or not to the client; in like manner, as where a witness objects to the production of his own title-deeds.[9] And the same discretion will be exercised by the courts, where the documents called for are in the hands of solicitors for the assignees of bankrupts;[10] though it was at one

[1] Wheatley *v.* Williams, 1 Mees. & W. 533; Brown *v.* Payson, 6 N. Hamp 443. But if the question were about a rasure in a deed or will, he might be examined to the question, whether he had ever seen it in any other plight. Bull. N. P. 284. So, as to a confession of the rasure by his client, if it were confessed before his retainer. Cutts *v.* Pickering, 1 Ventr. 197. See also Baker *v.* Arnold, 1 Caines, 258, per Thompson & Livingston, Js.

[2] Doe *v.* Andrews, Cowp. 845; Robson *v.* Kemp, 4 Esp. 235; 5 Esp. 53, s. c.; Sanford *v.* Remington, 2 Ves. 189.

[3] Ripon *v.* Davies, 2 Nev. & M. 210; Shore *v.* Bedford, 5 M. & Gr. 271; Griffith *v.* Davies, 5 B. & Ad. 502, overruling Gainsford *v.* Grammar, 2 Campb. 9, contra.

[4] Cowp. 846; Beckwith *v.* Benner, 6 C. & P. 681; Hurd *v.* Moring, 1 C. & P. 372; Rex *v.* Watkinson, 2 Stra. 1122, and note.

[5] Bull. N. P. 284; Cowp. 846.

[6] Duffin *v.* Smith, Peake's Cas. 108.

[7] Bevan *v.* Waters, 1 M. & M. 235; Eicke *v.* Nokes, Id. 303; Jackson *v.* McVey, 18 Johns. 330; Brandt *v.* Klein, 17 Johns. 335; Doe *v.* Ross, 7 M. & W. 102; Robson *v.* Kemp, 5 Esp. 53; Coates *v.* Birch, 2 Ad. & El. 252, n. s.; Coveney *v.* Tannahill, 1 Hill, 33; Dwyer *v.* Collins, 16 Jur. 569; 7 Exch. 639.

[8] Hurd *v.* Moring, 1 C. & P. 372; Johnson *v.* Daverne, 19 Johns. 134; 4 Hawk. P. C., b. 2, ch. 46, § 89.

[9] Copeland *v.* Watts, 1 Stark. R. 95; Amey *v.* Long, 9 East, 473; 1 Campb. 14 s. c.; Phil. & Am. on Evid. 186; 1 Phil. Evid. 175; Reynolds *v.* Rowley, 3 Rob. (Louis.) R. 201; Travis *v.* January, Id. 227.

[10] Bateson *v.* Hartsink, 4 Esp. 43; Cohen *v.* Templar, 2 Stark. R. 260; Laing *v.* Barclay, 3 Stark. R. 38; Hawkins *v.* Howard, Ry. & M. 64; Corsen *v.* Dubois, Holt's Cas. 239; Bull *v.* Loveland, 10 Pick. 9, 14; Volant *v.* Soyer, 22 Law

time thought that their production was a matter of public duty.[1] So, if the documents called for are in the hands of the *agent* or *steward* of a third person, or even in the hands of the owner himself, their production will not be required where, in the judgment of the court, it may injuriously affect his title.[2] This extension of the rule, which will be more fully treated hereafter, is founded on a consideration of the great inconvenience and mischief which may result to individuals from a compulsory disclosure and collateral discussion of their titles, in cases where, not being themselves parties, the whole merits cannot be tried.

§ 247. There is one other situation, in which the exclusion of evidence has been strongly contended for, on the ground of confidence and the general good, namely, that of a *clergyman;* and this chiefly, if not wholly, in reference to criminal conduct and proceedings; that the guilty conscience may with safety disburden itself by penitential confessions, and by spiritual advice, instruction, and discipline, seek pardon and relief. The law of Papal Rome has adopted this principle in its fullest extent; not only excepting such confessions from the general rules of evidence, as we have already intimated,[3] but punishing the priest who reveals

J. C. P. 83; 16 Eng. Law & Eq. R. 426.

[1] Pearson *v.* Fletcher, 5 Esp. 90, per Lord Ellenborough.

[2] Rex *v.* Hunter, 3 C. & P. 591; Pickering *v.* Noyes, 1 B. & C. 262; Roberts *v.* Simpson, 2 Stark. R. 203; Doe *v.* Thomas, 9 B. & C. 288; Bull *v.* Loveland, 10 Pick. 9, 14. And see Doe *v.* Langdon, 12 Ad. & El. 711, N. S.; 13 Jur. 96; Doe *v.* Hertford, 13 Jur. 632. H. brought an action upon bonds against E., in which the opinion of eminent counsel had been taken by the plaintiff, upon a case stated. Afterwards an action was brought by C. against E. upon other similar bonds, and the solicitor of H. lent to the solicitor of C. the case and opinion of counsel taken in the former suit, to aid him in the conduct of the latter. And upon a bill filed by E. against C., for the discovery and production of this document, it was held to be a privileged communication. Enthoven *v.* Cobb, 16 Jur. 1152; 17 Jur. 81; 15 Eng. Law & Eq. R. 277, 295. [* In a late case, Volant *v.* Soyer, 13 C. B. 231, it was held that an attorney had no right to produce or to answer any questions concerning the nature or contents of a deed or other document intrusted to him professionally by his client; nor can the judge look at the instrument, with a view to determine whether the objection to giving testimony in regard to it be well founded.

Where a witness declined answering on the ground that "his knowledge inquired after had been acquired by virtue of his employment as the solicitor of the defendant in relation to such matters, and from no other source," the court held, Kindersby, V. C., that to be privileged, it must be "a confidential communication between him and his client in the character of his professional relation of solicitor and client. It is not necessary to show that it was secret, but it must pass in that relation; and it must arise from communications by the client to the solicitor, or solicitor to the client." Marsh *v.* Keith, 6 Jur. N. S. 1182.]

[3] *Supra*, § 229, note. By the Capitularies of the French kings, and some other continental codes of the Middle Ages, the clergy were not only excused, but in some cases were utterly prohibited from attending as witnesses in any cause. Clerici de judicii sui cognitione non cogantur in publicum dicere testimonium. Capit. Reg. Francorum, lib. 7, § 118, (A. D. 827.) Ut nulla ad testimonia dicendum, ecclesiastici cujuslibet pulsetur persona. Id. § 91. See Leges Barbar. Antiq. vol. 3, pp. 313, 316. Leges Langobardicæ, in the same collec-

them. It even has gone farther; for *Mascardus*, after observing that, in general, persons coming to the knowledge of facts, under an oath of secrecy, are compellable to disclose them as witnesses, proceeds to state the case of confessions to a priest as not within the operation of the rule, on the ground that the confession is made not so much to the priest, as to the Deity; whom he represents; and that therefore the priest, when appearing as a witness in his private character, may lawfully swear that he knows nothing of the subject. *Hoc tamen restringe, non posse procedere in sacerdote producto in testem contra reum criminis, quando in confessione sacramentali fuit aliquid sibi dictum, quia potest dicere, se nihil scire ex eo; quod illud, quod scit, scit ut Deus, et ut Deus non producitur in testem, sed ut homo, et tanquam homo ignorat illud super quo producitur.*[1] In Scotland, where a prisoner in custody and preparing for his trial, has confessed his crimes to a clergyman, in order to obtain spiritual advice and comfort, the clergyman is not required to give evidence of such confession. But even in criminal cases, this exception is not carried so far as to include communications made confidentially to clergymen, in the ordinary course of their duty.[2] Though the law of England encourages the penitent to confess his sins, "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind," yet the minister to whom the confession is made is merely excused from presenting the offender to the civil magistracy, and enjoined not to reveal the matter confessed, "under pain of irregularity."[3] In all other respects, he is left to the full operation of the rules of the common law, by which he is bound to testify in such cases, as any other person when duly summoned. In the common law of evidence there is no distinction between clergymen and laymen; but all confessions, and other matters, not confided to legal counsel, must be disclosed, when required for the purposes of justice. Neither penitential confessions, made to the minister, or to members of the party's own church, nor secrets confided to a Roman Catholic

tion, vol. 1, pp. 184, 209, 237. But from the constitutions of King Ethelred, which provide for the punishment of priests guilty of perjury, — "Si presbyter, *alicubi* inveniatur in falso testimonio, vel in perjurio," — it would seem that the English law of that day did not recognize any distinction between them and the laity, in regard to the obligation to testify as witnesses. See Leges Barbaror. Antiq. vol. 4, p. 294; Ancient Laws and Inst. of England, vol. 1, p. 347, § 27.

[1] Mascard. De Probat. vol. 1, Quæst. 5, n. 61; Id. Concl. 377. Vid. et P. Farinac. Opera, tit. 8, Quæst. 78, n. 73.

[2] Tait on Evidence, pp. 386, 387; Alison's Practice, p. 586.

[3] Const. & Canon, 1 Jac. 1, Can. cxiii.; Gibson's Codex, p. 963.

priest in the course of confession, are regarded as privileged communications.[1]

§ 248. Neither is this protection extended to *medical persons*,[2] in regard to information which they have acquired confidentially, by attending in their professional characters; nor to *confidential friends*,[3] *clerks*,[4] *bankers*,[5] or *stewards*,[6] except as to matters which the employer himself would not be obliged to disclose, such as his title-deeds and private papers, in a case in which he is not a party.

§ 249. The case of *judges* and *arbitrators* may be mentioned, as the *second class* of privileged communications. In regard to judges of courts of record, it is considered dangerous to allow them to be called upon to state what occurred before them in court; and on this ground, the grand jury were advised not to examine the chairman of the Quarter Sessions, as to what a person testified in a trial in that court.[7] The case of arbitrators is

[1] Wilson *v.* Rastall, 4 T..R. 753; Butler *v.* Moore, McNally's Evid. 253–255; Anon. 2 Skin. 404, per Holt, C. J.; Du Barre *v.* Livette, Peake's Cas. 77; Commonwealth *v.* Drake, 15 Mass. 161. The contrary was held by De Witt Clinton, Mayor, in the Court of General Sessions in New York, June, 1813, in The People *v.* Phillips, 1 Southwest. Law Journ. p. 90. By a subsequent statute of *New York* (2 Rev. St. 406, § 72), "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." This is held to apply to those confessions *only* which are made to the minister or priest *professionally*, and in the course of *discipline enjoined* by the Church. The People *v.* Gates, 13 Wend. 311. A similar statute exists in *Missouri* (Rev. Stat. 1845, ch. 186, § 19; and in *Wisconsin*, Rev. Stat. 1849, ch. 98, § 75; and in *Michigan*, Rev. Stat. 1846, ch. 102, § 85; and in *Iowa*, Code of 1851, art. 2393). See also Broad *v.* Pitt, 3 C. & P. 518; in which case, Best, C. J., said, that he for one, would never compel a clergyman to disclose communications made to him by a prisoner; but that, if he chose to disclose them, he would receive them in evidence. Joy on Confessions, &c., pp. 49–58; Best's Principles of Evidence, § 417–419.

[2] Duchess of Kingston's case, 11 Hargr. St. Tr. 243; 20 Howell's St. Tr. 643; Rex *v.* Gibbons, 1 C. & P. 97; Broad *v.* Pitt, 3 C. & P. 518, per Best, C. J. By the Revised Statutes of New York (vol. 2, p. 406, § 73), "No person, duly authorized to practise physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." But though the statute is thus express, yet it seems the party himself may waive the privilege; in which case the facts may be disclosed. Johnson *v.* Johnson, 14 Wend. 637. A consultation, as to the means of procuring abortion in another, is not privileged by this statute. Hewett *v.* Prime, 21 Wend. 79. Statutes to the same effect have been enacted in *Missouri* (Rev. Stat. 1845, ch. 186, § 20); and in *Wisconsin* (Rev. Stat. 1849, ch. 98, § 75); and in *Michigan* (Rev. Stat. 1846, ch. 102, § 86). So in *Iowa;* in which state the privilege extends to public officers, in cases where the public interest would suffer by the disclosure. Code of 1851, arts. 2393, 2395.

[3] 4 T. R. 758, per Ld. Kenyon; Hoffman *v.* Smith, 1 Caines, 157, 159.

[4] Lee *v.* Birrell, 3 Campb. 337; Webb *v.* Smith, 1 C. & P. 337.

[5] Loyd *v.* Freshfield, 2 C. & P. 325.

[6] Vaillant *v.* Dodemead, 2 Atk. 524; 4 T. R. 756, per Buller, J.; E. of Falmouth *v.* Moss, 11 Price, 455.

[7] Regina *v.* Gazard, 8 C. & P. 595, per

governed by the same general policy; and neither the courts of law nor of equity will disturb decisions deliberately made by arbitrators, by requiring them to disclose the grounds of their award, unless under very cogent circumstances, such as upon an allegation of fraud; for, *Interest reipublicæ ut sit finis litium.*[1]

§ 250. We now proceed to the *third class* of cases, in which evidence is excluded from motives of public policy, namely, *secrets of state*, or things, the disclosure of which would be prejudicial to the public interest. These matters are either those which concern the administration of penal justice, or those which concern the administration of government; but the principle of public safety is in both cases the same, and the rule of exclusion is applied no further than the attainment of that object requires. Thus, in criminal trials, the names of persons employed in the discovery of the crime are not permitted to be disclosed, any farther than is essential to a fair trial of the question of the prisoner's innocence or guilt.[2] "It is perfectly right," said Lord Chief Justice Eyre,[3] "that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not be unnecessarily disclosed." Accordingly, where a witness, possessed of such knowledge, testified that he related it to a friend, not in office, who advised him to communicate it to another quarter; a majority of the learned judges held that the witness was not to be asked the name of that friend; and they all were of opinion that all those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, were, upon the general principle of the convenience of public justice, to be suppressed; that all persons in that situation were protected from the discovery; and that, if it was objected to, it was no more competent for the defendant to ask the witness who the person

Patteson, J.; [People *v.* Miller, 2 Parker, C. R. 197.]

[1] Story, Eq. Pl. 458, note (1); Anon. 3 Atk. 644; 2 Story, Eq. Jurisp. 680; Johnson *v.* Durant, 4 C. & P. 327; Ellis *v.* Saltau, 1b. n. (*a*); Habershon *v.* Troby, 3 Esp. 38. [See 2 Greenl. Evid. (7th edit.) § 78, and notes.]

[2] Rex *v.* Hardy, 24 Howell's St. Tr. 753. The rule has been recently settled, that, in a public prosecution, no question can be put which tends to reveal who was the secret informer of the government; even though the question be addressed to a witness in order to ascertain whether he was not himself the informer. Att.-Gen. *v.* Briant, 15 Law Journ. N. S. Exch. 265; 5 Law Mag. 333, N. S.

[3] In Rex *v.* Hardy, 24 Howell's St. Tr. 808.

was that advised him to make a disclosure, than to ask who the person was to whom he made the disclosure in consequence of that advice, or to ask any other question respecting the channel of communication, or all that was done under it.[1] Hence it appears that a witness, who has been employed to collect information for the use of government, or for the purposes of the police, will not be permitted to disclose the name of his employer, or the nature of the connection between them, or the name of any person who was the channel of communication with the government or its officers, nor whether the information has actually reached the government. But he may be asked whether the person to whom the information was communicated was a magistrate or not.[2]

§ 251. On a like principle of public policy, the official transactions between the *heads of the departments of state and their subordinate officers* are in general treated as privileged communications. Thus, communications between a provincial governor and his attorney-general, on the state of the colony, or the conduct of its officers;[3] or between such governor and a military officer under his authority;[4] the report of a military commission of inquiry, made to the commander-in-chief;[5] and the correspondence between an agent of the government and a Secretary of State,[6] are confidential and privileged matters, which the interests of the state will not permit to be disclosed. The President of the United States, and the governors of the several states, are not bound to produce papers or disclose information communicated to them, when, in their own judgment the disclosure would, on public considerations, be inexpedient.[7] And where the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents.[8]

[1] Rex *v.* Hardy, 24 Howell's St. Tr. 808–815, per Ld. C. J. Eyre; Id. 815–820.

[2] 1 Phil. Evid. 180, 181; Rex *v.* Watson, 2 Stark. R. 136; 32 Howell's St. Tr. 101; United States *v.* Moses, 4 Wash. 726; Home *v.* Ld. F. C. Bentinck, 2 B. & B. 130, 162, per Dallas, C. J.

[3] Wyatt *v.* Gore, Holt's N. P. Cas. 299.

[4] Cooke *v.* Maxwell, 2 Stark. R. 183.

[5] Home *v.* Ld. F. C. Bentinck, 2 B. & B. 130.

[6] Anderson *v.* Hamilton, 2 B. & B. 156, note; 2 Stark. R. 185, per Lord Ellenborough, cited by the Attorney-General; Marbury *v.* Madison, 1 Cranch, 144.

[7] 1 Burr's Trial, pp. 186, 187, per Marshall, C. J.; Gray *v.* Pentland, 2 S. & R. 23.

[8] Gray *v.* Pentland, 2 Serg. & R. 23, 31, 32, per Tilghman, C. J., cited and approved in Yoter *v.* Sanno, 6 Watts, 156, per Gibson, C. J. In Law *v.* Scott, 5 Har. & J. 438, it *seems* to have been held, that a senator of the United States may be examined, as to what transpired in a secret executive session, if the Senate has refused, on the party's application, to re-

But communications, though made to official persons, are not privileged where they are not made in the discharge of any public duty; such, for example, as a letter by a private individual to the chief secretary of the postmaster-general, complaining of the conduct of the guard of the mail towards a passenger.[1]

§ 252. For the same reason of public policy, in the furtherance of justice, the *proceedings of grand-jurors* are regarded as privileged communications. It is the policy of the law, that the preliminary inquiry, as to the guilt or innocence of a party accused, should be secretly conducted; and in furtherance of this object every grand-juror is sworn to secrecy.[2] One reason may be, to prevent the escape of the party, should he know that proceedings were in train against him; another may be, to secure freedom of deliberation and opinion among the grand-jurors, which would be impaired if the part taken by each might be made known to the accused. A third reason may be, to prevent the testimony produced before them from being contradicted at the trial of the indictment, by subornation of perjury on the part of the accused. The rule includes not only the grand-jurors themselves, but their clerk,[3] if they have one, and the prosecuting officer, if he is present at their deliberations;[4] all these being equally concerned in the administration of the same portion of penal law. They are not permitted to disclose who agreed to find the bill of indictment, or who did not agree; nor to detail the evidence on which the

move the injunction of secrecy. *Sed quære*, for if so, the object of the rule, in the preservation of state secrets, may generally be defeated. And see Plunkett *v.* Cobbett, 29 Howell's St. Tr. 71, 72; 5 Esp. 136, s. c., where Lord Ellenborough held, that though one member of parliament may be asked as to the fact that another member took part in a debate, yet he was not bound to relate any thing which had been delivered by such a speaker as a member of parliament. But it is to be observed, that this was placed by Lord Ellenborough on the ground of personal privilege in the member; whereas the transactions of a session, after strangers are excluded, are placed under an injunction of secrecy, for reasons of state. [* In a somewhat recent case, Beatson *v.* Skene, 5 H. & N. 838, it is said the head of the department will judge of the propriety of withholding state secrets in the first instance; and unless such officer refers the question to the court, it will not enforce the disclosure of such secrets without very conclusive evidence that it may be done without prejudice to the public service.]

[1] Blake *v.* Pilford, 1 M. & Rob. 198.

[2] ["The extent of the limitation upon the testimony of grand-jurors is best defined by the terms of their oath of office, by which 'the *commonwealth's* counsel, their *fellows'* and *their own*, they are to keep secret.'" By Bigelow, J. Commonwealth *v.* Hill, 11 Cush. 137, 140.]

[3] 12 Vin. Abr. 38, tit. Evid. B. *a*, pl. 5; Trials per Pais, 315.

[4] Commonwealth *v.* Tilden, cited in 2 Stark. Evid. 232, note (1), by Metcalf; McLellan *v.* Richardson, 1 Shepl. 82. But on the trial of an indictment for perjury, committed in giving evidence before the grand-jury, it has been held, that another person, who was present as a witness in the same matter, at the same time, is competent to testify to what the prisoner said before the grand-jury; and that a police-

accusation was founded.[1] But they may be compelled to state whether a particular person testified as a witness before the grand-jury;[2] though it seems they cannot be asked, if his testimony there agreed with what he testified upon the trial of the indictment.[3] Grand-jurors may also be asked, whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact.[4]

§ 252*a*. On similar grounds of public policy, and for the protection of parties against fraud, the law excludes the testimony of *traverse jurors*, when offered to prove *misbehavior* in the jury in regard to the verdict. Formerly, indeed, the affidavits of jurors have been admitted, in support of motions to set aside verdicts by reason of misconduct; but that practice was broken in upon by Lord Mansfield, and the settled course now is to reject them, because of the mischiefs which may result if the verdict is thus placed in the power of a single juryman.[5]

§ 253. There is a *fourth* species of evidence which is excluded, namely, that which is *indecent*, or offensive to public morals, or *injurious to the feelings or interests of third persons*, the parties themselves having no interest in the matter, except what they have impertinently and voluntarily created. The mere indecency of disclosures does not, in general, suffice to exclude them, where

officer in waiting was competent for the same purpose; neither of these being sworn to secrecy. Regina *v.* Hughes, 1 Car. & Kir. 519.

[1] Sykes *v.* Dunbar, 2 Selw. N. P. 815, [1059]; Huidekoper *v.* Cotton, 3 Watts, 56; McLellan *v.* Richardson, 1 Shepl. 82; Low's case, 4 Greenl. 439, 446, 453; Burr's Trial [Anon.], Evidence for Deft. p. 2.

[2] Sykes *v.* Dunbar, 2 Selw. N. P. 815, [1059]; Huidekoper *v.* Cotton, 3 Watts, 56; Freeman *v.* Arkell, 1 C. & P. 135, 137, n. (c.); [Commonwealth *v.* Hill, 11 Cush. 137, 140.]

[3] 12 Vin. Abr. 20, tit. Evidence, H.; Imlay *v.* Rogers, 2 Halst. 347. The rule in the text is applicable only to civil actions. In the case last cited, which was trespass, the question arose on a motion for a new trial, for the rejection of the grand-juror, who was offered in order to discredit a witness; and the court being equally divided, the motion did not prevail. Probably such also was the nature of the case in Clayt. 84, pl. 140, cited by Viner. But where a witness before the grand-jury has committed perjury in his testimony, either before them or at the trial, the reasons mentioned in the text for excluding the testimony of grand-jurors, do not prevent them from being called as witnesses after the first indictment has been tried, in order to establish the guilt of the perjured party. See 4 Bl. Comm. 126, n. 5, by Christian; 1 Chitty's Crim. Law, p. [317]. Sir J. Fenwick's case, 13 Howell's St. Tr. 610, 611; 5 St. Tr. 72; Wharton's Am. Crim. Law, p. 130. By the Revised Statutes of *New York*, vol. 2, p. 724, § 31, the question may be asked, even in civil cases.

[4] 4 Hawk. P. C., b. 2, ch. 25, § 15; McLellan *v.* Richardson, 1 Shepl. 82; Low's case, 4 Greenl. 439; Commonwealth *v.* Smith, 9 Mass. 107.

[5] Vaise *v.* Delaval, 1 T. R. 11; Jackson *v.* Williamson, 2 T. R. 281; Owen *v.* Warburton, 1 New R. 326; Little *v.* Larrabee, 2 Greenl. 37, 41, note, where the cases are collected. The State *v.* Freeman, 5 Conn. 348; Meade *v.* Smith, 16 Conn. 346; Straker *v.* Graham, 4 M. & W. 721; [Boston, &c., R. R. Corp. *v.* Dana, 1 Gray, 83, 105; Folsom *v.* Manchester, 11 Cush. 334, 337.]

the evidence is necessary for the purposes of civil or criminal justice; as, in an indictment for a rape; or in a question upon the sex of one, claiming an estate entailed, as heir male or female; or upon the legitimacy of one claiming as lawful heir; or in an action by the husband for criminal conversation with the wife. In these and similar cases the evidence is necessary, either for the proof and punishment of crime, or for the vindication of rights existing before, or independent of, the fact sought to be disclosed. But where the parties have voluntarily and impertinently interested themselves in a question, tending to violate the peace of society, by exhibiting an innocent third person to the world in a ridiculous or contemptible light, or to disturb his own peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers or contracts respecting the sex of a third person,[1] or upon the question whether an unmarried woman has had a child.[2] In this place may also be mentioned the declarations of the husband or wife, that they have had no connection, though living together, and that therefore the offspring is spurious; which on the same general ground of decency, morality, and policy, are uniformly excluded.[3]

§ 254. *Communications between husband and wife* belong also to the class of privileged communications, and are therefore protected, independently of the ground of interest and identity, which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept for ever inviolable; that nothing shall be extracted from the bosom of the wife, which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce or by the death of the husband, the wife is still precluded from disclosing any conversations with him; though she may be admitted to testify to facts which came to her knowl-

[1] Da Costa *v.* Jones, Cowp. 729.

[2] Ditchburn *v.* Goldsmith, 4 Campb. 152. If the subject of the action is frivolous, or the question impertinent, and this is apparent on the record, the court will not proceed at all in the trial. Brown *v.* Leeson, 2 H. Bl. 43; Henkin *v.* Gerss, 2 Campb. 408.

[3] Goodright *v.* Moss, Cowp. 594, said, per Lord Mansfield, to have been solemnly decided at the Delegates. Cope *v.* Cope, 1 M. & Rob. 269, per Alderson, J.; Rex *v.* Book, 1 Wils. 340; Rex *v.* Luffe, 8 East, 193, 202, 203; Rex *v.* Kea, 11 East, 132; Commonwealth *v.* Shepherd, 6 Binn. 283.

edge by means equally accessible to any person not standing in that relation.[1] Their general incompetency to testify for or against each other will be considered hereafter, in its more appropriate place.

§ 254*a*. It may be mentioned in this place, that though papers and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question.[2]

[1] Monroe *v.* Twistleton, Peake's Evid. App. lxxxii. as explained by Lord Ellenborough in Aveson *v.* Lord Kinnaird, 6 East, 192, 193; Doker *v.* Hasler, Ry. & M. 198; Stein *v.* Bowman, 13 Peters, R. 209, 223; Coffin *v.* Jones, 13 Pick. 441, 445; Edgell *v.* Bennett, 7 Verm. R. 536; Williams *v.* Baldwin, Id. 503, 506, per Royce, J. In Beveridge *v.* Minter, 1 C. & P. 364, where the widow was permitted by Abbott, C. J., to testify to certain admissions of her deceased husband, relative to the money in question, this point was not considered, the objection being placed wholly on the ground of her interest in the estate. See also 2 Kent, Comm. 180; 2 Stark. Evid. 399; Robbins *v.* King, 2 Leigh's R. 142, 144. See further, *infra*, § 333–345; [Smith *v.* Potter, 1 Williams, 304; Goltra *v.* Wolcott, 14 Ill. 89; Stein *v.* Weidman, 20 Mis. 17. In an action on the case brought by a husband for criminal conversation with his wife, the latter, after a divorce from the bonds of matrimony obtained subsequent to the time of the alleged criminal intercourse, is a competent witness for the plaintiff to prove the charge in the declaration. Dickerman *v.* Graves, 6 Cush. 308; Ratcliff *v.* Wales, 1 Hill, 63.]

[2] Commonwealth *v.* Dana, 2 Met. 329, 337; Leggett *v.* Tollervey, 14 East, 302; Jordan *v.* Lewis, Id. 306, note.

CHAPTER XIV.

OF THE NUMBER OF WITNESSES, AND THE NATURE AND QUANTITY OF PROOF REQUIRED IN PARTICULAR CASES.

[*§ 255. Two witnesses required to same overt act of treason, or to distinct acts of same species.
256. Proof restricted to overt acts laid in indictment.
257. In trials for perjury more is required than the evidence of one witness.
257*a*. And the rule applies to each separate specification.
258. It is not indispensable that any witness swear to the falsity. Other proof may be sufficient.
259. Mere contradiction in prisoner's statements not sufficient.
260. An answer in chancery requires more than the testimony of one witness to overcome it.
260*a*. General usage should be proved by more than one witness.
261. Written documents required to effect transmission of title in certain cases.
262. Statute of frauds requires written evidence in some cases.
263. This embraces all sales of land or of any interest therein.
264. Assignments or surrenders must also be in writing, &c.
265. Destruction of deed will not revest the title.
266. All trusts except resulting trusts must be evidenced by writing.
267. This statute embraces sundry other contracts.
268. Form of contract or mode of signature not important.
269. Power of agent need not be in writing. Auctioneer, agent of both parties.
270. Land embraces all interests and rights pertaining thereto.
271. Sale of things attached to land, without any use of land, not an interest in the land.
272. Devises of land required by the statute to be in writing, and witnessed by three witnesses.
273. What amounts to valid revocation of will.
274. Indentures of apprenticeship required to be in writing.]

§ 255. Under this head it is not proposed to go into an extended consideration of the statutes of treason, or of frauds, but only to mention briefly some instances in which those statutes, and some other rules of law, have regulated particular cases, taking them out of the operation of the general principles, by which they would otherwise be governed. Thus, in regard to *treasons* though by the common law the crime was sufficiently proved by one credible

witness,[1] yet, considering the great weight of the oath or duty of allegiance, against the probability of the fact of treason,[2] it has been deemed expedient to provide,[3] that no person shall be indicted or convicted of high treason, but upon the oaths and testimony of two witnesses to the same overt act, or to separate overt acts of the same treason, unless upon his voluntary confession in open court. We have already seen that a voluntary confession out of court, if proved by two witnesses, is sufficient to warrant a conviction; and that in England the crime is well proved if there be one witness to one overt act, and another witness to another overt act, of the same species of treason.[4] It is also settled that when the prisoner's confession is offered, as corroborative of the testimony of such witnesses, it is admissible, though it be proved by only one witness; the law not having excluded confessions, proved in that manner, from the consideration of the jury, but only provided that they alone shall not be sufficient to convict the prisoner.[5] And as to all matters merely *collateral*, and not conducing to the proof of the overt acts, it may be safely laid down as a general rule, that whatever was evidence at common law, is still good evidence under the express constitutional and statutory provision above mentioned.[6]

[1] Foster's Disc. p. 233; Woodbeck *v.* Keller, 6 Cowen, 120; McNally's Evid. 31.

[2] This is conceived to be the true foundation on which the rule has, in modern times, been enacted. The manner of its first introduction into the statutes was thus stated by the Lord Chancellor, in Lord Stafford's case, T. Raym. 408. "Upon this occasion, my Lord Chancellor, in the Lords House was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar, he believed; and it was this: anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law now, and then, in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and anciently heresy was treason; and from thence the parliament thought fit to appoint that two witnesses ought to be for proof of high treason."

[3] This was done by Stat. 7 W. III. c. 3, § 2. Two witnesses were required by the earlier statutes of 1 Ed. VI. c. 12, and 5 & 6 Ed. VI. c. 11; in the construction of which statutes, the rule afterwards declared in Stat. 7 W. III. was adopted. See Rex *v.* Ld. Stafford, T. Raym. 407. The Constitution of the United States provides that — "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Art. 3, § 3, LL. U. S. vol. 2, ch. 36, § 1. This provision has been adopted, in terms, in many of the state constitutions. But as in many other states there is no express law requiring that the testimony of both witnesses should be to *the* same overt act, the rule stated in the text is conceived to be that which would govern in trials for treason against those states; though in trials in the other states, and for treason against the United States, the constitutional provision would confine the evidence to the same overt act.

[4] *Supra*, § 235, n.; Lord Stafford's case, 7 Howell's St. Tr. 1527; Foster's Disc. 237; 1 Burr's Trial, 196.

[5] Willis's case, 15 Howell's St. Tr. 623, 624, 625; Grossfield's case, 26 Howell's St. Tr. 55, 56, 57; Foster's Disc. 241.

[6] *Supra*, § 235; Foster's Disc. 240, 242; 1 East, P. C. 130.

§ 256. It may be proper in this place to observe, that in treason, the rule is that no evidence can be given of any overt act, which is not expressly laid in the indictment. But the meaning of the rule is, not that the whole detail of facts should be set forth, but that no overt act, amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment. If, however, it will conduce to the proof of any of the overt acts which are laid, it may be admitted as evidence of such overt acts.[1] This rule is not peculiar to prosecutions for treason; though, in consequence of the oppressive character of some former state prosecutions for that crime, it has been deemed expedient expressly to enact it in the later statutes of treason. It is nothing more than a particular application of a fundamental doctrine of the law of remedy and of evidence, namely, that the proof must correspond with the allegations, and be confined to the point in issue.[2] This issue, in treason, is, whether the prisoner committed that crime, by doing the treasonable act stated in the indictment; as, in slander, the question is, whether the defendant injured the plaintiff by maliciously uttering the falsehoods laid in the declaration; and evidence of collateral facts is admitted or rejected on the like principle in either case, accordingly as it does or does not tend to establish the specific charge. Therefore the declarations of the prisoner, and seditious language used by him, are admissible in evidence as explanatory of his conduct, and of the nature and object of the conspiracy in which he was engaged.[3] And after proof of the overt act of treason, in the county mentioned in the indictment, other acts of treason tending to prove the overt acts laid, though done in a foreign country, may be given in evidence.[4]

§ 257. In proof of the crime of *perjury*, also, it was formerly held that two witnesses were necessary, because otherwise there would be nothing more than the oath of one man against another, upon which the jury could not safely convict.[5] But this strictness

[1] Foster's Disc. p. 245; 1 Phil. Evid. 471; Deacon's case, 18 Howell's St. Tr. 366; Foster, R. 9, s. c.; Regicide's case, J. Kely. 8, 9; 1 East, P. C. 121, 122, 123; 2 Stark. Evid. 800, 801.

[2] *Supra*, §§ 51, 52, 53.

[3] Rex *v.* Watson, 2 Stark. R. 116, 134; [United States *v.* Hanway, 2 Wallace, Jr. 139.]

[4] Deacon's case, 16 Howell's St. Tr. 367; Foster, R. 9, s. c.; Sir Henry Vane's case, 4th res., 6 Howell's St. Tr. 123, 129, n.; 1 East, P. C. 125, 126. [See *post*, vol. 3, (4th edit.) 246–248.]

[5] 1 Stark. Evid. 443; 4 Hawk. P. C., b. 2, c. 46, § 10; 4 Bl. Comm. 358; 2 Russ. on Crimes, 1791.

has long since been relaxed; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.[1] The oath of the opposing witness, therefore, will not avail, unless it be corroborated by other independent circumstances. But it is not precisely accurate to say, that these additional circumstances must be tantamount to another witness. The same effect being given to the oath of the prisoner, as though it were the oath of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed, by material and independent circumstances, before the party can be convicted. The additional evidence needs not be such as, standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose. But it must be at least strongly corroborative of the testimony of the accusing witness;[2] or, in the quaint but energetic language of Parker, C. J., "a strong and clear evidence, and more numerous than the evidence given for the defendant."[3]

[1] The history of this relaxation of the sternness of the old rule is thus stated by Mr. Justice Wayne, in delivering the opinion of the court in The United States *v.* Wood, 14 Peters, 440, 441. "At first, two witnesses were required to convict in a case of perjury; both swearing directly adversely from the defendant's oath. Contemporaneously with this requisition, the larger number of witnesses on one side or the other prevailed. Then a single witness, corroborated by other witnesses, swearing to circumstances bearing directly upon the imputed *corpus delicti* of a defendant, was deemed sufficient. Next, as in the case of Rex *v.* Knill, 5 B. & A. 929, n., with a long interval between it and the preceding, a witness, who gave proof only of the contradictory oaths of the defendant on two occasions, one being an examination before the House of Lords, and the other an examination before the House of Commons, was held to be sufficient; though this principle had been acted on as early as 1764, by Justice Yates, as may be seen in the note to the case of The King *v.* Harris, 5 B. & A. 937, and was acquiesced in by Lord Mansfield, and Justices Wilmot and Aston. We are aware that, in a note to Rex *v.* Mayhew, 6 C. & P. 315, a doubt is implied concerning the case decided by Justice Yates; but it has the stamp of authenticity, from its having been referred to in a case happening ten years afterwards before Justice Chambre, as will appear by the note in 6 B. & A. 937. Afterwards, a single witness, with the defendant's bill of costs (not sworn to) in lieu of a second witness, delivered by the defendant to the prosecutor, was held sufficient to contradict his oath; and in that case Lord Denman says, 'A letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness.' 6 C. & P. 315. We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule."

[2] Woodbeck *v.* Keller, 6 Cowen, 118, 121, per Sutherland, J.; Champney's case, 1 Lew. Cr. Cas. 258. And see *infra*, § 381.

[3] The Queen *v.* Muscot, 10 Mod. 194. See also The State *v.* Molier, 1 Dev. 263, 265; The State *v.* Hayward, 1 Nott. & McCord, 547; Rex *v.* Mayhew, 6 C. & P. 315; Reg. *v.* Boulter, 16 Jur. 135; Roscoe on Crim. Evid. 686, 687; Clark's Executors *v.* Van Reimsdyk, 9 Cranch, 160. It must corroborate him in something more than some slight particulars. Reg. *v.* Yates, 1 Car. & Marsh. 139. More recently, corroborative evidence, in cases where more than one witness is required

§ 257*a*. When there are several assignments of perjury in the same indictment, it does not seem to be clearly settled, whether, in addition to the testimony of a single witness, there must be corroborative proof with respect to each; but, the better opinion is, that such proof is necessary; and that too, although all the perjuries assigned were committed at one time and place.[1] For instance, if a person, on putting in his schedule in the insolvent debtor's court, or on other the like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence.[2]

§ 258. The principle that one witness with corroborating circumstances is sufficient to establish the charge of perjury, leads to the conclusion that *circumstances, without any witness*, when they exist in documentary or written testimony, may combine to the same effect; as they may combine, altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact, connected with the declarations of persons or the business of human life. The principle is, that circumstances necessarily make a part of the proofs of human transactions; that such as have been reduced to writing, in unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence *aliunde;* and that such as have not been reduced to writing, whether they relate to the declarations or conduct of men, can only be proved by oral testimony. Accordingly, it is now held that a living witness of the *corpus delicti* may be dispensed with, and documentary or written evidence be relied upon to convict of perjury,—*first*, where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself, with circumstances

by law, has been defined by Dr. Lushington, to be not merely evidence showing that the account is probable, but evidence, proving facts *ejusdem generis*, and tending to produce the same results. Simmons *v.* Simmons, 11 Jur. 850. See further to this point, Reg. *v.* Parker, C. & Marsh. 616; Reg. *v.* Champney, 2 Lewin, 258; Reg. *v.* Gardiner, 8 C. & P. 737; Reg. *v.* Roberts, 2 Car. & Kir. 614. [See *post*, vol. 3 (4th edit.), § 198.]

[1] R. *v.* Virrier, 12 A. & E. 317, 324, per Ld. Denman.

[2] R. *v.* Parker, C. & Marsh. 639, 645–647, per Tindal, C. J. In R. *v.* Mudie, 1 M. & Rob. 128, 129, Lord Tenterden, under similar circumstances, refused to stop the case, saying that, if the defendant was convicted, he might move for a new trial. He was, however, acquitted. See the (London) Law Review, &c., May, 1846, p. 128.

showing the corrupt intent; *secondly*, in cases where the matter so sworn is contradicted by a public record, proved to have been well known by the prisoner when he took the oath, the oath only being proved to have been taken; and *thirdly*, in cases where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other written testimony, existing and being found in his possession, and which has been treated by him as containing the evidence of the fact recited in it.[1]

§ 259. If the evidence adduced in proof of the crime of perjury consists of *two opposing statements of the prisoner*, and nothing more, he cannot be convicted. For if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that that declaration was the truth, and the other an error or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances, against him. And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, where no other evidence of the falsity is given.[2] If, indeed, it can be shown that, before giving the testimony on which perjury is assigned, the accused had been tampered with;[3] or, if there be other circumstances in the case, tending to prove that the statement offered in evidence against the accused was in fact true, a legal conviction may be obtained.[4] And "although the jury may believe that on the one or the other occasion the prisoner swore to what was not true, yet it is not a necessary consequence that he committed perjury. For there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circum-

[1] The United States *v.* Wood, 14 Peters, 440, 441. In this case, under the latter head of the rule here stated, it was held, that, if the jury were satisfied of the corrupt intent, the prisoner might well be convicted of perjury, in taking, at the custom-house in New York, the "owner's oath in cases where goods, wares, or merchandise have been actually purchased," upon the evidence of the invoice-book of his father, John Wood, of Saddleworth, England, and of thirty-five letters from the prisoner to his father, disclosing a combination between them to defraud the United States, by invoicing and entering the goods shipped at less than their actual cost.

[2] See Alison's Principles of the Criminal Law of Scotland, p. 481. Regina *v.* Hughes, 1 C. & K. 519; Regina *v.* Wheatland, 8 C. & P. 238; Regina *v.* Champney, 2 Lew. 258.

[3] Anon. 5 B. & A. 939, 940, note. And see 2 Russ. Cr. & M. 653, note.

[4] Rex *v.* Knill, 5 B. & A. 929, 930, note.

stances subsequently be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time.[1]

§ 260. The principles above stated, in regard to the proof of perjury, apply with equal force to the case of *an answer in chancery*. Formerly, when a material fact was directly put in issue by the answer, the courts of equity followed the maxim of the Roman law, *responsio unius non omninò audiatur*, and required the evidence of two witnesses, as the foundation of a decree. But of late years the rule has been referred more strictly to the equitable principle on which it is founded, namely, the right to credit which the defendant may claim, equal to that of any other witness in all cases where his answer is "positively, clearly, and precisely" responsive to any matter stated in the bill. For the plaintiff, by calling on the defendant to answer an allegation which he makes, thereby admits the answer to be evidence.[2] In such case, if the defendant in express terms negatives the allegations in the bill, and the bill is supported by the evidence of only a single witness, affirming what has been so denied, the court will neither make a decree, nor send the case to be tried at law; but will simply dismiss the bill.[3] But the corroborating testimony of an additional witness, or of circumstances, may give a turn either way to the balance. And even the evidence arising from circumstances alone may be stronger than the testimony of any single witness.[4]

[1] Per Holroyd, J., in Jackson's case, 1 Lewin's Cr. Cas. 270. This very reasonable doctrine is in perfect accordance with the rule of the Criminal Law of Scotland, as laid down by Mr. Alison, in his lucid and elegant treatise on that subject, in the following terms: "When contradictory and inconsistent oaths have been emitted, the mere contradiction is not decisive evidence of the existence of perjury in one or other of them; but the prosecutor must establish which was the true one, and libel on the other as containing the falsehood. Where depositions contradictory to each other have been emitted by the same person on the same matter, it may with certainty be concluded that one or other of them is false. But it is not relevant to infer perjury in so loose a manner; but the prosecutor must go a step farther, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. To admit the opposite course, and allow the prosecutor to libel on both depositions, and make out his charge by comparing them together, without distinguishing which contains the truth and which the falsehood, would be directly contrary to the precision justly required in criminal proceedings. In the older practice this distinction does not seem to have been distinctly recognized; but it is now justly considered indispensable, that the perjury should be specified existing in one, and the other deposition referred to in *modum probationis*, to make out, along with other circumstances, where the truth really lay." See Alison's Crim. Law of Scotland, p. 475.

[2] Gresley on Evid. p. 4.

[3] Cooth *v.* Jackson, 6 Ves. 40, per Ld. Eldon.

[4] Pember *v.* Mathers, 1 Bro. Ch. R. 52; 2 Story on Eq. Jur. § 1528; Gresley on Evid. p. 4; Clark *v.* Van Reimsdyk, 9 Cranch, 160; Keys *v.* Williams, 3 Y. & C. 55; Dawson *v.* Massey, 1 Ball & Beat. 234; Maddox *v.* Sullivan, 2 Rich. Eq. R. 4. Two witnesses are required, in *Missouri*, to prove the handwriting of a deceased subscribing witness to a *deed;* when

§ 260*a*. It has also been held, that the testimony of one witness alone is not sufficient to establish any *usage of trade*, of which all dealers in that particular line are bound to take notice, and are presumed to be informed.[1] [*The manner in which the rule is

all the subscribing witnesses are dead, or cannot be had, and the deed is offered to a court or magistrate for probate, preparatory to its registration. Rev. Stat. 1835, p. 121; Id. 1845, ch. 32, § 22; *infra*, § 569, note. Two witnesses are also required to a deed of conveyance of real estate, by the statutes of *New Hampshire*, *Vermont*, *Connecticut*, *Georgia*, *Florida*, *Ohio*, *Michigan*, and *Arkansas*. See 4 Cruise's Digest, tit. 32, ch. 2, § 77, note, (Greenleaf's edit.) [2d edit. (1856), vol. 2, p. 341.] And in *Connecticut*, it is enacted, that no person shall be convicted of a capital crime, without the testimony of two witnesses, or what is equivalent thereto. Rev. Stat. 1849, tit. 6, § 159. [See *post*, vol. 3, § 289 and notes. Hinkle *v.* Wanzer, 17 How. U. S. 353; Lawton *v.* Kittredge, 10 Foster, 500; Ing *v.* Brown, 3 Md. Ch. Decis. 521; Glen *v.* Grover, 3 Md. 212; Jordan *v.* Fenno, 8 Eng. 593; Johnson *v.* McGruder, 15 Mis. 365; Walton *v.* Walton, 17 Ib. 376; White *v.* Crew, 16 Geo. 416; Calkins *v.* Evans, 5 Ind. 441.]

[1] Wood *v.* Hickock, 2 Wend. 501; Parrott *v.* Thacher, 9 Pick. 426; Thomas *v.* Graves, 1 Const. Rep. 150, [308]; *post*, vol. 2 [7th edit.], § 252 [and notes.] As attempts have been made in some recent instances, to introduce into Ecclesiastical councils in the United States the old and absurd rules of the Canon law of England, foreign as they are to the nature and genius of American institutions, the following statement of the light in which those rules are at present regarded in England will not be unacceptable to the reader. It is taken from the (London) Law Review, &c., for May, 1846, pp. 132–135. "In the Ecclesiastical courts, the rule requiring a plurality of witnesses is carried far beyond the verge of common sense; and although no recent decision of those courts has, we believe, been pronounced, expressly determining that five, seven, or more witnesses, are essential to constitute full proof, yet the authority of Dr. Ayliffe, who states that, according to the Canon law, this amount of evidence is required in some matters, has been very lately cited, with apparent assent, if not approbation, by the learned Sir Herbert Jenner Fust.[1] The case in support of which the above high authority was quoted was a suit for divorce.[2] In a previous action for criminal conversation, a special jury had given £500 damages to the husband, who, with a *female* servant,[3] had found his wife and the adulterer together in bed. This last fact was deposed to by the servant; but as she was the only witness called to prove it, and as her testimony was uncorroborated, the learned judge did not feel himself at liberty to grant the promoter's prayer. This doctrine, that the testimony of a single witness, though *omni exceptione major*, is insufficient to support a decree in the

[1] Evans *v.* Evans, 1 Roberts, Ecc. R. 171. The passage cited from Ayliffe, Par. 444, is as follows: "Full proof is made by two or three witnesses at the least. For there are some matters which, according to the *Canon* law, do require five, seven, or more witnesses, to make full proof." The same learned commentator, a little farther on, after explaining that "*liquid* proof is that which appears to the judge from the act of court, since that cannot be properly said to be *manifest* or *notorious*;" adds,—"By the *Canon* law, a Jew is not admitted to give evidence against a Christian, *especially if he be a clergyman*, for by *that law* the *proofs against a clergyman ought to be much clearer than against a layman*." Par. 448. Dr. Ayliffe does not mention what matters require this superabundant proof, but we have already said (vol. 1, p. 380, n.), that in the case of a cardinal charged with incontinence, the *probatio*, in order to be *plena*, must be established by no less than seven *eye*-witnesses; so improbable does it appear to the Church that one of her highest dignitaries should be guilty of such an offence, and so anxious is she to avoid all possibility of judicial scandal. This is adopting with a vengeance the principles of David Hume with respect to miracles.

[2] Evans *v.* Evans, 1 Roberts, Ecc. R. 165.

[3] The fact that the witness was a woman, does not seem to have formed an element in the judgment of the court, though Dr. Ayliffe assures his readers, with becoming gravity, that, "by the Canon law, more credit is given to male than to female witnesses." Par. 545.

here stated by the learned and critical author may be liable to possible misconstruction. The point embraced in the proposition

ecclesiastical courts, when such testimony stands unsupported by adminicular circumstances, has been frequently propounded by Lord Stowell, both in suits for divorce,[1] for defamation,[2] and for brawling;[3] and before the new Will Act was passed,[4] Sir John Nicholl disregarded similar evidence, as not amounting to legal proof of a testamentary act.[5] In the case too, of Mackenzie *v.* Yeo,[6] when a codicil was propounded, purporting to have been duly executed, and was deposed to by one attesting witness only, the other having married the legatee, Sir Herbert Jenner Fust refused to grant probate, though he admitted the witness was unexceptionable, on the ground that his testimony was not confirmed by adminicular circumstances, and that the probabilities of the case inclined against the factum of such an instrument.[7] In another case, however, the same learned judge admitted a paper to probate on the testimony of one attesting witness, who had been examined a few days after the death of the testator, though the other witness, whose deposition had not been taken till two years and a half afterwards, declared that the will was not signed in his presence. In this case there was a formal attestation clause, and that fact was regarded by the court as favoring the supposition of a due execution. Though the cases cited above certainly establish beyond dispute, that, by the Canon law, as recognized in our spiritual courts, one uncorroborated witness is insufficient, they as certainly decide, that, in ordinary cases at least, two or more witnesses need not depose to the principal fact; but that it will suffice if one be called to swear to such fact, and the other or others speak merely to confirmatory circumstances. Nay, it would seem, from some expressions used, that, as in cases of perjury, documentary or written testimony, or the statements or conduct of the party libelled, may supply the place of a second witness.[8] If, indeed, proceedings be instituted under the provisions of some statute, which expressly enacts that the offence shall be proved by two lawful witnesses, as, for instance, the Act of 5 & 6 Edw. VI. c. 4, which relates to brawling in a church or churchyard, the court might feel some delicacy about presuming that such an enactment would be satisfied, by calling one witness to the fact, and one to the circumstances.[9] It seems that this rule of the canonists depends less on the authority of the civilians than on the Mosaic code, which enacts, that one witness shall not rise up against a man for any iniquity; but at the mouth of two or three witnesses shall the matter be established.[10] Indeed, the decretal of Pope Gregory the

[1] Donnellan *v.* Donnellan, 2 Hagg. 144. (Suppl.)

[2] Crompton *v.* Butler, 1 Cons. R. 460.

[3] Hutchins *v.* Denziloe, 1 Cons. R. 181, 182.

[4] 7 W. IV. and 1 Viet. c. 26, which, by § 34, applies to wills made after the 1st of January, 1833.

[5] Theakston *v.* Marson, 4 Hagg. 313, 314.

[6] 3 Curteis, 125.

[7] Gove *v.* Gawen, 3 Curteis, 151.

[8] In Kendrick *v.* Kendrick, 4 Hagg. 114, the testimony of a single witness to adultery being corroborated by evidence of the misconduct of the wife, was held to be sufficient, Sir John Nicholl distinctly stating, "that there need not be two witnesses; one witness and circumstances in corroboration are all that the law in these cases requires," pp. 136, 137, and Dr. Lushington even admitting, that "he was not prepared to say that one clear and unimpeached witness was insufficient," p. 130. See also 3 Burn. Eccl. L. 304.

[9] Hutchins *v.* Denziloe, 1 Cons. R. 182, per Lord Stowell.

[10] Deut. c. 19, v. 15; Deut. c. 17, v. 6; Numbers, c. 35, v. 30. [The rule of the Jewish law, above cited, is expressly applied to crimes only, and extends to all persons, lay as well as ecclesiastical. If it was designed to have any force beyond the Jewish theocracy or nation, it must, of course, be the paramount law of the criminal code of all Christian nations, at this day, and for ever. St. Paul makes merely a passing allusion to it, in reference to the third time of his coming to the Corinthians; not as an existing rule of their law; and much less with any view of imposing on them the municipal regulations of Moses. The Mosaic law, except those portions which are purely moral and universal in their nature, such as the ten commandments, was never to be enforced on any converts from heathenism. See Acts, ch. 15; Galatians, ch. 2, v. 11–14. Of course, it is not binding on us. Our Saviour, in Matt. ch. 18, v. 16,

is, that where one witness only testifies to the existence of such usage, and others deny all knowledge of its existence with equal means of knowledge, it cannot be regarded as sufficiently established. So also if the usage be improbable in itself, and only one witness be examined in its support, where others might easily have been called, it will not be considered as well established. But there is nothing, in a usage of trade, or a general custom, requiring proof from more than one witness, unless there is some ground of implying doubt of the accuracy of the knowledge, or of the disinterestedness of the witness, more than in any other case. More than one witness will naturally be called in such cases, where there is any controversy upon the point, and where others are accessible. But we are not aware of any different measure of proof here from that which exists in all cases.]

§ 261. There are also certain *sales*, for the proof of which the law requires a deed, or other *written document*. Thus, by the

Ninth, which enforces the observance of this doctrine,[1] expressly cites St. Paul as an authority, where he tells the Corinthians that 'in ore duorum vel trium testium stat omne verbum.'[2] Now, however well suited this rule might have been to the peculiar circumstances of the Jewish nation, who, like the Hindus of old, the modern Greeks, and other enslaved and oppressed people, entertained no very exalted notions on the subject of truth; and who, on one most remarkable occasion, gave conclusive proof that even the necessity of calling two witnesses was no valid protection against the crime of perjury;[3] — it may well be doubted whether, in the present civilized age, such a doctrine, instead of a protection, has not become an impediment to justice, and whether, as such, it should not be abrogated. That this was the opinion of the common-law judges in far earlier times than the present, is apparent from several old decisions, which restrict the rule to causes of merely spiritual cognisance, and determine that all temporal matters, which incidentally arise before the Ecclesiastical courts, may, and indeed must, be proved there as elsewhere, by such evidence as the common law would allow."[4] See also Best's Principles of Evidence, § 390–394; Wills on Circumst. Evid. p. 23; 2 H. Bl. 101; 2 Inst. 608.

17, directs that, in a case of private difference between Christian brethren, the injured party shall go to the offender, taking with him "one or two more," who are, in the first instance, to act as arbitrators and peacemakers; not as witnesses; for they are not necessarily supposed to have any previous knowledge of the case. Afterwards these may be called as witnesses before the Church, to testify what took place on that occasion; and their number will satisfy any rule, even of the Jewish Church, respecting the number of witnesses. But if this passage is to be taken as an indication of the number of witnesses, or quantity of oral proof to be required, it cannot be extended beyond the case for which it is prescribed; namely, the case of a private and personal wrong, prosecuted before the Church, in the way of ecclesiastical discipline, and this only where the already existing rule requires more than one witness. G.]

[1] Dec. Greg. lib. 2, tit. 20, c. 23.

[2] 2 Cor. c. 13, v. 1.

[3] St. Matthew, c. 26, v. 60, 61.

[4] Richardson *v.* Disborow, 1 Vent. 291; Shotter *v.* Friend, 2 Salk. 547; Breedon *v.* Gill, Ld. Raym. 221. See further, 3 Burn. Eccl. L. 304–308.

statutes of the United States,[1] and of Great Britain,[2] the *grand bill of sale* is made essential to the complete transfer of any *ship or vessel*; though, as between the parties themselves, a title may be acquired by the vendee without such document. Whether this documentary evidence is required by the law of nations or not, is not perfectly settled; but the weight of opinion is clearly on the side of its necessity, and that without this, and the other usual documents, no national character is attached to the vessel.[3]

§ 262. Written evidence is also required of the several transactions mentioned in the *Statute of Frauds*, passed in the reign of Charles II., the provisions of which have been enacted, generally in the same words, in nearly all of the United States.[4] The rules of evidence contained in this celebrated statute are calculated for the exclusion of perjury, by requiring, in the cases therein mentioned, some more satisfactory and convincing testimony than mere oral evidence affords. The statute dispenses with no proof of consideration which was previously required, and gives no efficacy to written contracts which they did not previously possess.[5] Its policy is to impose such requisites upon private transfers of property, as, without being hinderances to fair transactions, may be either totally inconsistent with dishonest projects, or tend to multiply the chances of detection.[6] The object of the present work will not admit of an extended consideration of the provisions of this statute; but will necessarily restrict us to a brief notice of the rules of evidence which it has introduced.

[1] United States Navigation Act of 1792, ch. 45, § 14; Stat. 1793, ch. 52; [Stat. 1793, ch. 1; Ib. ch. 8, vol. 1, U. S. Statutes at Large (Little & Brown's edit.), page 294, and page 305]; Abbott on Shipping, by Story, p. 45, n. (2); 3 Kent, Comm. 143, 149. [See also Stat. 1850, ch. 27, 9 U. S. Statutes at Large (L. & B.'s edit.), 440.]

[2] Stat. 6 Geo. IV. c. 109; 4 Geo. IV. c. 48; 3 & 4 W. IV. c. 55, § 31; Abbott on Shipping, by Shee, pp. 47–52.

[3] Abbott on Shipping, by Story, p. 1, n. (1,) and cases there cited; Id. p. 27, n. (1); Id. p. 45, n. (2); Ohl *v.* The Eagle Ins. Co. 4 Mason, 172; Jacobsen's Sea Laws, b. 1, ch. 2, p. 17; [3 Kent, Comm. 130.]

[4] 29 Car. 2, c. 3; 4 Kent, Comm. 95, and note (b), (4th edit.) The Civil Code of Louisiana, art. 2415, without adopting in terms the provisions of the Statute of Frauds, declares generally that all verbal sales of immovable property or slaves shall be void. 4 Kent, Comm. 450, note (a), (4th edit.) [For the general provisions of the existing English statutes, and of the statutes of all the United States except Louisiana, and excepting Kansas and Minnesota, admitted into the Union since the publication of his volume, see Browne on Stat. of Frauds, Appendix, pp. 501–532.]

[5] 2 Stark. Evid. 341.

[6] Roberts on Frauds, Pref. xxii. This statute introduced no new principle into the law; it was new in England only in the mode of proof which it required. Some protective regulations, of the same nature, may be found in the early codes of most of the Northern nations, as well as in the laws of the Anglo-Saxon princes; the prevention of frauds and perjuries being sought, agreeably to the simplicity of those unlettered times, by requiring a certain number of witnesses to a valid sale,

§ 263. By this statute, the necessity of some writing is universally required, upon all *conveyances of lands, or interest in lands*, for more than three years; all interests, whether of freehold or less than freehold, certain or uncertain, created by parol without writing, being allowed only the force and effect of estates at will;

and sometimes by restricting such sales to particular places. In the Anglo-Saxon laws, such regulations were quite familiar; and the Statute of Frauds was merely the revival of obsolete provisions, demanded by the circumstances of the times, and adapted, in a new mode of proof, to the improved condition and habits of the trading community. By the laws of Lotharius and Edric, kings of Kent, § 16, if a Kentish man purchased any thing in London, it must be done in the presence of two or three good citizens, or of the mayor of the city. (Canciani, Leges Barbarorum Antiquæ, vol. 4, p. 231.) The laws of King Edward the Elder (De jure et lite, § 1) required the testimony of the mayor, or some other credible person to every sale, and prohibited all sales out of the city. (Cancian. ub. sup. p. 256.) King Athelstan prohibited sales in the country, above the value of twenty pence; and, for those in the city, he required the same formalities as in the laws of Edward. (Id. pp. 261, 262, LL. Athelstani, § 12.) By the laws of King Ethelred, every freeman was required to have his surety (fidejussor), without whom, as well as other evidence, there could be no valid sale or barter. "Nullus homo faciat alterutrum, nec emat, nec permutet, nisi fidejussorem habeat, et testimonium." (Id. p. 287, LL. Ethelredi, §§ 1, 4.) In the Concilium Seculare of Canute, § 22, it was provided, that there should be no sale, above the value of four pence, whether in the city or country, without the presence of four witnesses. (Id. p. 305.) The same rule, in nearly the same words, was enacted by William the Conqueror. (Id. p. 357, LL. Guil. Conq. § 43.) Afterwards, in the Charter of the Conqueror (§ 60), no cattle ("nulla viva pecunia," scil. animalia) could be legally sold, unless in the cities, and in the presence of three witnesses. (Cancian. ub. sup. p. 360, Leges Anglo-Saxonicæ, p. 198 (o). Among the ancient Sueones and Goths, no sale was originally permitted but in the presence of witnesses, and (per mediatores) through the medium of brokers. The witnesses were required in order to preserve the evidence of the sale; and the brokers, or mediators (ut pretium moderarentur), to prevent extortion, and to see to the title. But these formalities were afterwards dispensed with, except in the sale of articles of value (res pretiosæ), or of great amount. (Cancian. ub. sup. p. 231, n. 4.) Alienations of lands were made only (publicis literis) by documents legally authenticated. By the Danish law, lands in the city or country might be exchanged without judicial appraisement (per tabulas manu signoque permutantis affixas), by deed, under the hand and seal of the party. (Id. p. 261, n. 4.) The Roman law required written evidence in a great variety of cases, embracing, among many others, all those mentioned in the Statute of Frauds; which are enumerated by N. De Lescut, De Exam. Testium, Cap. 26. (Farinac. Oper. Tom. 2, App. 243.) See also Brederodii Repertorium Juris, col. 984, *verb.* Scriptura. Similar provisions, extending in some cases even to the proof of payment of debts, were enacted in the statutes of Bologna (A. D. 1454), Milan (1498), and Naples, which are prefixed to Danty's Traité de la Preuve, par Temoins. By a Perpetual Edict in the Archduchy of Flanders (A. D. 1611), all sales, testaments, and contracts whatever, above the value of three hundred livres Artois, were required to be in writing. And in France, by the Ordonnance de Moulins (A. D. 1566), confirmed by that of 1667, parol or verbal evidence was excluded in all cases, where the subject-matter exceeded the value of one hundred livres. See Danty, de la Preuve, &c., *passim*; 7 Poth. (Œuvres, &c., 4to, p. 56; Traité de la Procéd. Civ. ch. 3, art. 4, Regle 3me.; 1 Poth. on Obl. part 4, ch. 2, arts. 1, 2, 3, 5; Commercial Code of France, art. 109. The dates of these regulations, and of the Statute of Frauds, and the countries in which they were adopted, are strikingly indicative of the revival and progress of commerce. Among the Jews, lands were conveyed by deed only, from a very early period, as is evident from the transaction mentioned in Jer. xxxii. 10, 11, 12; where the principal document was "sealed according to the law and custom," in the presence of witnesses; and another writing, or "open evidence," was also taken, probably, as Sir John Chardin thought, for common use, as is the manner in the East at this day.

except leases, not exceeding the term of three years from the making thereof, whereon the rent reserved shall amount to two-thirds of the improved value. The term of three years, for which a parol lease may be good, must be only three years from the making of it; but if it is to commence *in futuro*, yet if the term is not for more than three years it will be good. And if a parol lease is made to hold from year to year, during the pleasure of the parties, this is adjudged to be a lease only for one year certain, and that every year after it is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception of the statute; though as to the time past it is considered as one entire and valid lease for so many years as the tenant has enjoyed it.[1] But though a parol lease for a longer period than the statute permits is void for the excess, and may have only the effect of a lease for a year, yet it may still have an operation, so far as its terms apply to a tenancy for a year. If, therefore, there be a parol lease for seven years for a specified rent, and to commence and end on certain days expressly named; though this is void as to duration of the lease, yet it must regulate all the other terms of the tenancy.[2]

§ 264. By the same statute, no *leases*, estates, or interests, either of freehold or terms of years, or an uncertain interest, other than copyhold or customary interests in lands, tenements, or hereditaments, can be *assigned*, *granted*, *or surrendered*, unless by deed or writing, signed by the party, or his agent authorized by writing,[3] or by operation of law. At common law, surrenders of estates for life or years in things corporeal were good, if made by parol; but things incorporeal, lying in grant, could neither be created nor surrendered but by deed.[4] The effect of this statute is not to dispense with any evidence required by the common law, but to add to its provisions somewhat of security, by requiring a new and more permanent species of testimony. Wherever,

[1] Roberts on Frauds, pp. 241–244; [Browne on Stat. of Frauds, § 1–40.]

[2] Doe *v.* Bell, 5 T. R. 471; [Browne on Stat. of Frauds, § 39.]

[3] In the statutes of some of the United States, the words "authorized by writing" are omitted; in which case it is sufficient that the agent be authorized by parol, in order to make a binding *contract* of sale, provided the contract itself be made in writing; but his authority to *convey* must be by deed. Story on Agency, § 50; Alna *v.* Plummer, 4 Greenl. 258.

[4] Co. Lit. 337 *b*, 338 *a*; 2 Shep. Touchst. (by Preston), p. 300.

therefore, at common law a deed was necessary, the same solemnity is still requisite; but with respect to lands and tenements in possession, which before the statute might have been surrendered by parol, that is, by words only, some note in writing is now made essential to a valid surrender.[1]

§ 265. As to the *effect of the cancellation* of a deed to devest the estate, operating in the nature of a surrender, a distinction is taken between things lying in livery, and those which lie only in grant. In the latter case, the subject being incorporeal, and owing its very existence to the deed, it appears that at common law the destruction of the deed by the party, with intent to defeat the interest taken under it, will have that effect. Without such intent, it will be merely a case of casual spoliation. But where the thing lies in livery and manual occupation, the deed being at common law, only the authentication of the transfer, and not the operative act of conveying the property, the cancellation of the instrument will not involve the destruction of the interest conveyed.[2] It has been thought, that since writing is now by the statute made essential to certain leases of hereditaments lying in livery, the destruction of the lease would necessarily draw after it the loss of the interest itself.[3] But the better opinion seems to be, that it will not; because the intent of the statute is to take away the mode of transferring interests in lands by symbols and words alone, as formerly used, and therefore a surrender by cancellation, which is but a sign, is also taken away at law; though a symbolical surrender may still be recognized in chancery as the basis of relief.[4] The surrender in law, mentioned in the statute, is where a tenant accepts from his lessor a new interest, incon-

[1] Roberts on Frauds, p. 248; [Browne on Statute of Frauds, § 41–57.]

[2] Roberts on Frauds, pp. 248, 249; Bolton *v.* Bp. of Carlisle, 2 H. Bl. 263, 264; Doe *v.* Bingham, 4 B. & A. 672; Holbrook *v.* Tirrell, 9 Pick. 105; Botsford *v.* Morehouse, 4 Conn. 550; Gilbert *v.* Bulkley, 5 Conn. 262; Jackson *v.* Chase, 2 Johns. 86. See *infra*, § 568.

[3] 4 Bac. Abr. 218, tit. Leases and Terms from Years, T.

[4] Roberts on Frauds, pp. 251, 252; Magennis *v.* McCullogh, Gilb. Eq. R. 235; Natchbolt *v.* Porter, 2 Vern. 112; 4 Kent, Comm. 104; 4 Cruise's Dig. p. 85 (Greenleaf's edit.), tit. 32, ch. 7, §§ 5, 6, 7; [2d edit. (1856) vol. 2, p. 413 *et seq.*;] Roe *v.* Archb. of York, 6 East, 86. In several of the United States, where the owner of lands which he holds by an unregistered deed, is about to sell his estate to a stranger, it is not unusual for him to surrender his deed to his grantor, to be cancelled, the original grantor thereupon making a new deed to the new purchaser. This redelivery is allowed to have the practical effect of a surrender, or reconveyance of the estate, the first grantee and those claiming under him not being permitted to give parol evidence of the contents of the deed, thus surrendered and destroyed with his consent, with a view of passing a legal title to his own alienee. Farrar *v.* Farrar, 4 N. Hamp. 191; Commonwealth *v.* Dudley, 10 Mass. 403; Holbrook *v.* Tirrell, 9 Pick. 105; Barrett *v.* Thorndike,

sistent with that which he previously had; in which case a surrender of his former interest is presumed.[1]

§ 266. This statute further requires that the declaration or creation of *trusts* of lands shall be manifested and proved only by some writing, signed by the party creating the trust; and all grants and assignments of any such trust or confidence, are also to be in writing, and signed in the same manner. It is to be observed, that the same statute does not require that the trust itself be created by writing; but only that it be manifested and proved by writing; plainly meaning that there should be evidence in writing, proving that there was a trust, and what the trust was. A letter acknowledging the trust, and, *à fortiori*, an admission, in an answer in chancery, has therefore been deemed sufficient to satisfy the statute.[2] *Resulting trusts*, or those which arise by implication of law, are specially excepted from the operation of the statute. Trusts of this sort are said by Lord Hardwicke to arise in three cases: first, where the estate is purchased in the name of one person, but the money paid for it is the property of another; secondly, where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and, thirdly, in certain cases of fraud.[3] Other divisions have been suggested;[4] but they all seem to be reducible to these three heads. In all these cases, it seems now to be generally conceded that parol evidence, though received with great caution, is admissible to establish the collateral facts, (not contradictory to the deed, unless in the case of fraud,) from which a trust may legally result; and that it makes no difference

1 Greenl. 78. See 4 Cruise's Dig. tit. 32, c. 1, § 15, note (Greenleaf's edit.), [2d edit. (1856) vol. 2, p. 300.]

[1] Roberts on Frauds, pp. 259, 260; [Browne on Stat. of Frauds, §§ 44, 59, 60.]

[2] Forster *v.* Hale, 3 Ves. 696, 707, per Ld. Alvanley; 4 Kent, Comm. 305; Roberts on Frauds, p. 95; 1 Cruise's Dig. (by Greenleaf) tit. 12, ch. 1, §§ 36, 37, p. 390; [2d edit. (1856) vol. 1, p. 369;] Lewin on Trusts, p. 30. Courts of equity will receive parol evidence, not only to explain an imperfect declaration of a testator's intentions of trust, but even to add conditions of trust to what appears a simple devise or bequest. But it must either be fairly presumable, that the testator would have made the requisite declaration, but for the undertaking of the person whom he trusted, or else it must be shown to be an attempt to create an illegal trust. Gresley on Evid. in Equity, p. 108 [292]; Strode *v.* Winchester, 1 Dick. 397. See White & Tudor's Leading Cases in Equity, vol. 2, part 1, p. 591; [Browne on Stat. of Frauds, § 97 *et seq.*; Dean *v.* Dean, 1 Stockton, 44. In Connecticut, it has been held that where a husband conveyed land to his father, without consideration, but under a parol agreement that the father should convey it to the wife of the son, parol evidence was admissible to establish the trust in favor of the wife. Hayden *v.* Denslow, 27 Conn. 335.]

[3] Lloyd *v.* Spillet, 2 Atk. 148, 150.

[4] 1 Lomax's Digest, p. 200.

as to its admissibility whether the supposed purchaser be living or dead.[1]

§ 267. Written evidence, signed by the party to be charged therewith, or by his agent, is by the same statute required in every case of contract by an executor or administrator, to answer damages out of his own estate; every promise of one person to answer for the debt, default, or miscarriage of another; every agreement made in consideration of marriage; or which is not to be performed within a year from the time of making it; and every contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them. The like evidence is also required in every case of contract for the sale of goods, for the price of £10 sterling or upwards,[2] unless the buyer shall receive part of the goods at time of sale, or give something in earnest, to bind the bargain, or in part payment.[3]

§ 268. It is not necessary that the written evidence required by the Statute of Frauds should be comprised in a single document, nor that it should be drawn up in any particular form. It is sufficient, if the contract can be *plainly made out, in all its terms, from any writings* of the party, or even from his *correspondence.* But it must *all* be collected from the *writings;* verbal testimony not being admissible to supply any defects or omissions in the written evidence.[4] For the policy of the law is to prevent

[1] 3 Sugden on Vendors, 256–260 (10th edit.); 2 Story, Eq. Jurisp. § 1201, note; Lench *v.* Lench, 10 Ves. 517; Boyd *v.* McLean, 1 Johns. Ch. R. 582; 4 Kent, Comm. 305; Pritchard *v.* Brown, 4 N. Hamp. 397. See also an article in 3 Law Mag. p. 131, where the English cases on this subject are reviewed. The American decisions are collected in Mr. Rand's note to the case of Goodwin *v.* Hubbard, 15 Mass. 218. In *Massachusetts*, there are *dicta* apparently to the effect, that parol evidence is not admissible in these cases; but the point does not seem to have been directly in judgment, unless it is involved in the decision in Bullard *v.* Briggs, 7 Pick. 533, where parol evidence was admitted. See Storer *v.* Batson, 8 Mass. 431, 442; Northampton Bank *v.* Whiting, 12 Mass. 104, 109; Goodwin *v.* Hubbard, 15 Mass. 210, 217. [In New Hampshire, parol evidence is admissible to establish a fact from which the law will raise or imply a trust, but not to prove any declaration of trust or agreement of the parties for a trust. Moore *v.* Moore, 38 N. Hamp. 382.]

[2] The sum here required is different in the several states of the Union, varying from thirty to fifty dollars. [See Browne on Stat. of Frauds, Appendix, pp. 503–532.] But the rule is everywhere the same. By the statute of 9 Geo. IV. c. 14, this provision of the Statute of Frauds is extended to contracts executory, for goods to be manufactured at a future day, or otherwise not in a state fit for delivery at the time of making the contract. Shares in a joint-stock company, or a projected railway, are held not to be goods or chattels, within the meaning of the statute. Humble *v.* Mitchell, 11 Ad. & El. 205; Tempest *v.* Kilner, 3 M. G. & S. 251; Bowlby *v.* Bell, Id. 284.

[3] 2 Kent, Comm. 493, 494, 495.

[4] Boydell *v.* Drummond, 11 East, 142; Chitty on Contracts, pp. 314–316 (4th Am. edit.); 2 Kent, Comm. 511; Roberts on Frauds, p. 121; Tawney *v.* Crowther, 3 Bro. Ch. Rep. 161, 318; 4 Cruise's Dig.

fraud and perjury, by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever. Nor is the *place of signature* material. It is sufficient if the vendor's name be printed, in a bill of parcels, provided the vendee's name and the rest of the bill are written by the vendor.[1] Even his signature, as a witness to a deed, which contained a recital of the agreement, has been held sufficient, if it appears that in fact he knew of the recital.[2] Neither is it necessary that the agreement or memorandum be *signed by both parties*, or that both be legally bound to the performance; for the statute only requires that it be signed "by the party to be charged therewith," that is, by the defendant against whom the performance or damages are demanded.[3]

§ 269. Where the act is *done by procuration*, it is not necessary that the agent's authority should be in writing; except in those cases where, as in the first section of the statute of 29 Car. II, c. 3, it is so expressly required. These excepted cases are under-

(by Greenleaf), pp. 33, 35, 36, 37, tit. 32, c. 3, §§ 3, 16–26 [Greenleaf's 2d edit. (1856) vol. 2, pp. 344–351 and notes]; Cooper *v.* Smith, 15 East, 103; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. R. 280, 281, 282; Abeel *v.* Radcliff, 13 Johns. 297; Smith *v.* Arnold, 5 Mason, 414; Ide *v.* Stanton, 15 Verm. 685; Sherburne *v.* Shaw, 1 N. Hamp. 157; Adams *v.* McMillan, 7 Port. 73; Gale *v.* Nixon, 6 Cowen, 445; Meadows *v.* Meadows, 3 McCord, 458; Nichols *v.* Johnson, 10 Conn. 192. Whether the Statute of Frauds, in requiring that, in certain cases, the "agreement" be proved by writing, requires that the "consideration" should be expressed in the writing, as part of the agreement, is a point which has been much discussed, and upon which the English and some American cases are in direct opposition. The English courts hold the affirmative. See Wain *v.* Warlters, 5 East, 10; reviewed and confirmed in Saunders *v.* Wakefield, 4 B. & Ald. 595; and their construction has been followed in *New York*, Sears *v.* Brink, 3 Johns. 210; Leonard *v.* Vredenburg, 8 Johns. 29. In *New Hampshire*, in Neelson *v.* Sanborne, 2 N. Hamp. 413, the same construction seems to be recognized and approved. But in *Massachusetts*, it was rejected by the whole court, upon great consideration, in Packard *v.* Richardson, 17 Mass. 122. So in *Maine*, Levy *v.* Merrill, 4 Greenl. 180; in *Connecticut*, Sage *v.* Wilcox, 6 Conn. 81; in *New Jersey*, Buckley *v.* Beardsley, 2 South. 570; and in *North Carolina*, Miller *v.* Irvine, 1 Dev. & Batt. 103; and *now* in *South Carolina*, Fyler *v.* Givens, Riley's Law Cas. pp. 56, 62, overruling Stephens *v.* Winn, 2 N. & McC. 372, n.; Woodward *v.* Pickett, Dudley's So. Car. Rep. p. 30. See also Violet *v.* Patton, 5 Cranch, 142; Taylor *v.* Ross, 3 Yerg. 330; 3 Kent, Comm. 122; 2 Stark. Evid. 350 (6th Am. edit.).

[1] Saunderson *v.* Jackson, 2 B. & P. 238, as explained in Champion *v.* Plummer, 1 New Rep. 254; Roberts on Frauds, pp. 124, 125; Penniman *v.* Hartshorn, 13 Mass. 87.

[2] Welford *v.* Beezely, 1 Ves. 6; 1 Wils. 118, s. c. The same rule, with its qualification, is recognized in the Roman law, as applicable to all subscribing witnesses, except those whose official duty obliges them to subscribe, such as notaries, &c. Menochius, De Præsump. lib. 3; Præsump. 66, *per tot.*

[3] Allen *v.* Bennett, 3 Taunt. 169; 3 Kent, Comm. 510, and cases there cited; Shirley *v.* Shirley, 7 Blackf. 452; Davis *v.* Shields, 26 Wend. 341; Douglass *v.* Spears, 2 N. & McC. 207. [* The New-York statute seems to require a contract for the sale of goods above the value of fifty dollars to be signed by both parties. Dykers *v.* Townsend, 24 N. Y. Ct. App. 57. But the verbal directions of the party, sent by telegraph, accepting a proposition, will amount to signing within the statute. Dunning *v.* Roberts, 35 Barb. 463.]

stood to be those of an actual conveyance, not of a contract to convey; and it is accordingly held, that though the agent *to make a deed* must be authorized by deed, yet the agent to enter into an *agreement to convey* is sufficiently authorized by parol only.[1] An *auctioneer* is regarded as the agent of both parties, whether the subject of the sale be lands or goods; and if the whole contract can be made out from the memorandum and entries signed by him, it is sufficient to bind them both.[2]

§ 270. The word *lands*, in this statute, has been expounded to include every claim of a permanent right to hold the lands of another, for a particular purpose, and to enter upon them at all times, without his consent. It has accordingly been held, that a right to enter upon the lands of another, for the purpose of erecting and keeping in repair a mill-dam embankment, and canal, to raise water for working a mill, is an interest in land, and cannot pass but by deed or writing.[3] But where the interest is vested in a corporation, and not in the individual corporators, the shares of the latter in the stock of the corporation are deemed personal estate.[4]

§ 271. The main difficulties under this head have arisen in the application of the principle to cases, where the subject of the contract is trees, growing crops, or other *things annexed to the freehold*. It is well settled that a contract for the sale of *fruits of the earth*, *ripe*, but not yet gathered, is not a contract for any interest in lands, and so not within the Statute of Frauds, though the vendee is to enter and gather them.[5] And subsequently it has been held, that a contract for the sale of a *crop of potatoes* was essentially the same, whether they were covered with earth in a field, or were stored in a box; in either case, the subject-matter of the sale,

[1] Story on Agency, § 50; Coles *v.* Trecothick, 9 Ves. 250; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Roberts on Frauds, p. 113, n. (51); [Browne on Stat. of Frauds, § 355–366.] If an agent, having only a verbal authority, should execute a bond in the name of his principal, and afterwards he be regularly constituted by letter of attorney, bearing date prior to that of the deed; this is a subsequent ratification, operating by estoppel against the principal, and rendering the bond valid in law. Milliken *v.* Coombs, 1 Greenl. 343. And see Ulen *v.* Kittredge, 7 Mass. 233.

[2] Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Procter, 4 Taunt. 209; Long on Sales, p. 38 (Rand's edit.); Story on Agency, § 27, and cases there cited; Cleaves *v.* Foss, 4 Greenl. 1; Roberts on Frauds, pp. 113, 114, note (56); 2 Stark. Evid. 352 (6th Am. edit.); Davis *v.* Robertson, 1 Rep. Const. C. 71; Adams *v.* McMillan, 7 Port. 73; 4 Cruise's Dig. tit. 32, ch. 3, § 7, note (Greenleaf's edit.), [2d edit. (1856) vol. 2, p. 346; Browne on Stat. of Frauds, §§ 347, 369.]

[3] Cook *v.* Stearns, 11 Mass. 533; [Browne on Stat. of Frauds, § 227–262.]

[4] Bligh *v.* Brent, 2 Y. & Col. 268, 295, 296; Bradley *v.* Holdsworth, 3 M. & W. 422.

[5] Parker *v.* Staniland, 11 East, 362; Cutler *v.* Pope, 1 Shepl. 337.

namely, potatoes, being but a personal chattel, and so not within the Statute of Frauds.[1] The latter cases confirm the doctrine involved in this decision, namely, that the transaction takes its character of realty or personalty from the principal subject-matter of the contract, and the intent of the parties; and that therefore a sale of any growing produce of the earth, reared by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land.[2] In regard to things produced annually by the labor of man, the question is sometimes solved by reference to the law of emblements; on the ground, that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land.[3] But the case seems also to be covered by a broader principle of distinction, namely, between contracts conferring an exclusive right to the land for a time, for the purpose of *making a profit of the growing surface*, and contracts for things annexed to the freehold, *in prospect of their immediate separation;* from which it seems to result, that where timber, or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor, or to be taken by the vendee, under a special license to enter for that purpose, it is still in the contemplation of the parties, evidently and substantially a sale of goods only, and so is not within the statute.[4]

[1] Warwick *v.* Bruce, 2 M. & S. 205. The contract was made on the 12th of October when the crop was at its maturity; and it would seem that the potatoes were forthwith to be digged and removed.

[2] Evans *v.* Roberts, 5 B. & C. 829; Jones *v.* Flint, 10 Ad. & El. 753.

[3] See observations of the learned judges, in Evans *v.* Roberts, 5 B. & C. 829. See also Rodwell *v.* Phillips, 9 M. & W. 501, where it was held, that an agreement for the sale of growing *pears* was an agreement for the sale of an interest in land, on the principle, that the fruit would not pass to the executor, but would descend to the heir. The learned Chief Baron distinguished this case from Smith *v.* Surman, 9 B. & C. 561, the latter being the case of a sale of growing timber by the foot, and so *treated by the parties* as if it had been actually felled;—a distinction which confirms the view subsequently taken in the text.

[4] Roberts on Frauds, p. 126; 4 Kent, Comm. 450, 451; Long on Sales (by Rand), pp. 76–81, and cases there cited; Chitty on Contracts, p. 241 (2d edit.); Bank of Lansingburg *v.* Crary, 1 Barb. 542. On this subject neither the English nor the American decisions are quite uniform; but the weight of authority is believed to be as stated in the text, though it is true of the former, as Ld. Abinger remarked in Rodwell *v.* Phillips, 9 M. & W. 505, that "no general rule is laid down in any one of them, that is not contradicted by some others." See also Poulter *v.* Killingbeck, 1 B. & P. 398; Parker *v.* Staniland, 11 East, 362, distinguishing and qualifying Crosby *v.* Wadsworth, 6 East, 611; Smith *v.* Surman, 9 B. & C. 561; Watts *v.* Friend, 10 B. & C. 446. The distinction taken in Bostwick *v.* Leach, 3 Day, 476, 484, is this, that when there is a sale of property, which would pass by a deed of land, as such, without any other description, if it can be sepa-

§ 272. *Devises of lands and tenements* are also required to be in writing, signed by the testator, and attested by credible, that is, by competent witnesses. By the statutes, 32 Hen. VIII, c. 1. and 34 & 35 Hen. VIII., c. 5, devises were merely required to be in writing. The Statute of Frauds, 29 Car. II., c. 3, required the attestation of "three or four credible witnesses;" but the statute 1 Viet. c. 26, has reduced the number of witnesses to two. The provisions of the Statute of Frauds on this subject have been adopted in most of the United States.[1] It requires that the witnesses

rated from the freehold, and by the contract is to be separated, such contract is not within the statute. See accordingly, Whipple *v.* Foot, 2 Johns. 418, 422; Frear *v.* Hardenbergh, 5 Johns. 276; Stewart *v.* Doughty, 9 Johns. 108, 112; Austin *v.* Sawyer, 9 Cowen, 39; Erskine *v.* Plummer, 7 Greenl. 447; Bishop *v.* Doty, 1 Vermont, R. 38; Miller *v.* Baker, 1 Met. 27; Whitmarsh *v.* Walker, Id. 313; Claflin *v.* Carpenter, 4 Met. 586. Mr. Rand, who has treated this subject, as well as all others on which he has written, with great learning and acumen, would reconcile the English authorities, by distinguishing between those cases in which the subject of the contract, being part of the inheritance, is to be severed and delivered by the vendor, as a chattel, and those in which a right of entry by the vendee to cut and take it is bargained for. "The authorities," says he, "all agree in this, that a bargain for trees, grass, crops, or any such like thing, when severed from the soil, which are growing, at the time of the contract, upon the soil, but to be severed and delivered by the vendor, as chattels, separate from any interest in the soil, is a contract for the sale of goods, wares, or merchandise, within the meaning of the seventeenth section of the Statute of Frauds. (Smith *v.* Surman, 9 B. & C. 561; Evans *v.* Roberts, 5 B. & C. 836; Watts *v.* Friend, 10 B. & C. 446; Parker *v.* Staniland, 11 East, 362; Warwick *v.* Bruce, 2 M. & S. 205.) So, where the subject-matter of the bargain is *fructus industriales*, such as corn, garden-roots, and such like things, which are emblements, and which have already grown to maturity, and are to be taken immediately, and no right of entry forms absolutely part of the contract, but a mere license is given to the vendee to enter and take them, it will fall within the operation of the same section of the statute. (Warwick *v.* Bruce, 2 M. & S. 205; Parker *v.* Staniland, 11 East, 362; Park, B., Carrington *v.* Roots, 2 M. & W. 256; Bayley, B., Shelton *v.* Livius, 2 Tyrw. 427, 429; Bayley, J., Evans *v.* Roberts, 5 B. & C. 831; Scorell *v.* Boxall, 1 Y. & J. 398; Mayfield *v.* Wadsley, 3 B. & C. 357.) But where the subject-matter of the contract constitutes a part of the inheritance, and is not to be severed and delivered by the vendor as a chattel, but a right of entry to cut and take it is bargained for, or, where it is emblements growing, and a right in the soil to grow and bring them to maturity, and to enter and take them, that makes part of the bargain, the case will fall within the fourth section of the Statute of Frauds. (Carrington *v.* Roots, 2 M. & W. 257; Shelton *v.* Livius, 2 Tyrw. 429; Scorell *v.* Boxall, 1 Y. & J. 398; Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89; Teal *v.* Auty, 2 B. & Bing. 99; Emmerson *v.* Heelis, 2 Taunt. 38; Waddington *v.* Bristow, 2 B. & P. 452; Crosby *v.* Wadsworth, 5 East. 602.)" See Long on Sales (by Rand), pp. 80, 81. But the latter English and the American authorities do not seem to recognize such distinction. [See also Browne on Stat. of Frauds, §§ 235–257.]

[1] In *New Hampshire* alone the will is required to be sealed. Three witnesses are necessary to a valid will in *Vermont*, *New Hampshire*, *Maine*, *Massachusetts*, *Rhode Island*, *Connecticut*, *New Jersey*, *Maryland*, *South Carolina*, *Georgia*, *Florida*, *Alabama*, and *Mississippi*. Two witnesses only are requisite in *New York*, *Delaware*, *Virginia*, *Ohio*, *Illinois*, *Indiana*, *Missouri*, *Tennessee*, *North Carolina*, *Michigan*, *Wisconsin*, *Arkansas*, and *Kentucky*. In some of the states, the provision as to attestation is more special. In *Pennsylvania*, a devise is good, if properly signed, though it is not subscribed by any attesting witness, provided it can be proved by two or more competent witnesses; and if it be attested by witnesses, it may still be proved by others. 4 Kent, Comm. 514. See *post*, vol. 2, tit. Wills, [7th edit. (1858,) §§ 673–678, and notes.] See further, as to the execution of Wills, 6

should attest and subscribe the will in the testator's presence. The attestation of marksmen is sufficient; and, if they are dead, the attestation may be proved by evidence, that they lived near the testator, that no others of the same name resided in the neighborhood, and that they were illiterate persons.[1] One object of this provision is, to prevent the substitution of another instrument for the genuine will. It is therefore held, that to be present, within the meaning of the statute, though the testator need not be in the same room, yet he must be near enough to see and identify the instrument, if he is so disposed, though in truth he does not attempt to do so; and that he must have mental knowledge and consciousness of the fact.[2] If he be in a state of insensibility at the moment of attestation, it is void.[3] Being in the same room is held *primâ facie* evidence of an attestation in his presence; as an attestation, not made in the same room, is *primâ facie* not an attestation in his presence.[4] It is not necessary, under the Statute of Frauds, that the witnesses should attest in the presence of each other, nor that they should all attest at the same time;[5] nor is it requisite that they should actually have seen the testator sign, or known what the paper was, provided they subscribed the instrument in his presence and at his request.[6] Neither has it

Cruise's Dig. tit. 38, ch. 5, Greenleaf's notes; [2d edit. (1857) pp. 47–80, and notes;] 1 Jarman on Wills, ch. 6, by Perkins.

[1] Doe *v.* Caperton, 9 C. & P. 112; Jackson *v.* Van Dusen, 5 Johns. 144; Doe *v.* Davis, 11 Jur. 182.

[2] Shires *v.* Glascock, 2 Salk. 688 (by Evans), and cases cited in notes; 4 Kent, Comm. 515, 516; Casson *v.* Dade, 1 Bro. Ch. R. 99; Doe *v.* Manifold, 1 M. & S. 294; Tod *v.* E. of Winchelsea, 1 M. & M. 12; 2 C. & P. 488; Hill *v.* Barge, 12 Ala. 687.

[3] Right *v.* Price, Doug. 241.

[4] Neil *v.* Neil, 1 Leigh, R. 6, 10–21, where the cases on this subject are ably reviewed by Carr, J. If the two rooms have a communication by folding-doors, it is still to be ascertained whether, in fact, the testator could have seen the witnesses in the act of attestation. In the goods of Colman, 3 Curt. 118.

[5] Cook *v.* Parsons, Prec. in Chan. 184; Jones *v.* Lake, 2 Atk. 177, in note; Grayson *v.* Atkin, 2 Ves. 455; Dewey *v.* Dewey, 1 Met. 349; 1 Williams on Executors (by Troubat), p. 46, note (2.) The statute of 1 Vict. c. 26, § 9, has altered the law in this respect, by enacting that no will shall be valid unless it be in writing, signed by the testator in the presence of two witnesses at one time. See Moore *v.* King, 3 Curt. 243; in the goods of Simmonds, Id. 79.

[6] White *v.* Trustees of the British Museum, 6 Bing. 310; Wright *v.* Wright, 7 Bing. 457; Dewey *v.* Dewey, 1 Met. 349; Johnson *v.* Johnson, 1 C. & M. 140. In these cases, the court certainly seem to regard the knowledge of the witnesses, that the instrument was a will, as a matter of no importance; since in the first two cases only one of the witnesses knew what the paper was. But it deserves to be considered whether in such case, the attention of the witness would probably be drawn to the state of the testator's mind, in regard to his sanity; for if not, one object of the statute would be defeated. See Rutherford *v.* Rutherford, 1 Denio, 33; Brinkerhoff *v.* Remsen, 8 Paige, 488; 26 Wend. 325; Chaffee *v.* Baptist, M. C. 10 Paige, 85; 1 Jarm. on Wills (by Perkins), p. 114; 6 Cruise's Dig. tit. 38, ch. 5, § 14, note (Greenleaf's edit.), [2d edit. 1857, vol. 3, p. 53, and note.] See further, as to proof by subscribing witnesses, *infra*, §§ 569, 569 *a*, 572.

been considered necessary, under this statute, that the testator should *subscribe* the instrument; it being deemed sufficient that it be *signed* by him in any part, with his own *name* or *mark*, provided it appear to have been done *animo perficiendi*, and to have been regarded by him as completely executed.[1] Thus, where the will was signed in the margin only; or where, being written by the testator himself, his name was written only in the beginning of the will, I, A. B., &c., this was held a sufficient signing.[2] But where it appeared that the testator intended to sign each several sheet of the will, but signed only two of them, being unable, from extreme weakness, to sign the others, it was held incomplete.[3]

§ 273. By the Statute of Frauds, the *revocation of a will*, by the direct act of the testator, must be proved by some subsequent will or codicil, inconsistent with the former; or by some other writing, declaring the same, and signed in the presence of three witnesses; or by burning, tearing, cancelling, or obliterating the same by the testator, or in his presence and by his direction and consent.[4] It is observable, that this part of the statute only requires that the instrument of revocation, if not a will or codicil, be signed by the testator in presence of the witnesses, but it does not, as in the

[1] That the party's *mark* or *initials* is a sufficient signature to any instrument, being placed there with intent to bind himself, in all cases not otherwise regulated by statute, see Baker *v.* Dening, 8 Ad. & El. 94; Jackson *v.* Van Dusen, 5 Johns. 144; Palmer *v.* Stephens, 1 Den. 471, and the cases cited in 6 Cruise's Dig. tit. 38, ch. 5, §§ 7, 19, notes (Greenleaf's edit.), [2d edit. (1857) vol. 3, pp. 50–56]; *post*, vol. 2, § 677.

[2] Lemaine *v.* Stanley, 3 Lev. 1; Morrison *v.* Turnour, 18 Ves. 183. But this also is now changed by the statute 1 Vict. c. 26, § 9, by which no will is valid unless it be signed at the foot or end thereof, by the testator, or by some other person, in his presence and by his direction; as well as attested by two witnesses, subscribing their names in his presence. See in the goods of Carver, 3 Curt. 29.

[3] Right *v.* Price, Doug. 241. The Statute of Frauds, which has been generally followed in the United States, admitted exceptions in favor of nuncupative or verbal wills, made under certain circumstances therein mentioned, as well as in favor of parol testamentary dispositions of personalty, by soldiers in actual service, and by mariners at sea; any further notice of which would be foreign from the plan of this treatise. The latter exceptions still exist in England; but nuncupative wills seem to be abolished there, by the general terms of the statute of 1 Vict. c. 26, § 9, before cited. The common law, which allows a bequest of personal estate by parol, without writing, has been altered by statute in most, if not all of the United States; the course of legislation having tended strongly to the abolition of all distinctions between the requisites for the testamentary disposition of real and of personal property. See 4 Kent, Comm. 516–520; Lovelass on Wills, pp. 315–319; 1 Williams on Executors (by Troubat), pp. 46–48, notes; 1 Jarman on Wills (by Perkins), p. [90] 132, note; 6 Cruise's Dig. (by Greenleaf), tit. 38, ch. 5, § 14, note; [2d edit. (1857) vol. 3, p. 53, and note].

[4] Stat. 29 Car. II., c. 3, § 6. The statute of 1 Vict. c. 26, § 20, mentions "burning, tearing, or otherwise destroying the same," &c. And see further, as to the evidence of revocation, 6 Cruise's Dig. (by Greenleaf), tit. 38, ch. 6, §§ 18, 19, 29, notes; [2d edit. (1857) vol. 3, p. 81 *et seq.*; 2 Greenl. Evid. (7th edit.) § 680–687;] 1 Jarman on Wills (by Perkins), ch. 7, § 2, notes.

execution of a will, require that the witnesses should sign in his presence. In regard to the other acts of revocation here mentioned, they operate by one common principle, namely, the intent of the testator. Revocation is an act of the mind, demonstrated by some outward and visible sign or symbol of revocation;[1] and the words of the statute are satisfied by any act of spoliation, reprobation, or destruction, deliberately done upon the instrument, *animo revocandi*.[2] The declarations of the testator, accompanying the act, are of course admissible in evidence as explanatory of his intention.[3] Accordingly, where the testator rumpled up his will and threw it into the fire with intent to destroy it, though it was saved entire without his knowledge, this was held to be a revocation.[4] So, where he tore off a superfluous seal.[5] But where, being angry with the devisee, he began to tear his will, but being afterwards pacified, he fitted the pieces carefully together, saying he was glad it was no worse, this was held to be no revocation.[6]

§ 274. Documentary evidence is also required in proof of the *contract of apprenticeship;* there being no legal binding, to give the master coercive power over the person of the apprentice, unless it be by indentures, duly executed in the forms prescribed by the various statutes on this subject. The general features of the English statutes of apprenticeship, so far as the mode of binding is concerned, will be found in those of most of the United States. There are various other cases, in which a deed, or other documentary evidence is required by statutes, a particular enumeration of which would be foreign from the plan of this treatise.[7]

[1] Bibb *v.* Thomas, 2 W. Bl. 1043.

[2] Burtenshaw *v.* Gilbert, Cowp. 49, 52; Burns *v.* Burns, 4 S. & R. 567; 6 Cruise's Dig. (by Greenleaf) tit. 38, ch. 6, § 54; Johnson *v.* Brailsford, 2 Nott & McC. 272; Winsor *v.* Pratt, 2 B. & B. 650; Lovelass on Wills, pp. 346–350; Card *v.* Grinman, 5 Conn. 168; 4 Kent, Comm. 531, 532.

[3] Dan *v.* Brown, 4 Cowen, 490.

[4] Bibb *v.* Thomas, 2 W. Bl. 1043.

[5] Avery *v.* Pixley, 4 Mass. 462.

[6] Doe *v.* Perkes, 3 B. & Ald. 489.

[7] In several of the United States, two subscribing witnesses are necessary to the execution of a deed of conveyance of lands to entitle it to registration; in others, but one. In some others, the testimony of two witnesses is requisite, when the deed is to be proved by witnesses. See *supra*, § 260, note; 4 Cruise's Dig. tit. 32, c. 2, § 77, note (Greenleaf's edit.), [2d edit. (1856) vol. 2, p. 341;] 4 Kent, Comm. 457. See also *post*, vol. 2 [7th edit. 1858], tit. WILLS, *passim*, where the subject of Wills is more amply treated.

CHAPTER XV.

OF THE ADMISSIBILITY OF PAROL OR VERBAL EVIDENCE TO AFFECT THAT WHICH IS WRITTEN.[1]

[1] The subject of this chapter is ably discussed in Spence on the Equitable Jurisdiction of Chancery, vol. 1, pp. 553–575, and in 1 Smith's Leading Cases, pp. 410–418 [305–310], with Hare & Wallace's notes.

§ 275. By *written evidence*, in this place, is meant not every thing which is in writing, but that only which is of a documentary and more solemn nature, containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. *Fiunt enim de his* [*contractibus*] *scripturæ, ut, quod actum est, per eas facilius probari poterit.*[1] When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend, in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected.[2] In other words, as the rule is now more briefly expressed, "parol contemporaneous evidence is inadmissible, to contradict or vary the terms of a valid written instrument."[3]

[1] Dig. lib. 20, tit. 1, l. 4; Id. lib. 22, tit. 4, l. 4.

[2] Stackpole *v.* Arnold, 11 Mass. 30, 31, per Parker, J.; Preston *v.* Merceau, 2 W. Bl. 1249; Coker *v.* Guy, 2 B. & P. 565, 569; Bogert *v.* Cauman, Anthon's R. 70; Bayard *v.* Malcolm, 1 Johns. 467, per Kent, C. J.; Rich *v.* Jackson, 4 Bro. Ch. R. 519, per Ld. Thurlow; Sinclair *v.* Stevenson, 1 C. & P. 582, per Best, C. J.; McLellan *v.* The Cumberland Bank, 11 Shepl. 566. The general rule of the Scotch law is to the same effect, namely, that "writing cannot be cut down or taken away, by the testimony of witnesses." Tait on Evid. pp. 326, 327. And this, in other language, is the rule of the Roman Civil Law, — Contra scriptum testimonium, non scriptum testimonium non fertur. Cod. lib. 4, tit. 20, l. 1.

[3] Phil. & Am. on Evid. p. 753; 2 Phil. Evid. 350; 2 Stark. Evid. 544, 548; Adams *v.* Wordley, 1 M. & W. 379, 380, per Parke, B.; Boorman *v.* Johnston, 12 Wend. 573. [* Thus the entry in a court of record into which a recognizance is returnable, that the principal made default, cannot be contradicted by parol evidence, on *scire facias*, against the bail. Commonwealth *v.* Slocum, 14 Gray, 395. Nor can an official entry on a record, void for uncertainty, be explained by extrinsic evidence. Porter *v.* Byrne, 10 Ind. 146.]

§ 276. This rule "was introduced in early times, when the most frequent mode of ascertaining a party to a contract was by his seal affixed to the instrument; and it has been continued in force, since the vast multiplication of written contracts, in consequence of the increased business and commerce of the world. It is not because a seal is put to the contract, that it shall not be explained away, varied, or rendered ineffectual; but because the contract itself is plainly and intelligibly stated, in the language of the parties, and is the best possible evidence of the intent and meaning of those who are bound by the contract, and of those who are to receive the benefit of it." "The rule of excluding oral testimony has heretofore been applied generally, if not universally, to simple contracts in writing, to the same extent and with the same exceptions as to specialties or contracts under seal."[1]

§ 277. It is to be observed, that the rule is directed only against the admission of any other evidence of the *language* employed by the parties in making the contract, than that which is furnished by the writing itself. The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, *no other words* are to be added to it, or substituted in its stead. The duty of the court in such cases, is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express; but what is the meaning of words they have used.[2] It is merely a duty of interpretation; that is, to find out the true sense of the written words, as the parties used them; and of construction, that is, when the true sense is ascertained, to subject the instrument, in its operation, to the established rules of law.[3] And where the lan-

[1] Per Parker, J., in Stackpole *v.* Arnold, 11 Mass. 31. See also Woolam *v.* Hearn, 7 Ves. 218, per Sir William Grant; Hunt *v.* Adams, 7 Mass. 522, per Sewall, J.

[2] Doe *v.* Gwillim, 5 B & Ad. 122, 129, per Parke, J.; Doe *v.* Martin, 4 B. & Ad. 771, 786, per Parke, J.; Beaumont *v.* Field, 2 Chitty's R. 275, per Abbott, C. J. See *infra*, § 295. [And where a written instrument is lost, and parol evidence is given of its contents, its construction still remains the duty of the court. Berwick *v.* Horstall, 4 Com. B. Reps. N. S. 450.]

[3] The subject of Interpretation and Construction is ably treated by Professor Lieber, in his Legal and Political Hermeneutics, ch. 1, § 8, and ch. 3, §§ 2, 3. And see Doct. & St. 39, c. 24. The interpretation, as well as the construction of a written instrument, is for the court, and not for the jury. But other questions of intent, in fact, are for the jury. The court, however, where the meaning is doubtful, will, in proper cases, receive evidence in aid of its judgment. Story on Agency, § 63, note (1); Paley on Agency, by Lloyd, p. 198, n.; *supra*, § 49; Hutchinson *v.* Bowker, 5 M. & W. 535; and where it is doubtful whether a

guage of an instrument has a settled legal construction, parol evidence is not admissible to contradict that construction. Thus, where no time is expressly limited for the payment of the money mentioned in a special contract in writing, the legal construction is, that it is payable presently; and parol evidence of a contemporaneous verbal agreement, for the payment at a future day, is not admissible.[1]

§ 278. The *terms* of every written instrument are to be *understood in their plain, ordinary, and popular sense*, unless they have generally, in respect to the subject-matter, as, by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense. But where the instrument consists partly of a printed formula, and partly of written words, if there is any reasonable doubt of the meaning of the whole, the *written words* are entitled to have *greater effect* in the interpretation than those which are printed; they being the immediate language and terms selected by the parties themselves for the expression of their meaning, while the *printed formula* is more general in its nature, applying equally to their case and to that of all other contracting parties, on similar subjects and occasions.[2]

§ 279. The rule under consideration is *applied only in suits between the parties* to the instrument; as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons; who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, careless, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others.[3]

certain word was used in a sense different from its ordinary acceptation, it will refer the question to the jury. Simpson *v.* Margitson, 35 Leg. Obs. 172.

[1] Warren *v.* Wheeler, 8 Met. 97. Nor is parol evidence admissible to prove how a written contract was understood by either of the parties, in an action upon it at law, in the absence of any fraud. Bigelow *v.* Collamore, 5 Cush. 226; Harper *v.* Gilbert, Id. 417. [Parol evidence is not admissible to show in what sense the recorded vote of the directors of a corporation was understood by a director. Gould *v.* Norfolk Lead Co. 9 Cush. 338, 345.]

[2] Per Ld. Ellenborough, in Robertson *v.* French, 4 East, 135, 136. See Wigram on the Interpretation of Wills, pp. 15, 16, and cases there cited. See also Boorman *v.* Johnston, 12 Wend. 573; Taylor *v.* Briggs, 2 C. & P. 525; Alsager *v.* St. Katherine's Dock Co. 14 M. & W. 799, per Parke, B.

[3] *Supra*, §§ 23, 171, 204; 1 Poth. Obl. by Evans, P. 4, c. 2, art. 3, n. [766]; 2

§ 280. It is almost superfluous to add, that the rule does not exclude the *testimony of experts*, to aid the court in reading the instrument. If the characters are difficult to be deciphered, or the language, whether technical, or local and provincial, or altogether foreign, is not understood by the court, the evidence of persons skilled in deciphering writings, or who understood the language in which the instrument is written, or the technical or local meaning of the terms employed, is admissible, to declare what are the characters, or to translate the instrument, or to testify to the proper meaning of the particular words.[1] Thus the words "inhabitant,"[2] "level,"[3] "thousands,"[4] "fur,"[5] "freight,"[6] and many others, have been interpreted, and their peculiar meaning, when used in connection with the subject-matter of the transaction, has been fixed, by parol evidence of the sense in which they are usually received, when employed in cases similar to the case at bar. And so of the meaning of the phrase, "duly

Stark. Evid. 575; Krider *v.* Lafferty, 1 Whart. 303, 314, per Kennedy, J.; Reynolds *v.* Magness, 2 Iredell, R. 26; [Edgerly *v.* Emerson, 3 Foster, 555. See Langdon *v.* Langdon, 4 Gray, 186.]

[1] Wigram on the Interpretation of Wills, p. 48; 2 Stark. Evid. 565, 566; Birch *v.* Depeyster, 1 Stark. R. 210, and cases there cited; *infra*, §§ 292, 440, note; Sheldon *v.* Benham, 4 Hill, N. Y. Rep. 123; [Stone *v.* Hubbard, 7 Cush. 595, 597.]

[2] The King *v.* Mashiter, 6 Ad. & El. 153.

[3] Clayton *v.* Gregson, 5 Ad. & El. 302; 4 N. & M. 602, s. c.

[4] Smith *v.* Wilson, 3 B. & Ad. 728. The doctrine of the text was more fully expounded by Shaw, C. J., in Brown *v.* Brown, 8 Met. 576, 577, as follows: "The meaning of words, and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are, *primâ facie*, matter of law, to be construed and passed upon by the court. But language may be ambiguous, and used in different senses; or general words, in particular trades and branches of business, — as among merchants, for instance, — may be used in a new, peculiar, or technical sense; and, therefore, in a few instances, evidence may be received, from those who are conversant with such branches of business, and such technical or peculiar use of language, to explain and illustrate it. One of the strongest of these, perhaps, among the recent cases, is the case of Smith *v.* Wilson, 3 Barn. & Adolph. 728, where it was held that, in an action on a lease of an estate including a rabbit warren, evidence of usage was admissible, to show that the words, 'thousand of rabbits' were understood to mean one hundred dozen, that is, twelve hundred. But the decision was placed on the ground that the words 'hundred,' 'thousand,' and the like, were not understood, when applied to particular subjects, to mean that number of units; that the definition was not fixed by law, and therefore was open to such proof of usage. Though it is exceedingly difficult to draw the precise line of distinction, yet it is manifest that such evidence can be admitted only in a few cases like the above. Were it otherwise, written instruments, instead of importing certainty and verity, as being the sole repository of the will, intent, and purposes of the parties, to be construed by the rules of law, might be made to speak a very different language by the aid of parol evidence." [See also Attorney-General *v.* Clapham, 31 Eng. Law & Eq. 142].

[5] Astor *v.* The Union Ins. Co. 7 Cowen, 202.

[6] Peisch *v.* Dickson, 1 Mason, 11, 12. [Evidence of the character of the plaintiffs' freighting business for several years previous, is admissible to show that the defendant, in contracting to transport "their freight," did not mean to include hay. Noyes v. Canfield, 1 Williams, 79.]

honored,"[1] when applied to a bill of exchange; and of the expression, "in the month of October,"[2] when applied to the time when a vessel was to sail; and many others of the like kind. If the question arises from the obscurity of the writing itself, it is determined by the court alone;[3] but questions of custom, usage, and actual intention and meaning derived therefrom are for the jury.[4] But where the words have a known legal meaning, such, for example, as measures of quantity fixed by statute, parol evidence, that the parties intended to use them in a sense different from the legal meaning, though it were still the customary and popular sense, is not admissible.[5]

§ 281. The reason and policy of the rule will be further seen, by adverting to some of the cases in which parol evidence has been *rejected*. Thus, where a policy of insurance was effected on goods, "in ship or ships from Surinam to London," parol evidence was held inadmissible to show that a particular ship in the fleet, which was lost, was verbally excepted at the time of the contract.[6] So, where a policy described the two *termini* of the voyage, parol evidence was held inadmissible to prove that the risk was not to commence until the vessel reached an intermediate place.[7] So,

[1] Lucas *v.* Groning, 7 Taunt. 164.

[2] Chaurand *v.* Angerstien, Peake's Cas. 43. See also Peisch *v.* Dickson, 1 Mason, 12; Doe *v.* Benson, 4 B. & Ald. 588; United States *v.* Breed, 1 Sumn. 159; Taylor *v.* Briggs, 2 C. & P. 525. [And to explain such an expression as "Regular turns of loading," in an action on a contract for loading coals at Newcastle. Leideman *v.* Schultz, 24 Eng. Law & Eq. 305. Theological works of the period referred to are admissible, to show the meaning of the words "*Protestant dissenters*," in a trust deed. Drummond *v.* Attorney-General, 2 Ib. 15; *infra*, § 295].

[3] Remon *v.* Hayward, 2 Ad. & El. 666; Crofts *v.* Marshall, 7 C. & P. 597; *infra*, § 300. But see Sheldon *v.* Benham, 4 Hill, (N. Y.) Rep. 123.

[4] Lucas *v.* Groning, 7 Taunt. 164, 167, 168; Birch *v.* Depeyster, 1 Stark. R. 210; Paley on Agency (by Lloyd), p. 198; Hutchinson *v.* Bowker, 5 M. & W. 535.

[5] Smith *v.* Wilson, 3 B. & Ad. 728, per Lord Tenterden; Hockin *v.* Cooke, 4 T. R. 314; Attorney-General *v.* The Cast Plate Glass Co. 1 Anstr. 39; Sleght *v.* Rhinelander, 1 Johns. 192; Frith *v.* Barker, 2 Johns. 335; Stoever *v.* Whitman, 9 Binn. 417; Henry *v.* Risk, 1 Dall. 465; Doe *v.* Lea, 11 East, 312; Caine *v.* Horsefall, 2 C. & K. 349. Conversations between the parties at the time of making a contract are competent evidence, as a part of the *res gesta*, to show the sense which they attached to a particular term used in the contract. Gray *v.* Harper, 1 Story, R. 574. Where a sold note run thus:—"18 pockets of hops, at 100s.," parol evidence was held admissible to show that 100s. meant the price per hundred weight. Spicer *v.* Cooper, 1 G. & D. 52. [Parol evidence is inadmissible to show that the parties to a deed understood "half" of a rectangular lot to mean a less quantity. Butler *v.* Gale, 1 Williams, 739].

[6] Weston *v.* Eames, 1 Taunt. 115.

[7] Kaines *v.* Knightly, Skin. 54; Leslie *v.* De la Torre, cited 12 East, 358. [So where a policy was issued by a mutual insurance company, and made in terms subject to the conditions of its by-laws, and the by-laws provided that any policy issued upon property previously insured should be void unless the previous insurance should be expressed in the policy when issued, parol evidence is inadmissible to show that the fact of the existence of such prior insurance, and of the understanding of the insured that it should remain in force, was made known to the defendant company, and assented to by

where the instrument purported to be an absolute engagement to pay at a specified day, parol evidence of an oral agreement at the same time that the payment should be prolonged,[1] or depend upon a contingency,[2] or be made out of a particular fund, has been rejected.[3] Where a written agreement of partnership was unlimited as to the time of commencement, parol evidence that it was at the same time verbally agreed that the partnership should not commence until a future day was held inadmissible.[4] So, where, in assumpsit for use and occupation, upon a written memorandum of lease, at a certain rent, parol evidence was offered by the plaintiff of an agreement at the same time to pay a further sum, being the ground rent of the premises, to the ground landlord, it was rejected.[5] So, where, in a written contract of sale of a ship, the

them, prior to the execution and delivery of the policy. Barrett *v.* Union Mut. Fire Ins. Co. 7 Cush. 175, 180; Lee *v.* Howard, &c. Co. 3 Gray, 583, 592. So where a bill of lading expressly stipulated that certain goods named therein may be carried on deck, parol evidence is inadmissible to show that the shipper agreed and assented, at the time of the stowage, that an additional portion of the goods should be carried on deck. Sayward *v.* Stevens, 3 Gray, 97, 102].

[1] Hoare *v.* Graham, 3 Campb. 57; Hanson *v.* Stetson, 5 Pick. 506; Spring *v.* Lovett, 11 Pick. 417.

[2] Rawson *v.* Walker, 1 Stark. R. 361; Foster *v.* Jolly, 1 C. M. & R. 703; Hunt *v.* Adams, 7 Mass. 518; Free *v.* Hawkins, 8 Taunt. 92; Thompson *v.* Ketchum, 8 Johns. 189; Woodbridge *v.* Spooner, 3 B. & Ald. 233; Moseley *v.* Hanford, 10 B. & C. 729; Erwin *v.* Saunders, 1 Cowen, 249. [See Allen *v.* Furbish, 4 Gray, 504, 506, in which some of the Massachusetts cases, showing that parol evidence is inadmissible to annex a condition to an absolute promise in writing in the form of a promissory note, promising to pay a certain sum of money on a certain day named, are reviewed by Dewey, J., and the principle re-affirmed. Hollenbeck *v.* Shutts, 1 Gray, 431; Billings *v.* Billings, 10 Cush. 178, 182; Southwick *v.* Hapgood, Ib. 119, 121; Ridgway *v.* Bowman, 7 Cush. 268, 271. Parol evidence is not admissible to show that a promissory note was intended for a receipt. City Bank *v.* Adams, 45 Maine, 455].

[3] Campbell *v.* Hodgson, 1 Gow. R. 74.

[4] Dix *v.* Otis, 5 Pick. 38.

[5] Preston *v.* Merceau, 2 W. Bl. 1249. A similar decision was made in the "Isabella," 2 Rob. Adm. 241, and in White *v.* Wilson, 2 B. & P. 116, where seamen's wages were claimed in addition to the sum named in the shipping articles. The English statutes not only require such contracts to be in writing, but declare that the articles shall be conclusive upon the parties. The statute of the United States is equally imperative as to the writing, but omits the latter provision as to its conclusiveness. But the decisions in both the cases just cited rest upon the general rule stated in the text, which is a doctrine of general jurisprudence, and not upon the mere positive enactments of the statutes. See 2 Rob. Adm. 243; Bogert *v.* Cauman, Anthon's R. 70. The American courts adopt the same doctrine, both on general principles, and as agreeable to the intent of the Act of Congress regulating the merchant service. See Abbott on Shipping (by Story), p. 434, note; Bartlett *v.* Wyman, 14 Johns. 260; Johnson *v.* Dalton, 1 Cowen, R. 543; [Page *v.* Sheffield, 2 Curtis, C. C. 377]. The same rule is applied in regard to the Statute of Frauds. See 11 Mass. 31. See further, Rich *v.* Jackson, 4 Bro. Ch. R. 514; Brigham *v.* Rogers, 17 Mass. 571; Flinn *v.* Calow, 1 M. & G. 589. [So an oral promise to discharge an incumbrance not created by himself, made by a grantor to a grantee, cannot be shown to have been made at the same time and for the same consideration, as a deed containing covenants of special warranty only. Howe *v.* Walker, 4 Gray, 318; Goodrich *v.* Longley, Ib. 379, 383. Nor can a limited warranty in a deed be extended to a general warranty by proof of a parol agreement to that effect, made at the time of the delivery of the deed. Raymond *v.* Raymond, 10 Cush. 134, 141; Dutton *v.* Gerrish, 9 Ib. 89. Nor can it be shown by

ship was particularly described, it was held that parol evidence of a further descriptive representation, made prior to the time of sale, was not admissible to charge the vendor, without proof of actual fraud; all previous conversation being merged in the written contract.[1] So, where a contract was for the sale and delivery of "Ware potatoes," of which there were several kinds or qualities; parol evidence was held not admissible to show that the contract was in fact for the best of those kinds.[2] Where one signed a premium note in his own name, parol evidence was held inadmissible to show that he signed it as the agent of the defendant, on whose property he had caused insurance to be effected by the plaintiff, at the defendant's request, and who was sued as the promisor in the note, made by his agent.[3] So, where an agent let a ship on hire, describing himself in the charter-party as "owner," it was held, in an action upon the charter-party, brought by the true owner, that parol evidence was not admissible to show that the plaintiff, and not the agent, was the real owner of the ship.[4] Even the subsequent confession of the party, as to the true intent and construction of the title deed, under which he claims, will be

parol that the name of the grantee in a deed was inserted therein by mistake of the scrivener, in place of another person who was intended as the grantee, and who afterwards entered upon and occupied the land. Crawford *v.* Spencer, 8 Cush. 418.

Where a lease, under seal, of coal lands, said nothing as to the quantity to be mined, but established the price per bushel for all that was mined, it cannot be shown by parol that the lessee, at the time of signing the lease, promised to mine all he could dispose of. Lyon *v.* Miller, 24 Penn. State R. 392; Kennedy *v.* Erie, &c., Plank Road Co. 25 Ib. 224; Chase *v.* Jewett, 37 Maine, 351. "Furring for the whole house," in a written building contract, cannot be shown by parol to mean only usual furring. Herrick *v.* Noble, 1 Williams, 1. Nor can it be shown by parol that an assignment of store goods was intended to include the "store books." Taylor *v.* Sayre, 4 Zabr. 647.]

[1] Pickering *v.* Dowson, 4 Taunt. 779. See also Powell *v.* Edmunds, 12 East, 6; Pender *v.* Fobes, 1 Dev. & Bat. 250; Wright *v.* Crookes, 1 Scott, N. R. 64.

[2] Smith *v.* Jeffreys, 15 M. & W. 561.

[3] Stackpole *v.* Arnold, 11 Mass. 27. See also Hunt *v.* Adams, 7 Mass. 518; Shankland *v.* City of Washington, 5 Peters, 394; [Myrick *v.* Dame, 9 Cush. 248, 254.] But parol evidence is admissible to show that one of several promisors signed as the surety of another. Carpenter *v.* King, 9 Met. 511; McGee *v.* Prouty, Id. 547; [Davis *v.* Barrington, 10 Foster, 517. See Arnold *v.* Cessna, 25 Penn. State R. 34. (So as between successive indorsers, that they were in fact co-sureties. Weston *v.* Chamberlain, 7 Cush. 404); Riley *v.* Gerrish, 9 Ib. 104. And an agreement between two sureties on a bond, that one of them shall not, as between themselves, be liable in consequence of his becoming such a surety, may be proved by parol. Barry *v.* Ransom, 2 Kernan, 462. But see Norton *v.* Coons, 2 Selden, 33.] And where a special agreement was made in writing for the sale of goods from A to B, the latter being in part the agent of C, whose name did not appear in the transaction; it was held, that C might maintain an action in his own name against A for the breach of this contract, and that parol evidence was admissible to prove, that B acted merely as the agent of C, and for his exclusive benefit. Hubbert *v.* Borden, 6 Wharton's R. 79.

[4] Humble *v.* Hunter, 12 Ad. & El. 310, N. S. And see Lucas *v.* De la Cour, 1 M. & S. 249; Robson *v.* Drummond, 2 B. & Ad. 303.

rejected.[1] The books abound in cases of the application of this rule; but these are deemed sufficient to illustrate its spirit and meaning, which is the extent of our present design.

§ 282. From the examples given in the two preceding sections, it is thus apparent that *the rule excludes only parol evidence of the language* of the parties, contradicting, varying, or adding to that which is contained in the written instrument; and this because they have themselves committed to writing all which they deemed necessary to give full expression to their meaning, and because of the mischiefs which would result, if verbal testimony were in such cases received. But where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms.[2] It is also to be kept in mind, that though the first question in all cases of contract is one of interpretation and intention, yet the question, as we have already remarked, is not what the parties may have secretly and in fact intended, but what meaning did they intend to convey, by the words they employed in the written instrument. To ascertain the meaning of these words, it is obvious that parol evidence of extraneous facts and circumstances may in some cases be admitted to a very great extent, without in anywise infringing the spirit of the rule under consideration. These cases, which in truth are not exceptions to the rule, but on the contrary are out of the range of its operation, we shall now proceed to consider.

[*282*a*. It seems to be well settled that the rule excludes all evidence of intention, whether direct or inferential.[3] It seems too that parol evidence is competent to identify, and to show who were, in fact, the contracting parties.[4] So, also, it is always competent to prove custom or usage, in order to ascertain the sense in which the parties used the terms of the writing; as that a contract for "best palm oil," "wet, dirty, and inferior oil, if any, at

[1] Paine *v.* McIntire, 1 Mass. 69, as explained in 10 Mass. 461. See also Townsend *v.* Weld, 8 Mass. 146. [Where the plaintiff declares upon and puts in evidence a written contract as his ground of action, he cannot put in evidence the oral declarations of the defendant as to his supposed liability. Goodell *v.* Smith, 9 Cush. 592, 594.]

[2] Sweet *v.* Lee, 3 Man. & Gr. 452; [Webster *v.* Hodgkins, 5 Foster, 128. Where there is an acknowledgment of indebtedness, by making this memorandum: "I O U the sum of $160, which I shall pay on demand to you," parol evidence is admissible to show the person to whom it is addressed. Kinney *v.* Flynn, 2 R. I. 319.]

[3] [*Harrison *v.* Barton, 7 Jur. N. S. 19; S. C. 1 Johns. & H. 287.

[4] Holding *v.* Elliott, 5 H. & N. 117.]

a fair allowance," is satisfied if the oil on arrival is only one fifth "best oil."[1] So, also, to show a usage that a broker who contracts without disclosing his principal is himself personally responsible.[2] But a custom or usage must be reasonable, in order to be obligatory; and if it be such as honest and fair-minded men would deem unfair and unjust, it cannot be regarded as valid, or of any force in any respect.[3]]

§ 283. It is in the first place to be observed, that the rule does not restrict the court to the perusal of a single instrument or paper; for, while the controversy is between the original parties, or their representatives, *all their contemporaneous writings*, relating to the same subject-matter, are admissible in evidence.[4]

§ 284. It is in the next place to be noted, that the rule is not infringed by the admission of parol evidence, showing that the instrument is altogether *void*, or that it *never* had any legal existence or binding force; either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject-matter. This qualification applies to all contracts, whether under seal or not. The *want of consideration* may also be proved to show that the agreement is not binding; unless it is either under seal, which is conclusive evidence of a sufficient consideration,[5] or is a negotiable instrument in the hands of an innocent indorsee.[6] *Fraud*, practised by the party seeking the remedy, upon him against whom it is sought, and in that which is the subject-matter of the action or claim, is universally held fatal to his title. "The covin," says Lord Coke, "doth suffocate the right." The foundation of the claim, whether it be a record, or a deed, or a writing without seal, is of no importance; they being alike void, if obtained by fraud.[7] Parol evidence may also be offered to show that the contract was made for the furtherance of objects

[1] [*Lucas *v.* Bristow, Ellis Bl. & El. 907.

[2] Dale *v.* Humfrey, 7 El. & Bl. 266; s. c. El. & Bl. & El. 1004.

[3] Paxton *v.* Courtnay, 2 F. & F. 131.]

[4] Leeds *v.* Lancashire, 2 Campb. 205; Hartley *v.* Wilkinson, 4 Campb. 127; Stone *v.* Metcalf, 1 Stark. R. 53; Bowerbank *v.* Monteiro, 4 Taunt. 846, per Gibbs, J.; Hunt *v.* Livermore, 5 Pick. 395; Davlin *v.* Hill, 2 Fairf. 434; Couch *v.* Meeker, 2 Conn. 302; Lee *v.* Dick, 10 Pet. 482; Bell *v.* Bruen, 17 Pet. 161; 1 Howard, (s. c.) R. 169, 183, s. c.

[5] *Supra*, §§ 19, 22; *infra*, § 303.

[6] *Supra*, §§ 189, 190.

[7] 2 Stark. Evid. 340; Tait on Evid. 327, 328; Chitty on Contr. 527 *a*; Buckler *v.* Millerd, 2 Ventr. 107; Filmer *v.* Gott, 4 Bro. P. C. 230; Taylor *v.* Weld, 5 Mass. 116, per Sedgwick, J.; Franchot *v.* Leach, 5 Cowen, 508; Dorr *v.* Munsell, 13 Johns. 431; Morton *v.* Chandler, 8 Greenl. 9; Commonwealth *v.* Bullard, 9 Mass. 270; Scott *v.* Burton, 2 Ashm. 312; [Allen *v.* Furbish, 4 Gray, 504, 509; Prescott *v.* Wright, Ib. 461.]

forbidden by law,[1] whether it be by statute, or by an express rule of the common law, or by the general policy of the law; or that the writing was obtained by *felony*,[2] or by *duress*;[3] or that the party was *incapable* of binding himself, either by reason of some legal impediment, such as infancy or coverture,[4] or from actual imbecility or want of reason,[5] whether it be by means of permanent idiocy or insanity, or from a temporary cause such as drunkenness;[6] or that the instrument came into the hands of the plaintiff without any absolute and final *delivery*,[7] by the obligor or party charged.

§ 284*a*. Nor does the rule apply, in cases where the original contract was verbal and entire, and a *part only* of it was *reduced to writing*. Thus, where upon an adjustment of accounts, the debtor conveyed certain real estate to the creditor at an assumed value, which was greater than the amount due, and took the creditor's promissory note for the balance; it being verbally agreed that the real estate should be sold, and the proceeds accounted for by the grantee, and that the deficiency, if any, below the estimated value, should be made good by the grantor; which agreement the grantor afterwards acknowledged in writing; — it was held, in an action brought by the latter to recover the contents of the note, that the whole agreement was admissible in evidence on the part of the defendant; and that, upon the proof that the sale of the land produced less than the estimated value, the deficiency should be deducted from the amount due upon the note.[8]

[1] Collins *v.* Blantern, 2 Wils. 347; 1 Smith's Leading Cas. 154, 168, note, and cases there cited. If the contract is by deed, the illegality must be specially pleaded. Whelpdale's case, 5 Co. 119; Mestayer *v.* Biggs, 4 Tyrw. 471. But the rule in the text applies to such cases, as well as to those arising under the general issue. See also Biggs *v.* Lawrence, 3 T. R. 454; [see Corbin *v.* Adams, 6 Cush. 96, for queries as to Biggs *v.* Lawrence;] Waymell *v.* Reed, 5 T. R. 600; Doe *v.* Ford, 3 Ad. & El. 649; Catlin *v.* Bell, 4 Campb. 183; Commonwealth *v.* Pease, 16 Mass. 91; Norman *v.* Cole, 3 Esp. 253; Sinclair *v.* Stevenson, 1 C. & P. 582; Chitty on Contr. 519–527.

[2] 2 B. & P. 471, per Heath, J.

[3] 2 Inst. 482, 483; 5 Com. Dig. Pleader, 2 W. 18–23; Stouffer *v.* Latshaw, 2 Watts, 165; Thompson *v.* Lockwood, 15 Johns. 256; 2 Stark. Evid. 274.

[4] 2 Stark. Evid. 274; Anon. 12 Mod. 609; Van Valkenburg *v.* Rouk, 12 Johns. 338; 2 Inst. 482, 483; 5 Dig. *ub. sup.*

[5] 2 Kent, Comm. 450–453, and cases there cited; Webster *v.* Woodford, 3 Day, 90; Mitchell *v.* Kingman, 5 Pick. 431; Rice *v.* Peet, 15 Johns. 503.

[6] See Barrett *v.* Buxton, 2 Aik. 167, where this point is ably examined by Prentiss, J.; Seymour *v.* Delancy, 3 Cowen, 518; 1 Story's Eq. Jur. § 231, note (2); Wigglesworth *v.* Steers, 1 Hen. & Munf. 70; Prentice *v.* Achorn, 2 Paige, 31.

[7] Clark *v.* Gifford, 10 Wend. 310; United States *v.* Leffler, 11 Peters, 86; Jackson d. Titus *v.* Myers, 11 Wend. 533, 536; Couch *v.* Meeker, 2 Conn. R. 302. [Where an instrument was signed with an understanding that it was not to be delivered except upon the performance of a certain condition, this may be shown by parol. Black *v.* Lamb, 1 Beasley, 108.]

[8] Lewis *v.* Gray, 1 Mass. 297; Lapham *v.* Whipple, 8 Met. 59. [Sheffield *v.* Page,

[*But this is a qualification of the general rule, which, although correct in strictness of principle, it will be always difficult to apply, in practice, without materially trenching upon the integrity of the rule itself. But the English courts do not hesitate to act upon the exception, especially where that seems the only mode of reaching the justice of the case, and of enabling one party to escape from the fraud or injustice of the other. As where it was agreed the contract should not become operative unless a third party consented.[1]]

§ 285. Neither is this rule infringed by the introduction of parol evidence, *contradicting* or *explaining* the instrument in some of its *recitals of facts*, where such recitals do not, on other principles, estop the party to deny them; and accordingly in some cases such evidence is received.[2] Thus, in a settlement case, where the value of an estate, upon which the settlement was gained, was in question, evidence of a greater sum paid than was recited in the deed was held admissible.[3] So, to show that the lands, described in the deed as in one parish, were in fact situated in another.[4] So, to show, that at the time of entering into a contract of service in a particular employment, there was a further agreement to pay a sum of money as a premium, for teaching the party the trade, whereby an apprenticeship was intended; and that the whole was therefore void for want of a stamp, and so no settlement was gained.[5] So, to contradict the recital of the date of a deed; as, for example, by proving that a charter-party, dated February 6th, conditioned to sail on or before February 12th, was not executed till after the latter day, and that therefore the condition was dispensed with.[6] So, to show that the reference, in a codicil to a will of 1833, was a mistake, that will being supposed to be destroyed; and that the will of 1837 was intended.[7] And on the other hand, where a written

Sprague's Decisions, 285; Harris *v.* Forman, 5 Com. B. Rep. N. S. 1.]

[1] [*Wallis *v.* Littell, 11 C. B. N. S. 368; 8 Jur. N. S. 745; see also Wake *v.* Hartop, 10 W. R. 626; S. C. 7 Law T. N. S. 96, in the Exchequer Chamber.]

[2] 2 Poth. on Obl. by Evans, pp. 181, 182. [*Harris *v.* Rickett, 4 H. & N. 1; Chapman *v.* Callis, 2 F. & F. 161.]

[3] Rex *v.* Scammonden, 3 T. R. 474. See also Doe *v.* Ford, 3 Ad. & El. 649.

[4] Rex *v.* Wickhan, 2 Ad. & El. 517. [The plan or map of a railroad, filed with the location, and constituting part of the description, may be referred to, to explain the written location, but not to vary or modify it. Hazen *v.* Boston & M. R. R., 2 Gray, 574, 579; Boston & P. R. R. *v.* Midland R. R. 1 Gray, 340.]

[5] Rex *v.* Laindon, 8 T. R. 379. [Creamer *v.* Stephenson, 15 Md. 211.]

[6] Hall *v.* Cazenove, 4 East, 477. See further, Tait on Evid. pp. 332, 333–336; *infra*, § 304.

[7] Quincey *v.* Quincey, 11 Jur. 111.

guaranty was expressed to be "in consideration of your *having discounted* V.'s note," and it was objected that it was for a past consideration, and therefore void, explanatory parol evidence was held admissible, to show that the discount was contemporaneous with the guaranty.[1] So where the guaranty was "in consideration of your having *this day* advanced to V. D.," similar evidence was held admissible.[2] It is also admissible to show when a written promise, without date, was in fact made.[3] Evidence may also be given of a consideration, not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it.[4]

§ 286. As it is a leading rule, in regard to written instruments, that they are to be interpreted according to their subject-matter, it is obvious that parol or verbal testimony must be resorted to, in order to ascertain the *nature and qualities of the subject*,[5] to which the instrument refers. Evidence, which is calculated to explain the subject of an instrument, is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive if considered in the abstract. Thus, where certain premises were leased, including a yard, described by metes and bounds, and the question was, whether a cellar under the yard was or was not included in the lease; verbal evidence was held admissible to show that, at the time of the lease, the cellar was in the occupancy of another tenant, and therefore, that it could not have been intended by the parties that it should pass by the lease.[6] So, where a house, or a mill, or a factory is conveyed, *eo nomine*, and the question is, as to what was part and parcel thereof, and so passed by the deed, parol evidence to this point is admitted.[7]

[1] *Ex parte* Flight, 35 Leg. Obs. 240. And see Haigh *v.* Brooks, 10 Ad. & El. 309; Butcher *v.* Stuart, 11 M. & W. 857.

[2] Goldshede *v.* Swan, 35 Leg. Obs. 203; 1 Exch. R. 154. This case has been the subject of some animated discussion in England. See 12 Jur. 22, 94, 102.

[3] Lobb *v.* Stanley, 5 Ad. & El. 574, N. S.

[4] Clifford *v.* Turrill, 9 Jur. 633.

[5] In the term "subject," in this connection, text-writers include every thing to which the instrument relates, as well as the person who is the other contracting party, or who is the object of the provision, whether it be by will or deed. Phil. & Am. on Evid. 732, n. (1.)

[6] 2 Poth. on Obl. by Evans, p. 185; Doe d. Freeland *v.* Burt, 1 T. R. 701; Elfe *v.* Gadsden, 2 Rich. 373; Brown *v.* Slater, 16 Conn. 192; Milbourn *v.* Ewart, 5 T. R. 381, 385; [*infra*, §§ 401, 402, and notes.] [*Chadwick *v.* Burnley, 12 W. R. 1077.]

[7] Ropps *v.* Barker, 4 Pick. 239; Farrar

§ 287. Indeed, there is *no material difference* of principle in the rules of interpretation *between wills and contracts*, except what naturally arises from the different circumstances of the parties. The object, in both cases, is the same, namely, to discover the intention. And, to do this, the court may, in either case, *put themselves in the place of the party*, and then see how the terms of the instrument affect the property or subject-matter.[1] With this

v. Stackpole, 6 Greenl. 154; *infra*, § 287, cases in note. But where the language of the deed was broad enough plainly to include a garden, together with the house, it was held, that the written paper of conditions of sale, excepting the garden, was inadmissible to contradict the deed. Doe *v.* Wheeler, 4 P. & D. 273; [Goodrich *v.* Longley, 1 Gray, 615, 618.]

[1] Doe *v.* Martin, 1 N. & M. 524; 4 B. & Ad. 771, 785, s. c. per Park, J.; Holstein *v.* Jumpson, 4 Esp. 189; Brown *v.* Thorndyke, 15 Pick. 400; Phil. & Am. on Evid. 736; 2 Phil. Evid. 277. [*Prior, contemporaneous, and subsequent enjoyment of a right claimed, is admissible to show the condition of property, in order to place the court in the position of the parties. Baird *v.* Fortune, 7 Jur. N. S. 926.] The rules of interpretation of Wills, in Vice-Chancellor Wigram's admirable treatise on that subject, may be safely applied, *mutato nomine*, to all other private instruments. They are contained in seven propositions, as the result both of principle and authority, and are thus expressed: — "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, 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

view, evidence must be admissible, of all the circumstances surrounding the author of the instrument.[1] In the simplest case that can be put, namely, that of an instrument appearing on the face of it to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If, in the conveyance of an estate, it is designated as Blackacre, parol evidence must be admitted to show what field is known by that name. Upon the same principle, where there is a devise of an estate purchased of A, or of a farm in the occupation of B, it must be shown by extrinsic evidence what estate it was that was purchased of A, or what farm was in the occupation of B, before it can be known what is devised.[2] So, if a contract in writing is made, for extending the time of payment of "certain notes," held by one party against the other, parol evidence is admissible to show what notes were so held and intended.[3]

§ 288. It is only in this mode that parol evidence is admissible (as is sometimes, but not very accurately said), *to explain written instruments;* namely, by showing the situation of the party in all

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.* 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." See Wigram on the Admission of Extrinsic Evidence in aid of the Interpretation of Wills, pp. 11–14. See also Guy *v.* Sharp, 1 M. & K. 602, per Ld. Brougham, C. [*post*, vol. 2, § 671. For Mr. Powell's rules for the construction of devises, see 2d Pow. on Dev. by Jarman, pp. 5–11; Cruise's Dig. (Greenleaf's edit.) tit. 38, ch. 9, §§ 1–15, and notes; 2d Greenleaf's edit. (1857) &c., vol. 3, pp. 172–179, and notes.]

[1] The propriety of admitting such evidence, in order to ascertain the meaning of doubtful words or expressions in a will, is expressly conceded by Marshall, C. J., in Smith *v.* Bell, 6 Peters, 75. See also Wooster *v.* Butler, 13 Conn. 317; Baldwin *v.* Carter, 17 Conn. 201; Brown *v.* Slater, 16 Conn. 192; Marshall's Appeal, 2 Barr, 388; Stoner's Appeal, Id. 428; The Great Northern Railw. Co. *v.* Harrison, 16 Jur. 565; 14 Eng. L. & Eq. R. 195, per Parke, B. If letters are offered against a party, it seems he may read his immediate replies; Roe *v.* Day, 7 C. & P. 705; and may prove a previous conversation with the party to show the motive and intention in writing them. Reay *v.* Richardson, 2 C. M. & R. 442; *supra*, § 197.

[2] Sanford *v.* Raikes, 1 Mer. 646, 653, per Sir W. Grant; Doe d. Preedy *v.* Horton, 4 Ad. & El. 76, 81, per Coleridge, J.; Doe *v.* Martin, 4 B. & Ad. 771, per Parke, J. "Whether parcel, or not, of the thing demised, is always matter of evidence." Per Buller, J., in Doe *v.* Burt, 1 T. R. 704, R. acc. in Doe *v.* E. of Jersey, 3 B. & C. 870; Doe *v.* Chichester, 4 Dow's P. C. 65; 2 Stark. Evid. 558–561; [*infra*, § 401, and notes. So, a deed of land known by the name of the "mill spot," may be explained by parol evidence of what "the mill spot" was commonly reputed, at and before the time of the execution of the deed, to include. Woods *v.* Sawin, 4 Gray, 322. So, an agreement in writing to convey "the wharf and flats occupied by A, and owned by B," may be applied to the subject-matter by parol. Gerrish *v.* Towne, 3 Gray, 82, 88. So, "the Schermerhorn brickyard." Seaman *v.* Hogeboom, 21 Barb. 398. See also Russel *v.* Werntz, 24 Penn. St. R. 337.]

[3] Bell *v.* Martin, 3 Harrison, R. 167.

his relations to persons and things around him, or, as elsewhere expressed, by proof of the surrounding circumstances. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings;[1] or the terms be vague and general, or have divers meanings, as "household furniture," "stock," "freight," "factory prices," and the like;[2] or in a will, the words "child," "children," "grandchildren," "son," "family," or "nearest relations," are employed;[3] in all these and the like cases, parol evidence is admissible of *any extrinsic circumstances*, tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect;[4] and this, without any infringement of the rule, which, as we have seen, only excludes parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself.

[1] Miller *v.* Travers, 8 Bing. 244; Storer *v.* Freeman, 10 Mass. 435; Waterman *v.* Johnson, 13 Pick. 261; Hodges *v.* Horsfall, 1 Rus. & My. 116; Dillon *v.* Harris, 4 Bligh, N. S. 343, 356; Parks *v.* The Gen. Int. Assur. Co. 5 Pick. 34; Coit *v.* Starkweather, 8 Conn. 289; Blake *v.* Doherty, 5 Wheaton, 359; 2 Stark. Evid. 558–561. [Storer *v.* Elliot Fire Insurance Co. 45 Maine, 175.]

[2] Peisch *v.* Dickson, 1 Mason, 10–12, per Story, J.; Pratt *v.* Jackson, 1 Bro. P. C. 222; Kelly *v.* Powlet, Ambl. 610; Bunn *v.* Winthrop, 1 Johns. Ch. 329; Le Farrant *v.* Spencer, 1 Ves. 97; Colpoys *v.* Colpoys, Jacob's R. 451; Wigram on Wills, p. 64; Goblet *v.* Beechey, 3 Sim. 24; Barrett *v.* Allen, 1 Wilcox, 426; Avery *v.* Stewart, 2 Conn. 69; Williams *v.* Gilman, 3 Greenl. 276.

[3] Blackwell *v.* Bull, 1 Keen, 176; Wylde's case, 6 Co. 16; Brown *v.* Thorndike, 15 Pick. 400; Richardson *v.* Watson, B. & Ad. 787. See also Wigram on Wills, p. 58; Doe *v.* Joinville, 3 East, 172; Green *v.* Howard, 1 Bro. Ch. R. 32; Leigh *v.* Leigh, 15 Ves. 92; Beachcroft *v.* Beachcroft, 1 Madd. R. 430.

[4] Goodings *v.* Goodings, 1 Ves. 231; Jeacock *v.* Falkener, 1 Bro. Ch. R. 295; Fonnereau *v.* Poyntz, Id. 473; Machell *v.* Winter, 3 Ves. 540, 541; Lane *v.* Ld. Stanhope, 6 T. R. 345; Doe *v.* Huthwaite, 3 B. & Ald. 632; Goodright *v.* Downshire, 2 B. & P. 608, per Ld. Alvanley; Landsowne *v.* Landsowne, 2 Bligh, 60; Clementson *v.* Gandy, 1 Keen, 309; King *v.* Badeley, 3 My. & K. 417. So, parol evidence is admissible to show what debt was referred to, in a letter of collateral guaranty. Drummond *v.* Prestman, 12 Wheat. 515. So, to show that advances, which had been made, were in fact made upon the credit of a particular letter of guaranty. Douglass *v.* Reynolds, 7 Pet. 113. So, to identify a note, which is provided for in an assignment of the debtor's property for the benefit of his creditors, but which is misdescribed in the schedule annexed to the assignment. Pierce *v.* Parker, 4 Met. 80. So, to show that the indorsement of a note was made merely for collateral security. Dwight *v.* Linton, 3 Rob. (Louis.) R. 57. See also Bell *v.* Firemen's Ins. Co. Id. 423, 428, where parol evidence was admitted of an agreement to sell, prior to the deed or act of sale. So, to show what flats were occupied by the riparian proprietor as appurtenant to his upland and wharf, and passed with them by the deed. Treat *v.* Strickland, 10 Shepl. 234. [Parol evidence may be introduced to show what persons were meant by the designation of "Horace Gray and others," in a written agreement. Herring *v.* Boston Iron Co. 1 Gray, 134; and to show the circumstances attending the giving a written certificate of competency to teach school. Hopkins *v.* School District, 1 Williams, 281. So, also, where a note had on it the following indorsements: "Greenwood & Nichols — without recourse — Asa Perley," the first indorsers were allowed to prove that the words "without recourse," were written by them when they indorsed the note. Fitchburg Bank *v.* Greenwood, 2 Allen, 434. See also Rey *v.* Simpson, 22 How. 341.]

[*288*a*. Previous conversations between the parties may be shown, when that becomes important to show in what sense subsequent writings passing between them were understood.[1] So, when a written memorandum is so brief that, without material explanation of the terms, it would have no sensible meaning, parol proof must be received for that purpose.[2] So, parol proof is always admissible to show which of two or more persons or things of the same name was intended by the parties, as where cotton is sold to arrive by ship "Peerless" from Bombay, and two ships of that name sailed from that port, at different dates.[3]

[*288*b*. A question has sometimes been made in regard to the tribunal which must determine the correct reading of a written paper. It seems formerly to have been referred exclusively to the court. But that was owing mainly to the consideration that the jury were often wholly illiterate. Accordingly now, when jurors are supposed to be competent to read and write as well as the court, we apprehend it has become, ultimately, a question for them to determine, where there is any fair ground of doubt, since no one can doubt, that it is exclusively a question of fact, as much as any other.[4] But where the reading of the paper is undisputed, the question of construction cannot be submitted to the jury, except so far as it is liable to be affected by extraneous circumstances which are in controversy. In such cases the court may fix the construction, in the alternative, and thus refer the matter of faith to the jury.[5]]

§ 289. In regard to *wills*, much greater latitude was formerly allowed, in the admission of evidence of intention, than is warranted by the later cases. The *modern doctrine* on this subject, is nearly or quite identical with that which governs in the interpretation of other instruments; and is best stated in the language of Lord Abinger's own lucid exposition, in a case in the Exchequer.[6] "The object," he remarked, "in all cases is to discover

[1] [*Macdonald *v.* Longbottom, 1 Ellis & Ellis, 977.

[2] Pharaoh *v.* Lush, 2 F. & F. 721.

[3] Raffles *v.* Wichelhaus, 2 H. & C. 906; s. c. 33 Law J. 160.

[4] Hills *v.* London Gas Co., 27 L. J. Exch. 60.

[5] Morse *v.* Weymouth, 28 Vt. R. 824.]

[6] Hiscocks *v.* Hiscocks, 5 M. & W. 363, 367. This was an action of ejectment, brought on the demise of Simon Hiscocks against John Hiscocks. The question turned on the words of a devise in the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff and of the defendant. By his will, Simon Hiscocks, after devising estates to his son Simon for life, and from and after his death, to his grandson, Henry Hiscocks, in tail male, and making, as to certain other estates, an exactly similar provision in favor of his son John for life; then,

the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances, respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances.[1] To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words. Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator, in these particulars, must be receivable as evidence, to explain the meaning of his will. But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor

after his death, the testator devised those estates to "my grandson, John Hiscocks, eldest son of the said John Hiscocks." It was on this devise that the question wholly turned. In fact, John Hiscocks, the father, had been twice married; by his first wife he had Simon, the lessor of the plaintiff, his eldest son; the eldest son of the second marriage was John Hiscocks, the defendant. The devise, therefore, did not, both by name and description, apply to either the lessor of the plaintiff, who was the eldest son, but whose name was Simon, nor to the defendant, who, though his name was John, was not the eldest son.

[1] See Crocker *v.* Crocker, 11 Pick 257; Lamb *v.* Lamb, Id. 375, per Shaw, C. J.; Bainbridge *v.* Wade, 20 Law J. Rep. (N. S.) Q. B. 7; 1 Eng. L. & Eq Rep. 236.

obscure, and where the devise is, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' that is, the words equally apply to either manor; and evidence of previous intention may be received to solve this latent ambiguity, for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it, by the general words he has used, which in their ordinary sense, may properly bear that construction. It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will." [1]

[1] The learned chief baron's subsequent commentary on the opposing decisions seems, in a great measure, to have exhausted this topic. "It must be owned, however," said he, "that there are decided cases which are not to be reconciled with this distinction, in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the case of Doe *v.* Huthwaite, and Bradshaw *v.* Bradshaw, the only thing decided was, that, in a case like the present, some parol evidence was admissible. There, however, it was not decided that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that where the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in order to show that, in some secondary sense of the words, — and one in which the testator meant to use them, — the devise may have a full effect. Thus again, in Cheyney's case, and in Counden *v.* Clarke, 'the averment is taken,' in order to show which of two persons, both equally described within the words of the will, was intended by the testator to take the estate; and the late cases of Doe d. Morgan *v.* Morgan, and Doe d. Gord *v.* Needs, both in this court, are to the same effect. So, in the case of Jones *v.* Newman, according to the view the court took of the facts, the case may be referred to the same principles as the former. The court seems to have thought the proof equivalent only to proof of there being two J. C.'s strangers to each other, and then the decision was right, it being a mere case of what Lord Bacon calls equivocation. The cases of Price *v.* Page, Still *v.* Hoste, and Careless *v.* Careless, do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivalent description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in Price *v.* Page, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and in that case, evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seem at variance with the true principles of evidence. In Selwood *v.* Mildmay, evidence of instructions for the will was received.

§ 290. From the above case, and two other leading modern decisions,[1] it has been collected,[2] (1.) that where the description in the will, of the *person or thing* intended, is *applicable* with legal

That case was doubted in Miller *v.* Travers; but, perhaps, having been put by the Master of the Rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses, it may, as suggested by Lord Chief Justice Tindal, in Miller *v.* Travers, be considered as being only a wrong application to the facts of a correct principle of law. Again, in Hampshire *v.* Pierce, Sir John Strange admitted declarations of the intentions of the testatrix to be given in evidence, to show that by the words, 'the four children of my niece Bamfield,' she meant the four children by the second marriage. It may well be doubted whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment, without the questionable evidence. And it may be further observed, that the principle with which Sir J. Strange is said to have commenced his judgment is stated in terms much too large, and is so far inconsistent with later authorities. Beaumont *v.* Fell, though somewhat doubtful, can be reconciled with true principles upon this ground, that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This, and other circumstances of the like nature, which were clearly admissible, may perhaps be considered to warrant that decision; but there the evidence of the testator's declarations, as to his intention of providing for Gertrude Yardley, was also received; and the same evidence was received at Nisi Prius, in Thomas *v.* Thomas, and approved on a motion for a new trial, by the dicta of Lord Kenyon and Mr. Justice Lawrence. But these cases seem to us at variance with the decision in Miller *v.* Travers, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of showing, that by Catherine Earnley and Mary Thomas, the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove, that by the county of Limerick a testator meant the county of Clare. Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of Miller *v.* Travers), to adhere to the authority of that case. Upon the whole, then, we are of opinion that, in this case, there must be a new trial. Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of Doe *v.* Huthwaite, Bradshaw *v.* Bradshaw, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the court to give such a direction to the jury, the defendant will indeed for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty."

[1] Miller *v.* Travers, 8 Bing. 244, and Doe d. Gord *v.* Needs, 2 M. & W. 129. The rule on this subject was thus stated by Tindal, C. J.: "In all cases where a difficulty arises in applying the words of a will or deed to the subject-matter of a devise or grant, the difficulty or ambiguity, which is introduced by the admission of extrinsic evidence, may be rebutted or removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be granted or devised." Miller *v.* Travers, *supra*, expressly recognized and approved in Atkinson *v.* Cummins, 9 How. s. c. Rep. 479. The same rule is applied to the monuments in a deed, in Clough *v.* Bowman, 15 N. Hamp. 504.

[2] By Vice-Chancellor Wigram, in his Treatise on the Interpretation of Wills, pl. 184, 188. See also Gresley on Evid. 203.

certainty *to each of several subjects*, extrinsic evidence is admissible to prove, which of such subjects was intended by the testator. But (2.) if the description of the person or thing be *wholly inapplicable* to the subject intended, or said to be intended by it, evidence is not admissible to prove whom or what the testator really intended to describe. His declarations of intention, whether made before or after the making of the will, are alike inadmissible.[1] Those made at the time of making the will, when admitted at all, are admitted under the general rules of evidence applicable alike to all written instruments.[2]

§ 291. But declarations of the testator, proving or tending to prove a material fact collateral to the question of intention, where such fact would go in aid of the interpretation of the testator's words, are, on the principles already stated, admissible. These cases, however, will be found to be those only, in which the description in the will is unambiguous in its application to any one of several subjects.[3] Thus, where lands were devised to John Cluer of Calcot, and there were father and son of that name, parol evidence of the testator's declarations, that he intended to leave them to the son, was held admissible.[4] So, where a legacy was

[1] Wigram on Wills, pl. 104, 187; Brown *v.* Saltonstall, 3 Met. 423, 426; Trustees, &c. *v.* Peaslee, 15 N. Hamp. 317, 330.

[2] [* We have examined the cases very extensively upon this question. Redfield on Wills, §§ 39, 40, 41.]

[3] Wigram on Wills, pl. 104, 194, 195. This learned writer's *General Conclusions*, as the result of the whole matter, which he has so ably discussed in the treatise just cited, are "(1.) That the evidence of material facts is, in all cases, admissible in aid of the exposition of a will. (2.) That the legitimate purposes to which — *in succession* — such evidence is applicable, are two: namely, *first*, to determine whether the words of the will, with reference to the facts, admit of being construed in their primary sense; and, *secondly*, if the facts of the case *exclude* the primary meaning of the words, to determine whether the intention of the testator is certain in any other sense, of which the words, with reference to the facts, are capable. And (3.), That intention cannot be averred in support of a will, except in the special cases, which are stated under the Seventh Proposition;" (see *supra*, § 287, note,) namely, cases "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*." Id. pl. 211, 212, 213, 214. And he insists, "(1.) That the judgment of a court, in expounding a will, should be simply *declaratory* of what is *in* the instrument; and (2.), That every claimant under a will has a right to require that a court of construction, in the execution of its office, shall — by means of extrinsic evidence — place itself in the situation of the testator, the meaning of whose language it is called upon to declare." Id. pl. 5, 96, 215. Doe *v.* Martin, 1 N. & M. 524, per Parke, J.; 4 B. & Ad. 771, s. c.; Guy *v.* Sharp, 1 M. & K. 602, per Ld. Brougham, C. See also Boys *v.* Williams, 2 Russ. & M. 689, where parol evidence of the testator's property and situation was held admissible, to determine whether a bequest of stock was intended as a specific or a pecuniary legacy. These rules apply with equal force to the interpretation of every other private instrument.

[4] Jones *v.* Newman, 1 W. Bl. 60. See also Doe *v.* Benyon, 4 P. & D. 193; Doe *v.* Allen, 4 P. & D. 220. But where the testator devised to his "grandson Rufus," and there were two of that name, the one

given to "the four children of A." who had six children, two by a first, and four by a second marriage, parol evidence of declarations by the testatrix, that she meant the latter four, was held admissible.[1] So, where the devise was, "to my granddaughter, Mary Thomas of Llechloyd in Merthyr parish," and the testator had a granddaughter named Elinor Evans in that parish, and a great-granddaughter, Mary Thomas, in the parish of Llangain; parol evidence of the testator's declarations at the time of making the will was received, to show which was intended.[2] So, where a legacy was given to Catherine Earnley, and there was no person of that name; but the legacy was claimed by Gertrude Yardley; parol proof was received, that the testator's voice, when the scrivener wrote the will, was very low, that he usually called the legatee Gatty, and had declared that he would do well by her in his will; and thereupon the legacy was awarded to her.[3] So, also, where a devise was to "the second son of Charles Weld, of Lulworth, Esq.," and there was no person of that name, but the

legitimate who lived in a foreign land, and whom he had seen only once and when a child, and the other *illegitimate*, living with him, and whom he had brought up and educated; it was held, that the words were legally applicable only to the *legitimate* grandson, and that parol evidence to the contrary was not admissible. Doe *v.* Taylor, 1 Allen, 425 (N. Bruns.), Street, J., *dissentiente*.

[1] Hampshire *v.* Pierce, 2 Ves. 216.

[2] Thomas *v.* Thomas, 6 T. R. 671.

[3] Beaumont *v.* Fell, 2 P. Wms. 141. The propriety of receiving evidence of the testator's declarations, in either of the two last-cited cases, was, as we have just seen (*supra*, § 239, note), strongly questioned by Lord Abinger (in Hiscocks *v.* Hiscocks, 5 Mees. & Welsb. 371), who thought them at variance, in this particular, with the decision in Miller *v.* Traverse, 8 Bing. 244, which, he observed, was a decision entitled to great weight. But upon the case of Beaumont *v.* Fell, it has been correctly remarked, that "the evidence, which is confessedly admissible, would, in conjunction with the will itself, show that there was a devise to Catherine Earnley, and that no such person existed, but that there was a claimant named Gertrude Yardley, whom the testator usually called Gatty. In this state of the case, the question would be, whether, upon the principle of *falsa demonstratio non nocet*, the surname of Earnley being rejected, the christian name, if correct, would itself be a sufficient indication of the devisee; and if so, whether Gatty satisfied that indication. Both these questions leave untouched the general question of the admissibility of evidence, to show the process by which Gatty passed into Katty, and from Katty to Catherine." See Phil. & Am. on Evid. p. 729, note (2). It is not easy, however, to perceive why extrinsic evidence of the testator's declared intentions of beneficence towards an individual is not as admissible, as evidence is, that he used to speak of him or address him as his son, or godson, or adopted child; when the object in both cases is to ascertain which, of several demonstrations, is to be retained as true, and which rejected as false. Now the evidence of such declarations, in Beaumont *v.* Fell, went to show that "Earnley" was to be rejected as *falsa demonstratio;* and the other evidence went to designate the individual intended by the word "Catherine;" not by adding words to the will, but by showing what the word used meant. See *infra*, § 300; Wigram on the Interpretation of Wills, pp. 128, 129, pl. 166. See also Baylis *v.* The Attor.-Gen. 2 Atk. 239; Abbott *v.* Massie, 3 Ves. 148; Doe d. Oxenden *v.* Chichester, 4 Dow's P. C. 65, 93; Duke of Dorset *v.* Ld. Hawarden, 3 Curt. 80; Trustees, &c., *v.* Peaslee, 15 N. Hamp. 317; Doe *v.* Hubbard, 15 Ad. & El. (N. S.) 248, per Ld. Campbell.

testator had two relatives there, bearing the names of Joseph Weld, and Edward-Joseph Weld, it was held, upon the context of the will, and upon extrinsic evidence, that the second son of Joseph Weld was the person intended. So, where a bequest was to John Newbolt, second son of William-Strangways Newbolt, Vicar of Somerton; and it appeared *aliunde* that the name of the vicar was William-Robert Newbolt, that his second son was Henry-Robert, and that his third son was John-Pryce; it was held that John-Pryce was entitled to the legacy.[1] So, where the testatrix gave legacies to Mrs. and Miss B. of H., widow and daughter of the Rev. Mr. B.; upon the legacies being claimed by Mrs. and Miss W., widow and daughter of the late Rev. Mr. W. of H., it was held, that they were entitled; it appearing *aliunde* that there were no persons literally answering the description in the will, at its date; but that the claimants were a daughter and granddaughter of the late Rev. Mr. B., with all of whom the testatrix had been intimately acquainted, and that she was accustomed to call the claimants by the maiden name of Mrs. W.[2] The general principle in all these cases is this, that if there be a mistake in the name of the devisee, but a right description of him, the court may act upon such right description;[3] and that if two persons equally answer the same name or description, the court may determine, from the rest of the will and the surrounding circumstances, to which of them the will applies.[4]

§ 292. It is further to be observed, that the rule under consideration, which forbids the admission of parol evidence to contradict or vary a written contract, is not infringed by any evidence of *known and established usage* respecting the subject to which the contract relates. To such usage, as well as to the *lex loci*, the parties may be supposed to refer, just as they are presumed to employ words in their usual and ordinary signification; and accordingly the rule is in both cases the same. Proof of usage is admitted, either to interpret the meaning of the language of the contract, or to ascertain the nature and extent of the contract,

[1] Newbolt *v.* Pryce, 14 Sim. 354.

[2] Lee *v.* Pain, 4 Hare, 251; 9 Jur. 24.

[3] On the other hand, if the name is right, but the description is wrong, the name will be regarded as the best evidence of the testator's intention. Thus, where the testator had married two wives, Mary and Caroline, successively, both of whom survived him; and he devised an estate to his "dear wife Caroline," the latter was held entitled to take, though she was not the true wife. Doe *v.* Roast, 12 Jur. 99.

[4] Blundell *v.* Gladstone, 1 Phil. Ch. R. 279, 288, per Patteson, J.

in the absence of express stipulations, and where the meaning is equivocal and obscure.[1] Thus, upon a contract for a year's service, as it does not in terms bind the party for every day in the year, parol evidence is admissible to show a usage for servants to have certain holidays for themselves.[2] So, where the contract was for performance as an actor in a theatre, for *three years*, at a certain sum *per week*, parol evidence was held admissible to show that, according to uniform theatrical usage, the actor was to be paid only during the theatrical *season*, namely, during the time while the theatre was open for performance, in each of those years.[3] So, where a ship is warranted "to depart with convoy," parol evidence is admissible to show at what place convoy for such a voyage is usually taken; and to that place the parties are presumed to refer.[4] So, where one of the subjects of a charter-party was "cotton in bales," parol evidence of the mercantile use and meaning of this term was held admissible.[5] So, where a promissory note or bill is payable with grace, parol evidence of the known and established usage of the bank at which it is payable is admissible to show on what day the grace expired.[6] But though usage may be admissible to explain what is doubtful, it is not admissible to contradict what is plain.[7] Thus, where a policy was made in the usual form, upon the ship, her tackle, apparel, boats, &c., evidence of usage, that the underwriters never pay for the loss of boats slung upon the quarter, outside of the ship, was held inadmissible.[8] So, also, in a libel *in rem* upon a bill of lading,

[1] 2 Poth. on Obl. by Evans, App. No. xvi. p. 187; 2 Sumn. 569, per Story, J.; 11 Sim. 626, per Parke, B.; 4 East, 135, per Ld. Ellenborough; Cutter *v.* Powell, 6 T. R. 320; Vallance *v.* Dewar, 1 Campb. 503; Noble *v.* Kennoway, 2 Doug. 510; Bottomley *v.* Forbes, 5 Bing. N. C. 121; 8 Scott, 866; Ellis *v.* Thompson, 3 M. & W. 445; *post*, vol. 2 [7th edit.], § 251, [252, and notes.] The usage must be general in the whole city or place, or among all persons in the trade, and not the usage of a particular class only, or the course of practice in a particular office or bank, to whom or which the party is a stranger. Gabay *v.* Lloyd, 3 B. & C. 793.

[2] Regina *v.* Stoke upon Trent, 5 Ad. & El. 303, N. S.

[3] Grant *v.* Maddox, 15 M. & W. 737.

[4] Lethulier's case, 2 Salk. 443.

[5] Taylor *v.* Briggs, 2 C. & P. 525. [Where part of a memorandum of sale was as follows: "Bought 150 tons madder, 12¼, 6 ms.," it may be shown that among dealers in madder, in such a contract 12¼ means 12¼ cents per pound, and expresses the price of the madder. Dana *v.* Fielder, 2 Kernan, 40; Brown *v.* Brooks, 25 Penn. St. R. 210; Allan *v.* Comstock, 17 Geo. 554; Brown *v.* Byrne, 26 Eng. Law & Eq. 247.] [*And a similar rule was applied to determining the mode of measuring the amount of freight in a bill of lading. Russian Steam Nav. Co. *v.* Silva, 13 C. B. N. S. 610.]

[6] Remer *v.* Bank of Columbia, 9 Wheat, 581, where the decisions to this point are reviewed by Mr. Justice Thompson.

[7] 2 Cr. & J. 249, 250, per Ld. Lyndhurst. [Oelricks *v.* Ford, 23 How. 49.]

[8] Blackett *v.* The Royal Exch. Assurance Co. 2 Cr. & J. 244. So, where the written contract was for "prime singed bacon," and evidence was offered to prove, that by the usage of the trade a certain

containing the usual clause, "the dangers of the seas only excepted," where it was articulated in the answer, that there was an established usage, in the trade in question, that the shipowners should see the merchandise properly secured and stowed, and that this being done, they should not be liable for any damages not occasioned by their own neglect; it was held that this article was incompetent, in point of law, to be admitted to proof.[1]

latitude of deterioration, called average taint, was allowed to subsist, before the bacon ceases to answer the description of prime bacon; it was held inadmissible. Yates *v.* Pym, 6 Taunt. 446. So also, parol evidence has been held inadmissible to prove, that by the words, "glass ware in casks," in the memorandum of excepted articles in a fire policy, according to the common understanding and usage of insurers and insured, were meant such ware in open casks only. Bend *v.* The Georgia Ins. Co., Sup. Court, N. York, 1842. But see Gray *v.* Harper, 1 Story, R. 574, (*infra*, page 420 note.) [Whitmore *v.* The South Boston Iron Co. 2 Allen, 52. Where in an action against warehousemen for the non-delivery of property bailed to them, the defence was, that the property had been fraudulently taken from their custody, without any negligence on their part, and the plaintiff did not claim that the property had in fact been delivered to any person, evidence of the usage of other warehousemen of taking receipts from persons to whom property was delivered, is inadmissible. Lichtenhein *v.* Boston & P. R. R. Co. 11 Cush. 70, 72. Had there been an actual delivery to a third person by the warehouseman, *quære* how far such evidence of general usage might not be admissible to show negligence. Ib.]

[1] The schooner "Reeside," 2 Sumn. 567. In this case the doctrine on this subject was thus briefly but energetically expounded and limited by Mr. Justice Story: "I own myself," said he, "no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find, that, of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend, that it never can be proper to resort to any usage or custom, to control or vary the positive stipulations in a written contract, and, *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." See also Taylor *v.* Briggs, 2 C. & P. 525; Smith *v.* Wilson, 3 B. & Ad. 728; 2 Stark. Evid. 565; Park on Ins. ch. 2, pp. 30–60; *post*, vol. 2 [7th edit.], § 251; Hone *v.* Mutual Safety Ins. Co. 1 Sandf. s. c. R. 137. [Ware *v.* Hayward Rubber Co. 3 Allen, 84; Symonds *v.* Lloyd, 6 Com. B. Rep. (N. s.) 691; Winn *v.* Chamberlain, 32 Vt. 318.] [*Beacon Life & Fire Assurance Co. *v.* Gibb, 1 Moore, P. C. C. N. s. 73; 9 Jur. N. s. 185.]

§ 293. The reasons which warrant the admission of evidence of usage in any case, apply equally, whether it be required to aid the interpretation of a *statute*, a *public charter*, or a *private deed;* and whether the usage be still existing or not, if it were contemporaneous with the instrument.[1] And where the language of a deed is doubtful in the *description of the land conveyed*, parol evidence of the practical interpretation, by the acts of the parties, is admissible to remove the doubt.[2] So, evidence of former transactions between the same parties has been held admissible to explain the meaning of terms in a written contract, respecting subsequent transactions of the same character.[3]

§ 294. Upon the same principle, parol evidence of usage or custom is admissible "*to annex incidents*," as it is termed, that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. Thus, it may be shown by parol that a heriot is due by custom, on the death of a tenant for life, though it is not expressed in the lease.[4] So, a lessee by a deed may show that, by the custom of the country, he is entitled to an away-going crop, though no such right is reserved in the deed.[5] So, in an action for the price of tobacco sold, evidence was held admissible to show that, by the usage of the trade, all sales were by sample, though not so expressed in the bought and sold notes.[6] This evidence is admitted on the principle, that the parties did not intend to express in writing the whole of the contract by which they were to be bound, but only to make their contract with reference to the known and established usages and

[1] Withnell *v.* Gartham, 6 T. R. 388; Stammers *v.* Dixon, 7 East, 200; Wadley *v.* Bayliss, 5 Taunt. 752; 2 Inst. 282; Stradling *v.* Morgan, Plowd. 205, ad. calc.; Haydon's case, 3 Co. 7; Wells *v.* Porter, 2 Bing. N. C. 729, per Tindal, C. J.; Duke of Devonshire *v.* Lodge, 7 B. & C. 36, 39, 40; Chad *v.* Tilsed, 2 B. & B. 403; Attorney-General *v.* Boston, 9 Jur. 838; 2 Eq. Rep. 107, s. c.; Farrar *v.* Stackpole, 6 Greenl. 154; Meriam *v.* Harsen, 2 Barb. Ch. R. 232.

[2] Stone *v.* Clark, 1 Metcalf's R. 378; Livingston *v.* Tenbroeck, 16 Johns. 14, 22, 23; Cook *v.* Booth, Cowp. 419. This last case has been repeatedly disapproved of, and may be considered as overruled; not, however, in the principle it asserts, but in the application of the principle to that case. See Phil. & Am. on Evid. 747, note (1); 1 Sugd. Vend. (6th edit.) 210, *178; Cambridge *v.* Lexington, 17 Pick. 222; Choate *v.* Burnham, 7 Pick. 274; Allen *v.* Kingsbury, 16 Pick. 239; 4 Cruise's Dig. tit. 32, ch. 20, § 23, note, (Greenleaf's edit.) [2d edit. 1857, vol. 2, p. 598, and note.]

[3] Bourne *v.* Gatliff, 11 Cl. & Fin. 45, 69. 70. [See Bliven *v.* New England Screw Co. 23 How. 420.] [*Falkner *v.* Earle, 3 B. & S. 360; s. c. 32 L. J. Q. B. 124.]

[4] White *v.* Sayer, Palm. 211.

[5] Wigglesworth *v.* Dallison, 1 Doug. 201; 1 Smith's Leading Cas. 300; 1 Bligh, 287; Senior *v.* Armytage, Holt's N. P. Cas. 197; Hutton *v.* Warren, 1 M. & W. 466.

[6] Syers *v.* Jonas, 2 Exch. R. 111.

customs relating to the subject-matter. But, in all cases of this sort, the rule for admitting the evidence of usage or custom must be taken with this qualification, that the evidence be not repugnant to, or inconsistent with, the contract; for otherwise it would not go to interpret and explain, but to contradict that which is written.[1] This rule does not add new terms to the contract, which, as has already been shown,[2] cannot be done; but it shows the full extent and meaning of those which are contained in the instrument.

§ 295. But, in resorting to usage for the *meaning of particular words* in a contract, a distinction is to be observed between local and technical words, and other words. In regard to words which are purely technical, or local, that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science or trade, parol evidence is always receivable, to define and explain their meaning among those who use them. And the principle and practice are the same in regard to words which have two meanings, the one common and universal, and the other technical, peculiar, or local; parol evidence being admissible of facts tending to show that the words were used in the latter sense, and to ascertain their technical or local meaning. The same principle is also applied in regard to words and phrases, used in a peculiar sense by members of a particular religious sect.[3] But beyond this the principle does

[1] Yeates *v.* Pim, Holt's N. P. Cas. 95; Holding *v.* Pigott, 7 Bing. 465, 474; Blackett *v.* The Royal Exch. Assur. Co. 2 C. & J. 244; Caine *v.* Horsefall, 2 C. & K. 349.

[2] *Supra*, § 281.

[3] The doctrine on this subject has recently been very fully reviewed, in the case of Lady Hewley's charities. This lady, who was a non-conformist, in the year 1704, conveyed certain estates by deeds, in trust, for the benefit of "poor and godly preachers of Christ's Holy Gospel," and their widows, and "for the encouraging and promoting of the preaching of Christ's Holy Gospel," &c.; with the usual provision for preserving a perpetual succession of trustees. Afterwards, in 1707, by other deeds to the same trustees, she made provision for the erection and support of a hospital or almshouse, for certain descriptions of poor persons, ordaining rules for the government of the house, and appointing the trustees as the visitors, &c.; and disposing of the surplus funds as in the deeds of 1704. The rules permitted the admission of none but such as were poor and piously disposed, and of the Protestant religion, and were able to repeat the Lord's Prayer, the Creed, and the Ten Commandments, and Mr. Edward Bowles's Catechism. It was alleged that Lady Hewley, and all the trustees, whose religious opinions could be ascertained, believed in the doctrine of the Trinity, the Atonement, and Original Sin. In the course of time, however, the estates became vested in trustees, the majority of whom, though calling themselves Presbyterians, professed Unitarian opinions, and the funds had for some years been applied, to a considerable extent, for the support of a seminary, and for the benefit of poor preachers of that denomination. When the charity was founded, the Stat. 9 & 10 W. III., c. 32, against blasphemy, was in force, by which those persons, who by preaching denied the doctrine of the Trinity, were liable to severe penalties. The object of the suit was, in effect, to take this trust out of the hands of the Unitarians, and to obtain a declaration, that it should be managed and applied by

not extend. If, therefore, a contract is made in ordinary and popular language, to which no local or technical and peculiar

and for none but Orthodox Dissenters; and the controversy turned chiefly on the question, whether certain evidence was admissible, which was offered to show what sort of persons were intended, in the deed of 1704, by "godly preachers of Christ's Holy Gospel," &c. This evidence, in addition to the deed of 1707, consisted principally of the will of Lady Hewley, the sermon of Dr. Coulton, one of the trustees, which was preached at her funeral, and the will of Sir John Hewley, her husband; all containing passages, showing that she and the trustees were Presbyterians, believing in the Trinity, the Atonement, and Original Sin; together with the depositions of persons conversant with the history and language of the times when the deeds were executed, defining the meaning then commonly attached to the words in question, by persons of the donor's faith; and it was argued that the persons whom she intended to designate as beneficiaries could have been only those of her own faith. The Vice-Chancellor admitted this evidence, and decreed that preachers of the Unitarian doctrine and their widows were not entitled to the benefit of this charity, and he ordered that the existing trustees should be removed and others appointed, and that the charity should in future be applied accordingly. This decree Lord Ch. Lyndhurst, assisted by Patteson, J., and Alderson, B., afterwards affirmed. An appeal being taken from the judgment of Lord Lyndhurst, to the House of Lords, the House, after taking the opinions of the common-law judges, upon certain questions proposed to them, dismissed the appeal. The first and principal of these questions was, whether the extrinsic evidence adduced, or what part of it, was admissible for the purpose of determining who were entitled under the terms "godly preachers of Christ's Holy Gospel," "godly persons," and the other descriptions contained in the deeds of 1704 and 1707, to the benefit of Lady Hewley's bounty. The other questions, which were five in number, were framed to ascertain, if such evidence should be deemed admissible, what descriptions of persons were, and what were not the proper objects of the trusts. Of the seven learned judges, who answered these questions, six were of opinion, but on various grounds, that Unitarians were excluded. *Maule, J.*, was of opinion, that none of the evidence offered was admissible; and that the religious opinions of the founder of a charity, even if certainly known, could have no legal effect in the interpretation of an instrument, in which no reference is made to his own religious opinions or belief. *Erskine, J.*, was also of opinion that none of the evidence was admissible, for the purpose for which it was offered; but that the sense of the words in question might be ascertained from contemporaneous writings, and the history of that day; and that from these sources, already open to the House, it was easy to collect, that the words were applicable to none but Trinitarian Dissenters. *Coleridge, J.*, and *Gurney, B.*, were of opinion, that the evidence was admissible, to show the opinions of those with whom the founder lived in most confidence, and to what sect she in fact belonged; and that the phraseology of that party might be ascertained from other sources. *Williams, J.*, thought that the words employed were so indefinite and ambiguous, that she must be presumed to have used them in a limited sense; and that this sense might be ascertained from her opinions; for which purpose the evidence was admissible. *Parke, B.*, and *Tindal, C. J.*, were of opinion, that, though it might well be shown, by competent evidence, that the words employed had a peculiar meaning at the time they were used, and what was that meaning; and that the deeds were to be read by substituting the equivalent expressions, thus ascertained, instead of those written in the deeds; yet, that evidence of her own religious opinions was not admissible, to limit or control the meaning of the words. Upon this occasion, the general doctrine of the law was stated by Mr. Baron *Parke*, in the following terms: "I apprehend that there are two descriptions of evidence, which are clearly admissible, in every case, for the purpose of enabling a court to construe any written instrument and to apply it practically. In the first place, there is no doubt, that not only where the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent where technical words or peculiar terms, or, indeed, any expressions are used, which, at the time the instrument was written, had acquired any appropriate meaning, either generally, or by local usage, or amongst particular classes. This description of evidence is admissible,

meaning is attached, parol evidence, it seems, is not admissible to show that, in that *particular case*, the words were used in any other than their ordinary and popular sense.[1]

in order to enable the court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, namely, every *material* fact, that will enable the court to identify the person or thing mentioned in the instrument, and to place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be, in the situation of the parties to it. From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to have been written." Lord Ch. J. *Tindal* expounded the same doctrine as follows: "The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty, as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does, of necessity, take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired, in the present age, a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which, in many instances, use a peculiar language, employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general, common meaning, have acquired, by custom or otherwise, a well-known, peculiar, idiomatic meaning, in the particular country in which the party using them was dwelling, or in the particular society, of which he formed a member, and in which he passed his life. In all these cases, evidence is admitted, to expound the real meaning of the language used in the instrument, in order to

[1] 2 Stark. Evid. 566; *supra*, §§ 277, 280. But see Gray *v.* Harper, 1 Story's R. 574, where two booksellers having contracted for the sale and purchase of a certain work at "cost," parol evidence of conversations between them, at the time of making the contract, was held admissible, to show what sense they attached to that term. See also Selden *v.* Williams, 9 Watts, 9; Kemble *v.* Lull, 3 McLean, 272.

§ 295*a*. It is thus apparent, as was remarked at the outset, that in all the cases in which parol evidence has been admitted in exposition of that which is written, the principle of admission is, that the court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted; the question being, what did the person, thus circumstanced, mean by the language he has employed?

§ 296. There is another class of cases, in which parol evidence is allowed by courts of equity to affect the operation of a writing, though the writing on its face is free from ambiguity, which is yet considered as no infringement of the general rule; namely, where the evidence is offered to *rebut an equity*. The meaning of this is, that where a certain presumption would, in general, be deduced from the nature of an act, such presumption may be repelled by extrinsic evidence, showing the intention to be otherwise.[1] The

enable the court, or judge, to construe the instrument, and to carry such real meaning into effect. But, whilst evidence is admissible, in these instances, for the purpose of making the written instrument speak for itself, which, without such evidence, would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to; it would be evidence which, in most instances, could not be met or countervailed by any of an opposite bearing or tendency, and would, in effect, cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed." See Attorney-General *v.* Shore, 11 Sim. R. 592, 616–627, 631, 632. Though, in this celebrated case, the general learning on this subject has been thus ably opened and illustrated; yet the precise question, whether the religious opinions of the founder of a charity can be received as legal exponents of his intention, in an instrument otherwise intelligible in its terms, and in which no reference is made to his own opinions or belief, can hardly be considered as definitely settled; especially as a majority of the learned judges, in coming to the conclusion in which they concurred, proceeded on grounds which rendered the consideration of that point wholly unnecessary. The previous judgment of Lord Ch. Lyndhurst, in the same case, is reported in 7 Sim. 309, n., 312–317. See Attorney-General *v.* Pearson *et al.* 3 Meriv. 353, 409–411, 415; and afterwards in 7 Sim. 290, 307, 308, where such evidence was held admissible. But how far this decision is to be considered as shaken by what fell from the learned judges, in the subsequent case of the Attorney-General *v.* Shore, above stated, remains to be seen. The acts of the founder of such a charity may be shown, in aid of the construction of the deed, where the language is doubtful; and contemporaneous treatises, documents, and statutes may be read, to show the sense in which any words or phrases were commonly used in that day, and thereby to show the sense in which the founder used them, in the deed of donation; but his opinions are inadmissible. Attorney-General *v.* Drummond, 1 Drury & Warren, 353, per Sugden, C.; affirmed in Dom. Proc. on Appeal, 2 Eng. Law & Eq. R. 15; 14 Jur. 137. See Attorney-General *v.* Glasgow College, 10 Jurist, 676.

[1] 2 Poth. on Obl. by Evans, App. No.

simplest instance of this occurs, when two legacies, of which the sums and the expressed motives exactly coincide, are presumed not to have been intended as cumulative. In such case, to rebut the presumption which makes one of these legacies inoperative, parol evidence will be received; its effect being not to show that the testator did not mean what he said, but on the contrary, to prove that he did mean what he had expressed.[1] In like manner, parol evidence is received to repel the presumption against an executor's title to the residue, from the fact that a legacy has been given to him. So also to repel the presumption, that a portion is satisfied by a legacy;[2] and in some cases, that the portionment of a legatee was intended as an ademption of the legacy.[3]

§ 296*a*. Courts of equity also admit parol evidence to contradict or vary a writing, where it is *founded in a mistake* of material facts, and it would be unconscientious or unjust to enforce it against either party, according to its expressed terms. Thus, if the plaintiff seeks a specific performance of the agreement, the defendant may show that such a decree would be against equity and justice, by parol evidence of the circumstances, even though they contradict the writing. So, if the agreement speaks, by mistake, a different language from what the parties intended, this may be shown in a bill to *reform the writing* and correct the mistake. In short, wherever the active agency of a court of equity is invoked, specifically to enforce an agreement, it admits parol evidence to show that the claim is unjust, although such evidence contradicts that which is written. Whether courts of equity will sustain a claim to reform a writing, or to establish a mistake in it, by parol evidence, and for specific performance of it when corrected, in one and the same bill, is still an open question. The English authorities are against it; but in America their soundness is strongly

xvi. p. 184; Coote *v.* Boyd, 2 Bro. C. R. 522; Bull. N. P. 297, 298; Mann *v.* Mann, 1 Johns. Ch. 231.

[1] Gresley on Evid. 210; Hurst *v.* Beach, 5 Madd. R. 360, per Sir J. Leach, V. C.

[2] 5 Madd. R. 360; 2 Poth. on Obl. by Evans, App. No. xvi. p. 184; Ellison *v.* Cookson, 1 Ves. 100; Clinton *v.* Hooper, Id. 173. So, to rebut an implied trust. Livermore *v.* Aldrich, 5 Cush. 431.

[3] Kirk *v.* Eddowes, 8 Jur. 530. As the further pursuit of this point, as well as the consideration of the presumed revocation of a will, by a subsequent marriage and the birth of issue, does not consist with the plan of this treatise, the reader is referred to 1 Roper on Legacies, by White, pp. 317–353; Gresley on Evid. pp. 209–218; 6 Cruise's Dig. tit. 38, ch. 6, §§ 45–57, and notes by Greenleaf [2d edit. (1857), vol. 3, p. 104, and notes;] 1 Jarm. on Wills, ch. 7, and notes by Perkins. See also *post*, vol. 2, §§ 684, 685, [7th edit. (1858).]

questioned.[1] So, also, if a grantee *fraudulently* attempts to convert into an absolute sale that which was originally meant to be a security for a loan, the original design of the conveyance, though contrary to the terms of the writing, may be shown by parol.[2]

§ 297. Having thus explained the nature of the rule under consideration, and shown that it only excludes evidence of the language of the party, and not of the circumstances in which he was placed, or of collateral facts, it may be proper to consider the case of *ambiguities*, both *latent* and *patent*. The leading rule on this subject is thus given by Lord Bacon: *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.*[3] Upon which he remarks, that "there be two sorts of ambiguities of words: the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for any thing that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. *et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be *ambiguitas latens*, then otherwise it is; as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all. But if the truth be that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was that the party intended should pass."[4]

[1] 1 Story, Eq. Jurisp. §§ 152–161; Gresley on Evid. 205–209.

[2] Morris *v.* Nixon, 17 Pet. 109. See Jenkins *v.* Eldridge, 3 Story, R. 181, 284–287. [*See also McClane *v.* White, 5 Min. 178; Tillson *v.* Moulton, 23 Ill. 648; People *v.* Irwin, 14 Cal. 428.]

[3] Bacon's Maxims, Reg. 23, [25.]

[4] See Bacon's Law Tracts, pp. 99, 100. And see Miller *v.* Travers, 8 Bing. 244; *supra*, § 290; Reed *v.* Prop'rs of Locks, &c., 8 How. s. c. Rep. 274. Where a bill was drawn expressing £200 in the body in words, but £245 in figures in the margin, it was held that the words in the body must be taken to be the true amount to be paid; and that the ambiguity created by the figures in the margin was patent, and could not be explained by parol. Saunderson *v.* Piper, 5 Bing. N. C. 425;

§ 298. But here it is to be observed, that words cannot be said to be ambiguous because they are unintelligible to a man who cannot read; nor is a written instrument ambiguous or uncertain merely because an ignorant or uninformed person may be unable to interpret it. *It is ambiguous only, when found to be of uncertain meaning by persons of competent skill and information.* Neither is a judge at liberty to declare an instrument ambiguous, because he is ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this were not so, then the question, whether a will or other instrument were ambiguous or uncertain, might depend not upon the propriety of the language the party has used, but upon the degree of knowledge, general or local, which a particular judge might happen to possess; nay, the technical accuracy and precision of a scientific man might occasion his intestacy, or defeat his contract. Hence it follows that no judge is at liberty to pronounce an instrument ambiguous or uncertain, until he has brought to his aid, in its interpretation, all the lights afforded by the collateral facts and circumstances, which, as we have shown, may be proved by parol.[1]

[*298*a*. It was decided in a recent case,[2] that when evidence legitimately admitted in the course of a trial raises a latent ambiguity, evidence to explain it is properly admissible; and, if there were in truth no latent ambiguity, and the evidence to

[Lathrop *v.* Blake, 3 Foster, 46. In Sargent *v.* Adams, 3 Gray, 72, 77, the question arose how far an agreement in writing to let for a term of years "the 'Adams House,' so called, situate on Washington Street, in Boston, and numbered 371 on said Washington Street," could be explained by parol. The defendant had fitted up an old tavern as a hotel, under the name of the "Adams House," on Washington Street. The entrance to the hotel was from said street, and was numbered 371. The rest of the ground-floor of the building was fitted up for stores, which were numbered from 1 to 5, Adams House, and were, at the time of making the agreement, severally occupied by different tenants. The defendant tendered, in pursuance of the above agreement, a lease duly executed, of the hotel known as the Adams House, but not including the stores, which the plaintiff refused to accept, and subsequently brought this action to recover a sum of money previously paid by him to the defendant, in part performance of the agreement. The defendant, to show that he had complied with his obligations under the agreement, by tendering a proper lease, offered to prove by parol, that the original agreement was that the lease should include only the hotel proper and not the stores; and he was permitted so to do. The opinion of the court, by Shaw, C. J., [*places the case among latent ambiguities, upon the ground, that the very general terms used in the contract apply with sufficient legal certainty to the entire building, including the stores, and to the portion of it fitted up for a public house; and consequently it was competent to show, by parol, in which sense the parties used the terms.]

[1] See Wigram on the Interpretation of Wills, p. 174, pl. 200, 201.

[2] [*Bruff *v.* Coneybeare, 9 Jur. N. S. 78.

explain were consequently inadmissible, still the improper admission of such evidence would not be a ground for a new trial, because the writing would then be for the court to construe without regard to the evidence. And if the jury, with the aid of the evidence, had put the true construction upon it, the verdict should stand;[1] and, if not, the court might render such a judgment as the true construction required, notwithstanding the verdict.]

§ 299. A *distinction* is further to be observed, between the *ambiguity* of language and its *inaccuracy*. "Language," Vice-Chancellor Wigram remarks, "may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator, having one leasehold house in a given place, and no other house, were to devise his freehold house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an accurate description is found to be sufficient merely by the rejection of words of surplusage are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language. A judge, in such cases, may hesitate long before he comes to a conclusion; but if he is able to come to a conclusion at last, with no other assistance than the light derived from a knowledge of those circumstances, to which the words of the will expressly or tacitly refer, he does in effect declare that the words have legal certainty — a declaration which, of course, excludes the existence of any ambiguity. The language may be inaccurate; but if the court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts, upon which — from the very nature of language in general — its meaning depends, the language, though inaccurate cannot be ambiguous. The circumstance, that the inaccuracy is apparent on the face of the instrument, cannot, in principle, alter the case."[2] Thus, in the will of Nollekens, the sculptor, it was provided that, upon his decease, "all the marble in the yard, the tools in the shop, bankers, *mòd*, tools for carving," &c., should

[1] [*Morse *v.* Weymouth, 28 Vt. R. 824.]

[2] Wigram on the Interpretation of Wills, pp. 175, 176, pl. 203, 204.

be the property of Alex. Goblet. The controversy was upon the word "*mod;*" which was a case of *patent inaccuracy;* but the court, with no guide to the testator's intention but his words, and the knowledge common to every working sculptor, decided that the word in question sufficiently described the testator's *models;* thus negativing the existence of any ambiguity whatever.[1]

§ 300. The patent ambiguity, therefore, of which Lord Bacon speaks, must be understood to be that which remains uncertain to the court, after all the evidence of surrounding circumstances and collateral facts, which is admissible under the rules already stated, is exhausted. His illustrations of this part of the rule are not cases of misdescription, either of the person or of the thing to which the instrument relates; but are cases in which the persons and things being sufficiently described, the *intention* of the party in relation to them is ambiguously expressed.[2] Where this is the case, no parol evidence of expressed intention can be admitted. In other words, and more generally speaking, if the court, placing itself in the situation in which the testator or contracting party stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot ascertain his meaning and intention from the language of the instrument thus illustrated, it is a case of incurable and hopeless uncertainty, and the instrument therefore is so far inoperative and void.[3]

§ 301. There is another class of cases, so nearly allied to these as to require mention in this place, namely, those in which, upon applying the instrument to its subject-matter, it appears that in relation to the subject, whether person or thing, the description in it is true in part, but not true in every particular. The rule, in such cases, is derived from the maxim: *Falsa demonstratio non nocet, cum de corpore constat.*[4] Here so much of the description as

[1] Goblet *v.* Beachy, 3 Sim. 24; Wigram on the Interpretation of Wills, pp. 179, 185. Parol evidence is admissible to explain short and incomplete terms in a written agreement, which *per se* are unintelligible, if the evidence does not contradict what is in writing. Sweet *v.* Lee, 3 M. & G. 452; Farm. & Mech. Bank *v.* Day, 13 Verm. R. 36.

[2] Wigram on the Interpretation of Wills, p. 179; Fish *v.* Hubbard, 21 Wend. 651.

[3] Per Parsons, C. J., in Worthington *v.* Hylyer, 4 Mass. 205; United States *v.* Cantrill, 4 Cranch, 167; 1 Jarman on Wills, 315; 1 Powell on Devises (by Jarman), p. 348; 4 Cruise's Dig. 255, tit. 32, ch. 20, § 60 (Greenleaf's edit.), [Greenl. (2d edit. 1857) vol. 2, p. 609 and notes.] Patent ambiguities are to be dealt with by the court alone. But where the meaning of an instrument becomes ambiguous, by reason of extrinsic evidence, it is for the jury to determine it. Smith *v.* Thompson, 18 Law J. 314; Doe *v.* Beviss, Id. 628. See *supra*, § 280.

[4] 6 T. R. 676; Broom's Maxims, p. 269; Bac. Max. Reg. 25. And see Just. Ins. lib. 2, tit. 20, § 29. Siquidem in nomine, cognomine, prænomine, agnomine legata-

is false is rejected; and the instrument will take effect, *if a sufficient description remains to ascertain its application.* It is essential, that enough remains to show plainly the intent.[1] "The rule," said Mr. Justice Parke,[2] "is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but, that if the premises be described in general terms, and a particular description be added, the latter controls the former." It is not, however, because one part of the description is placed first and the other last in the sentence; but because, taking the whole together, that intention is manifest. For, indeed, "it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence."[3] Therefore, under a lease of "all that part of Blenheim Park, situate in the county of Oxford, now in the occupation of one S., lying" within certain specified abuttals, "with all the houses thereto belonging, which are in the occupation of said S.," it was held, that a house lying within the abuttals though not in the occupation of S., would pass.[4] So, by a devise of "the farm called Trogue's Farm, now in the occupation of C.," it was held, that the whole farm passed, though it was not all in C.'s occupation.[5] Thus, also, where one devised all his freehold and real estate "in the county of Limerick and in the city of Limerick;" and the testator had no real estates in the county of Limerick, but his real estates consisted of estates in the county of Clare, which was not mentioned in the will, and a small estate in the city of Limerick, inadequate to meet the charges in the will; it was held, that the devisee could not be allowed to show, by parol evidence, that the estates in the county of Clare were inserted in the devise to him, in the first draft of the will, which was sent to a conveyancer, to make certain alterations, not affecting those estates; that, by mistake, he erased the words "county of Clare;" and that the testator, after keeping the will by him for some time, executed it, without adverting to the alteration as

rii, testator erraverit, cum de persona constat, nihilominus valet legatum; idemque in hæredibus servatur; et rectè: nomina enim significandorum hominum gratiâ reperta sunt; qui si alio quolibet modo intelligantur, nihil interest.

[1] Doe *v.* Hubbard, 15 Ad. & El. 240, 241, 245, N. S.; [Peaslee *v.* Gee, 19 N. H. 273.]

[2] Doe d. Smith *v.* Galloway, 5 B. & Ad. 43, 51.

[3] Stukeley *v.* Butler, Hob. 171.

[4] Doe d. Smith *v.* Galloway, 5 B. & Ad. 43.

[5] Goodtitle *v.* Southern, 1 M. & S. 299.

to that county.[1] And so, where land was described in a patent as lying in the county of M., and further described by reference

[1] Miller *v.* Travers, 8 Bing. 244; Doe *v.* Chichester, 4 Dow's P. C. 65; Doe *v.* Lyford, 4 M. & S. 550. The opinion of the court in Miller *v.* Travers, by Tindal, C. J., contains so masterly a discussion of the doctrine in question, that no apology seems necessary for its insertion entire. After stating the case with some preliminary remarks, the learned chief justice proceeded as follows: "It may be admitted that, in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity, which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, 'Ambiguitas verborum latens, verificatione suppletur.' But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator, it is found that there are more than one estate or subject-matter of devise, or more than one person, whose description follows out and fills the words used in the will. As, where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or, where a man devises to his son John, and he has two sons of that name. In each of these cases respectively, parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. (Bac. Max. 23; Hob. R. 32; Edward Altham's case, 8 Rep. 155.) The other class of cases is that, in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As, where an estate is devised called A, and is described as in the occupation of B, and it is found, that, though there is an estate called A, yet the whole is not in B's occupation; or, where an estate is devised to a person, whose surname or christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence. But the case now before the court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in Clare. The present case is rather one, in which the plaintiff does not endeavor to apply the description contained in the will to the estates in Clare; but, in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself. The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon inquiry, that he has property in the city of Limerick, which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property, as it really exists. The natural and necessary construction of the will is, that it passes the estate which he has in the city of Limerick, but passes no estate in the county of Limerick, where the testator had no estate to answer that description. The plaintiff, however, contends, that he has a right to prove that the testator intended to pass, not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare; and that the will is to be read and construed as if the word 'Clare' stood in the place of, or in addition to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty arising from a defective or mistaken description; it is making the will speak upon a subject, on which it is altogether silent, and is the same in effect as the filling up a blank, which the testator might have left in his will. It amounts, in short, by the admission of parol evi-

to natural monuments; and it appeared, that the land described by the monuments was in the county of H., and not of M.; that

dence, to the making of a new devise for the testator, which he is supposed to have omitted. Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule, which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added. Denn *v.* Page, 3 T. R. 87. But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and therefore open for his inspection, which copy was afterwards executed by him, with all the formalities required by the statute of frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up, as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended to be introduced by the statute of frauds would be entirely destroyed, and the statute itself virtually repealed. And upon examination of the decided cases, on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for. On the contrary, they will all be found consistent with the distinction above adverted to,—that an uncertainty which arises from applying the description contained in the will, either to the thing devised or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself. Thus, in the case of Lowe *v.* Lord Huntingtower, 4 Russ. 581, n., in which it was held, that evidence of collateral circumstances was admissible, as, of the several ages of the devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will; such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will, consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord Coke, in 8 Rep. 155, 'stand well with the words of the will.' The case of Standen *v.* Standen, 2 Ves. 589, decides no more, than that a devise of all the residue of the testator's real estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate, over which he has the power, though the power is not referred to. But this proceeds upon the principle, that the will would be altogether inoperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment. The case of Mosley *v.* Massey and others, 8 East, 149, does not appear to bear upon the question now under consideration. After the parol evidence had established, that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth, and *vice versâ;* the court held, that it was sufficiently to be collected from the words of the will itself, which estate the testator meant to give to the one devisee, and which to the other, independent of their local description; all, therefore, that was done, was to reject the local description, as unnecessary, and not to import any new description into the will. In the case of Selwood *v.* Mildway, 3 Ves. 306, the testator devised to his wife part of his stock in the four per cent. annuities of the Bank of England; and it was shown by parol evidence, that at the time he made his will he had no stock in the four per cent. annuities, but that he had some which he had sold out and had invested the produce in long annuities. And in this case it was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identi-

part of the description which related to the county was rejected. The entire description in the patent, said the learned judge, who

cal corpus of the stock; and as none could be found to answer the description but the long annuities, it was held, that such stock should pass, rather than the will be altogether inoperative. This case is certainly a very strong one; but the decision appears to us to range itself under the head, that 'falsa demonstratio non nocet,' where enough appears upon the will itself to show the intention, after the false description, is rejected. The case of Goodtitle *v.* Southern, 1 M. & S. 299, falls more closely within the principle last referred to. A devise 'of all that my farm called Trogue's Farm, now in the occupation of A. C.' Upon looking out for the farm devised, it is found that part of the lands which constituted Trogue's Farm are in the occupation of another person. It was held, that the thing devised was sufficiently ascertained by the devise of 'Trogue's Farm,' and that the inaccurate part of the devise might be rejected as surplusage. The case of Day *v.* Trigg, 1 P. W. 286, ranges itself precisely in the same class. A devise of all 'the testator's freehold houses in Aldersgate Street,' when in fact he had no freehold, but had leasehold houses there. The devise was held in substance and effect to be a devise of his houses there; and that as there were no freehold houses there to satisfy the description, the word 'freehold' should rather be rejected, than the will be totally void. But neither of these cases affords any authority in favor of the plaintiff; they decide only that, where there is a sufficient description in the will to ascertain the thing devised, a part of the description, which is inaccurate, may be rejected, not that any thing may be added to the will; thus following the rule laid down by Anderson, C. J., in Godb. R. 131,—'An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.' On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that where a complete blank is left for the name of the legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. Hunt *v.* Hort, 3 Bro. C. C. 311, and in many other cases. Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in Clare. In the case of Doe d. Oxenden *v.* Chichester, 4 Dow, P. C. 65, it was held by the House of Lords, in affirmance of the judgment below, that in the case of a devise of 'my estate of Ashton,' no parol evidence was admissible to show, that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate. The chief justice of the Common Pleas, in giving the judgment of all the judges, says, 'If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say, that you ought to receive evidence, that his intention was to devise lands out of those counties.' Lord Eldon, then Lord Chancellor, in page 90 of the Report, had stated in substance the same opinion. The case, so put by Lord Eldon and the chief justice, is the very case now under discussion. But the case of Newburgh *v.* Newburgh, decided in the House of Lords on the 16th of June, 1825, appears to be in point with the present. In that case the appellant contended, that the omission of the word 'Gloucester,' in the will of the late Lord Newburgh, proceeded upon a mere mistake, and was contrary to the intention of the testator, at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself, as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estates in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein. The question, 'whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word "Gloucester" had been inserted in the will,' was submitted to the judges, and Lord Chief Justice Abbott declared it to be the unanimous opinion of those who had heard the argument that it could not. As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue." [*As a general rule, the courts adhere to the

delivered the opinion of the court, must be taken, and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls in the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void.[1] So, if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description and not to the other, the description of the lands which he owned will be taken to be the true one, and the other rejected as *falsa demonstratio*.[2]

maxim, Veritas nominis tollit errorem demonstrationis. Colclough *v.* Smith, 10 L. T. N. S. 918. But there have been very marked departures from it, where it was obvious that the description was more reliable than the name.]

[1] Boardman *v.* Reed and Ford's Lessees, 6 Peters, 328, 345, per McLean, J.

[2] Loomis *v.* Jackson, 19 Johns. 449; Lush *v.* Druse, 4 Wend. 313; Jackson *v.* Marsh, 6 Cowen, 281; Worthington *v.* Hylyer, 4 Mass. 196; Blague *v.* Gold, Cro. Car. 447; Swift *v.* Eyres, Id. 548. So, where one devised "all that *freehold* farm called the Wick Farm, containing two hundred acres or thereabouts, occupied by W. E. as tenant to me, with the appurtenances," to uses applicable to freehold property alone; and at the date of the will, and at the death of the testator, W. E. held, under a lease from him, two hundred and two acres of land, which were described in the lease as the Wick Farm, but of which twelve acres were not freehold, but were leasehold only; it was held that these twelve acres did not pass by the lease. Hall *v.* Fisher, 1 Collyer, R. 47. The object in cases of this kind is, to interpret the instrument, that is, to ascertain the intent of the parties. The rule to find the intent is, to give most effect to those things about which men are least liable to mistake. Davis *v.* Rainsford, 17 Mass. 210; McIver *v.* Walker, 9 Cranch, 178. On this principle, the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled: *First*. The highest regard is had to natural boundaries. *Secondly*. To lines actually run, and corners actually marked at the time of the grant. *Thirdly*. If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the deed is thereby required; marked lines prevailing over those which are not marked. *Fourthly*. To courses and distances; giving preference to the one or the other, according to circumstances. See Cherry *v.* Slade, 3 Murphy, 82; Dogan *v.* Seekright, 4 Hen. & Munf. 125, 130; Preston *v.* Bowmar, 6 Wheat. 582; Loring *v.* Norton, 8 Greenl. 61; 2 Flintoff on Real Property, 537, 538; Nelson *v.* Hall, 1 McLean's R. 518; Wells *v.* Crompton, 3 Rob. Louis. R. 171; [Kellogg *v.* Smith, 7 Cush. 375, 379–384; Newhall *v.* Ireson, 8 Ib. 595; Haynes *v.* Young, 36 Maine, 557.] And in determining the lines of old surveys, in the absence of any monuments to be found, the variation of the needle from the true meridian, at the date of the original survey, should be ascertained; and this is to be found by the jury, it being a question of fact, and not of law. Burgin *v.* Chenault, 9 B. Monroe, 285; 2 Am. Law Journ. 470, N. S. Monuments mentioned in the deed, and not then existing, but which are forthwith erected by the parties, in order to conform to the deed, will be regarded as the monuments referred to, and will control the distances given in the deed. Makepeace *v.* Bancroft, 12 Mass. 469; Davis *v.* Rainsford, 17 Mass. 207; [Blaney *v.* Rice, 20 Pick. 62; Cleaveland *v.* Flagg, 4 Cush. 76, 81;] Leonard *v.* Morrill, 2 N. Hamp. 197. And if no monuments are mentioned, evidence of long-continued occupation, though beyond the given distances, is admissible. Owen *v.* Bartholomew, 9 Pick. 520. If the description is ambiguous or doubtful, parol evidence of the practical construction given by the parties, by acts of occupancy, recognition of monuments or boundaries, or otherwise, is admissible in

§ 302. Returning now to the consideration of the general rule, that extrinsic verbal evidence is not admissible to contradict or alter a written instrument, it is further to be observed, that this rule does not exclude such evidence, when it is adduced to prove that the written agreement is *totally discharged*. If the agreement be by deed, it cannot, in general, be dissolved by any executory agreement of an inferior nature; but any obligation by writing not under seal, may be totally dissolved, before breach, by an oral agreement.[1] And there seems little room to doubt, that this rule will apply, even to those cases where a writing is by the statute of frauds made necessary to the validity of the agreement.[2] But where there is an entire agreement in writing, consisting of divers particulars, partly requisite to be in writing by the statute of frauds, and partly not within the statute, it is not competent to prove an agreed variation of the latter part, by oral evidence, though that part might, of itself, have been good without writing.[3] [*The question of the alteration of contracts in writing and under seal, by subsequent oral agreements, is extensively discussed in an early case[4] in Vermont; and the principle maintained, that

aid of the interpretation. Stone *v.* Clark, 1 Met. 378; [Kellogg *v.* Smith, 7 Cush. 375, 383; Waterman *v.* Johnson, 13 Pick. 261; Frost *v.* Spaulding, 19 Pick. 445; Clark *v.* Munyan, 22 Pick. 410; Crafts *v.* Hibbard, 4 Met. R. 438; Civil Code of Louisiana, art. 1951; Wells *v.* Compton, 3 Rob. Louis. R. 171. Words necessary to ascertain the premises must be retained; but words not necessary for that purpose may be rejected, if inconsistent with the others. Worthington *v.* Hylyer, 4 Mass. 205; Jackson *v.* Sprague, 1 Paine, 494; Vose *v.* Handy, 2 Greenl. 322. The expression of quantity is descriptive, and may well aid in finding the intent, where the boundaries are doubtful. Mann *v.* Pearson, 2 Johns. 37, 41; Perkins *v.* Webster, 2 N. H. 287; Thorndike *v.* Richards, 1 Shepl. 437; Allen *v.* Allen, 3 Shepl. 287; Woodman *v.* Lane, 7 N. H. 241; Pernam *v.* Weed, 6 Mass. 131; Riddick *v.* Leggatt, 3 Murphy, 539, 544; *supra*, § 290. See also 4 Cruise's Dig. tit. 32, c. 21, § 31, note (Greenleaf's edit.), [2 Greenleaf's edit. (1856) vol. 2, pp. 628–641, and notes,] where this subject is more fully considered.

[1] Bull. N. P. 152; Milword *v.* Ingram, 1 Mod. 206; 2 Mod. 43, s. c.; Edwards *v.* Weeks, 1 Mod. 262; 2 Mod. 259, s. c.; 1 Freem. 230, s. c.; Lord Milton *v.* Edgeworth, 5 Bro. P. C. 318; 4 Cruise's Dig. tit. 32, c. 3, § 51; Clement *v.* Durgin, 5 Greenl. 9; Cottrill *v.* Myrick, 3 Fairf. 222; Ratcliff *v.* Pemberton, 1 Esp. 35; Fleming *v.* Gilbert, 3 Johns, 531. But if the obligation be by deed, and there be a parol agreement in discharge of such obligation, if the parol agreement be executed, it is a good discharge. Dearborn *v.* Cross, 7 Cowen, 48. See also Littler *v.* Holland, 3 T. R. 390; Peytoe's case, 9 Co. 77; Kaye *v.* Waghorne, 1 Taunt. 428; Le Fevre *v.* Le Fevre, 4 S. & R. 241; Snydam *v.* Jones, 10 Wend. 180; Barnard *v.* Darling, 11 Wend. 27, 30. In equity, a parol rescission of a written contract, after breach, may be set up in bar of a bill for specific performance. Walker *v.* Wheatley, 2 Humphreys, R. 119. By the law of Scotland, no written obligation whatever can be extinguished or renounced, without either the creditor's oath, or a writing signed by him. Tait on Evid. p. 325.

[2] Phil. & Am. on Evid. 776; 2 Phil. Evid. 363; Goss *v.* Ld. Nugent, 5 B. & Ad. 58, 65, 66, per Ld. Denman, C. J.; Stowell *v.* Robinson, 3 Bing. N. C. 928; Cummings *v.* Arnold, 3 Met. 486; [Stearns *v.* Hall, 9 Cush. 31, 34.]

[3] Harvey *v.* Grabham, 5 Ad. & El. 61, 74; Marshall *v.* Lynn, 6 M. & W. 109.

[4] [*Lawrence *v.* Dole, 11 Vt. R. 549. The same is held in Leathe *v.* Bullard, 8 Gray, 545.]

a contract under seal may be modified by a naked oral agreement, provided the other party have so acted upon such modification that he cannot be placed *in statu quo*.]

§ 303. Neither is the rule infringed by the admission of oral evidence to prove a *new and distinct agreement*, upon a *new consideration*, whether it be as a substitute for the old, or in addition to and beyond it. And if subsequent, and involving the same subject-matter, it is immaterial whether the new agreement be entirely oral, or whether it refers to and partially or totally adopts the provisions of the former contract in writing, provided the old agreement be rescinded and abandoned.[1] Thus, where one by an instrument under seal agreed to erect a building for a fixed price, which was not an adequate compensation, and, having performed part of the work, refused to proceed, and the obligee thereupon promised that, if he would proceed, he should be paid for his labor and materials, and should not suffer, and he did so; it was held that he might recover in assumpsit upon this verbal agreement.[2] So, where the abandonment of the old contract was expressly mutual.[3] So, where a ship was hired by a charter-party under seal, for eight months, commencing from the day of her sailing from Gravesend, and to be loaded at any British port in the English Channel; and it was afterwards agreed by parol that she should be laden in the Thames, and that the freight should commence from her entry outwards at the custom-house; it was held that an action would lie upon the latter agreement.[4]

§ 304. It is also well settled that, in a case of a simple contract in writing, oral evidence is admissible to show that, by a subsequent agreement, the *time of performance was enlarged*, or the *place* of performance changed, the contract having been performed according to the enlarged time, or at the substituted place, or the

[1] Burn *v.* Miller, 4 Taunt. 745; Foster *v.* Alanson, 2 T. R. 479; Shack *v.* Anthony, 1. M. & S. 573, 575; Sturdy *v.* Arnaud, 3 T. R. 596; Brigham *v.* Rogers, 17 Mass. 573, per Putnam, J.; Heard *v.* Wadham, 1 East, 630, per Lawrence, J.; 1 Chitty on Pl. 93; Richardson *v.* Hooper, 13 Pick. 446; Brewster *v.* Countryman, 12 Wend. 446; Delacroix *v.* Bulkeley, 13 Wend. 71; Vicary *v.* Moore, 2 Watts, 456, 457, per Gibson, C. J.; Brock *v.* Sturdivant, 3 Fairf. 81; Marshall *v.* Baker, 1 Appleton, R. 402; Chitty on Contracts, p. 88. [Where two distinct contracts, for service on two distinct voyages, are made at the same time, and one only is reduced to writing, the other may be proved by parol. Page *v.* Sheffield, 2 Curtis, C. C. 377; Cilley *v.* Tenney, 31 Vt. 401.] [*But new terms cannot be incorporated into a written contract by parol. Adler *v.* Friedman, 16 Cal. 138.]

[2] Munroe *v.* Perkins, 9 Pick. 298. [See also Rand *v.* Mather, 11 Cush. 1.]

[3] Lattimore *v.* Harsen, 14 Johns. 330.

[4] White *v.* Parkin, 12 East, 578; [Holmes *v.* Doane, 9 Cush. 135.]

performance having been prevented by the act of the other party; or that the *damages* for non-performance were waived and remitted;[1] or that it was founded upon an insufficient or an unlawful *consideration*, or was without consideration;[2] or that the agreement itself was *waived* and abandoned.[3] So, it has been held competent to prove an additional and *suppletory agreement*, by parol; as, for example, where a contract for the hire of a horse was in writing, and it was further agreed by parol that accidents, occasioned by his *shying*, should be at the risk of the hirer.[4] A further consideration may also be proved by parol, if it is not of a different nature from that which is expressed in the deed.[5] And if the deed appears to be a voluntary conveyance, a valuable consideration may be proved by parol.[6]

§ 305. In regard to *receipts*, it is to be noted that they may be either mere acknowledgments of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only

[1] Jones *v.* Barkley, 2 Doug. 684, 694; Hotham *v.* E. In. Co. 1 T. R. 638; Cummings *v.* Arnold, 3 Met. 486; Clement *v.* Durgin, 5 Greenl. 9; Keating *v.* Price, 1 Johns. Cas. 22; Fleming *v.* Gilbert, 3 Johns. 530, 531, per Thompson, J.; Erwin *v.* Saunders, 1 Cowen, 249; Frost *v.* Everett, 5 Cowen, 497; Dearborn *v.* Cross, 7 Cowen, 50; Neil *v.* Cheves, 1 Bailey, 537, 538, note (*a*); Cuff *v.* Penn, 1 M. & S. 21; Robinson *v.* Bachelder, 4 N. Hamp. 40; Medomak Bank *v.* Curtis, 11 Shepl. 36; Blood *v.* Goodrich, 9 Wend. 68; Youqua *v.* Nixon, 1 Peters, C. C. R. 221. But see Marshall *v.* Lynn, 6 M. & W. 109.

[2] See *supra*, § 26, cases in note; Mills *v.* Wyman, 3 Pick, 207; Erwin *v.* Saunders, 1 Cowen, 249; Hill *v.* Buckminster, 5 Pick. 391; Rawson *v.* Walker, 1 Stark. R. 361; Foster *v.* Jolly, 1 C. M. & R. 707, 708, per Parke, B.; Stackpole *v.* Arnold, 11 Mass. 27, 32; Folsom *v.* Mussey, 8 Greenl. 400.

[3] Ballard *v.* Walker, 3 Johns. Cas. 60; Poth. on Obl. pt. 3, ch. 6, art. 2, No. 636; Marshall *v.* Baker, 1 Appleton, 402; Eden *v.* Blake, 13 M. & W. 614.

[4] Jeffery *v.* Walton, 1 Stark. R. 267. In a suit for breach of a written agreement to manufacture and deliver weekly to the plaintiff a certain quantity of cloth, at a certain price per yard, on eight months' credit, it was held, that the defendant might give in evidence, as a good defence, a subsequent parol agreement between him and the plaintiff, made on sufficient consideration, by which the mode of payment was varied, and that the plaintiff had refused to perform the parol agreement. Cummings *v.* Arnold, 3 Met. 486. See further, Wright *v.* Crookes, 1 Scott, N. S. 685. Where the action is for work and labor extra and beyond a written contract, the plaintiff will be held to produce the written contract, for the purpose of showing what was included in it. Buxton *v.* Cornish, 12 M. & W. 426; Vincent *v.* Cole, 1 M. & Malk. 257. [It may be shown by parol that, at the time a promissory note was given by A to B for money lent, an agreement was made to pay a certain sum as extra interest. Rohan *v.* Hanson, 11 Cush. 44, 46. The date of a contract in writing, when referred to in the body of the contract, as fixing the time of payment, cannot be altered or varied by parol. Joseph *v.* Bigelow, 4 Cush. 82, 84. The time of performance of a written contract within the statute of frauds, may be shown to have been enlarged by a subsequent parol agreement. Stearns *v.* Hall, 9 Cush. 31, 34.]

[5] Clifford *v.* Turrill, 9 Jur. 633. [Miller *v.* Goodwin, 8 Gray, 542; Pierce *v.* Weymouth, 45 Maine, 481; Shoenberger *v.* Zook, 34 Penn. 24.]

[6] Pott *v.* Todhunter, 2 Collyer, Ch. Cas. 76, 84.

to acknowledge payment or delivery, it is merely *primâ facie* evidence of the fact, and not conclusive; and therefore the fact which it recites may be contradicted by oral testimony. But in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol.[1] Thus, for example, a bill of lading, which partakes of both these characters, may be contradicted and explained in its recital, that the goods were in good order and well conditioned, by showing that their internal order and condition was bad; and, in like manner, in any other fact which it erroneously recites; but in other respects it is to be treated like other written contracts.[2]

We here conclude the Second Part of this Treatise.

[1] Stratton *v.* Rastall, T. R. 366; Alner *v.* George, 1 Campb. 392; *supra*, § 26, note; Stackpole *v.* Arnold, 11 Mass. 27, 32; Tucker *v.* Maxwell, Id. 143; Johnson *v.* Johnson, Id. 359, 363, per Parker, C. J.; Wilkinson *v.* Scott, 17 Mass. 257; Rex *v.* Scammonden, 3 T. R. 474; Rollins *v.* Dyer, 4 Shepl. 475; Brooks *v.* White, 2 Met. 283; Niles *v.* Culver, 4 Law Rep. 72, N. S. "The true view of the subject seems to be, that such circumstances, as would lead a Court of Equity to set aside a contract, such as fraud, mistake, or surprise, may be shown at law to destroy the effect of a receipt." Per Williams, J., in Fuller *v.* Crittenden, 9 Conn. 406; *supra*, § 285. [A discharge on an execution is only a receipt and may be explained by parol evidence. Edgerly *v.* Emerson, 3 Foster, 555; *supra*, § 212. See also Brown *v.* Cambridge, 3 Allen, 474.]

[2] Barrett *v.* Rogers, 7 Mass. 297; Benjamin *v.* Sinclair, 1 Bailey, 174. In the latter case it was held, that the recital in the bill of lading, as to the good order and condition of the goods, was applicable only to their external and apparent order and condition; but that it did not extend to the quality of the material in which they were enveloped, nor to secret defects in the goods themselves; and that, as to defects of the two latter descriptions, parol evidence was admissible. See also Smith *v.* Brown, 3 Hawks, 580; May *v.* Babcock, 4 Ohio R. 334, 346; [Clark *v.* Barnwell, 12 How. U. S. 272; O'Brien *v.* Gilchrist, 34 Maine, 554; Ellis *v.* Willard, 5 Selden, 529; Fitzhugh *v.* Wiman, Ib. 559, 566; McTyer *v.* Steele, 26 Ala. 487. Where the payee of a promissory note, not negotiable, for $120, delivered it to a third person, and took back the following writing: "Received of A a note (describing it), for which I am to collect and account to the said A the sum of $110, when the above note is collected, or return said note back to said A if I choose;" it was decided that parol evidence, which was offered to show that the note was held on other and different terms, was rightly excluded. Langdon *v.* Langdon, 4 Gray, 186, 188; Furbush *v.* Goodwin, 5 Foster, 425; Wood *v.* Whiting, 21 Barb. 190, 197. See also Alexander *v.* Moore, 19 Mis. 143; Sutton *v.* Kettell, Sprague's Decisions, 309.]

[§ 305*a*. "The rule, that parol evidence is not admissible to vary or control a written contract, is not applicable to mere *bills of parcels* made in the usual form, in which nothing appears but the names of the vendor and vendee, the articles purchased, with the prices affixed, and a receipt of payment by the vendor. These form an exception to the general rule of evidence, being informal documents, intended only to specify prices, quantities, and a receipt of payment, and not used or designed to embody and set out the terms and conditions of a contract of bargain and sale. They are in the nature of receipts, and are always open to evidence, which proves the real terms upon which the agreement of sale was made between the parties. 1 Cowen & Hill's note to Phil. on Evid. 385, n. 229; 2 Ib. 603, n. 295; Harris *v.* Johnston, 3 Cranch, 311; Wallace *v.* Rogers, 2 N. H. 506; Bradford *v.* Manley, 13 Mass. 139; Fletcher *v.* Willard, 14 Pick. 464." By Bigelow, J., in Hazard *v.* Loring, 10 Cush. 267, 268. The words, on a bill of parcels, "consigned 6 mo." and "Terms Cash,"

may be explained by parol. George *v.* Joy, 19 N. H. 544. See Linsley *v.* Lovely, 26 Vt. 123.]

[* It may be shown that a bond, absolute in its terms, was intended as collateral security for the debt of third parties. Chester *v.* Bank of Kingston, 16 N. Y. Court of Appeals, 336. So also that an option was intended to be left with one of the parties when the writing is silent. Chaltant *v.* Williams, 35 Penn. St. 212. But this latter seems questionable upon strict principle.]

PART III.

OF THE

INSTRUMENTS OF EVIDENCE.

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CHAPTER I.

OF WITNESSES, AND THE MEANS OF PROCURING THEIR ATTENDANCE.

[* § 306. The instruments of evidence next considered.
307. These are written and unwritten.
308. Classification of the subject.
309. Attendance of witnesses compelled by subpœna.
310. The witness fees must be paid in advance.
311. The state is excused from paying witnesses in advance.
312. Witness imprisoned may be brought up on *habeas corpus*.
313. State witnesses may be recognized for their appearance.
314. One day's notice required in all cases.
315. The service must be personal, and within jurisdiction of court.
316. Witness exempt from arrest, going to, attending, and returning from court.
317. Privilege extends to all tribunals in nature of courts.
318. Court will, in such cases, discharge arrest, on motion.
319. Witness refusing to attend, or to give evidence, may be punished for contempt.
320. Depositions may be taken where witness cannot attend court.
321. Provisions in the different states for taking depositions.
322. The mode of taking depositions in United States Courts.
323. Regularity and cause of taking must appear.
324. United States Courts take depositions by *dedimus potestatem*.
325. Testimony may be perpetuated in equity.]

§ 306. Having thus considered the general nature and principles of evidence, and the rules which govern in the production of evidence, we come now, in the third place, to speak of the instruments of evidence, or the means by which the truth in fact is established.[1] In treating this subject, we shall consider how such

[1] Parties are, ordinarily, permitted to exercise their own judgment, as to the order of introducing their proofs. Lynch *v.* Benton, 3 Rob. Louis. R. 105. And testimony, apparently irrelevant, may, in the discretion of the judge, be admitted, if it is expected to become relevant by its connection with other testimony to be afterwards offered. The State *v.* M'Allister, 11 Shepl. 139.

instruments are obtained and used, and their admissibility and effect.

§ 307. The instruments of evidence are divided into two general classes, namely, *unwritten* and *written*. The former is more naturally to be first considered, because oral testimony is often the first step in proceeding by documentary evidence, it being frequently necessary first to establish, in that mode, the genuineness of the documents to be adduced.

§ 308. By *unwritten*, or *oral evidence*, is meant the testimony given by witnesses, *vivâ voce*, either in open court, or before a magistrate, acting under its commission, or the authority of law. Under this head it is proposed briefly to consider, — (1.) The method, in general, of procuring the attendance and testimony of witnesses; — (2.) The competency of witnesses; — (3.) The course and practice in the examination of witnesses; and herein, of the impeachment and the corroboration of their testimony.

§ 309. And *first*, in regard to the method of procuring the *attendance of witnesses*, it is to be observed that every court, having power definitely to hear and determine any suit, has, by the common law, inherent power to call for all adequate proofs of the facts in controversy, and, to that end, to summon and compel the attendance of witnesses before it.[1] The ordinary summons is a writ of *subpœna*, which is a judicial writ, directed to the witness, commanding him to appear at the court, to testify what he knows in the cause therein described, pending in such court, under a certain penalty mentioned in the writ. If the witness is expected to produce any books or papers in his possession, a clause to that effect is inserted in the writ, which is then termed a *subpœna duces tecum*.[2] The writ of *subpœna* suffices for only one sitting, or term of the court. If the cause is made a *remanet*, or is postponed by

[1] [The House of Representatives of Massachusetts has power to compel witnesses to attend and testify before the House or one of its committees; and the refusal of a witness to appear is a contempt for which the House may cause him to be arrested, and brought before the House; and for a refusal to testify he may be imprisoned. Burnham *v.* Morrissey, 14 Gray, 226.]

[2] This additional clause is to the following effect: "And, also, that you do diligently and carefully search for, examine, and inquire after, and bring with you and produce, at the time and place aforesaid, a bill of exchange, dated," &c. (here describing with precision the papers and documents to be produced), "together with all copies, drafts, and vouchers, relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause; then and there to testify and show all and singular those things, which you (or either of you) know, or the said documents, letters, or instruments in writing do import of and concerning the said cause now depending. And this you (or any of you) shall in no wise omit," &c. 3 Chitty's Gen. Practice, 830, n.; Amey *v.* Long, 9 East, 473.

adjournment to another term or session, the witness must be summoned anew. The manner of serving the *subpœna* being in general regulated by statutes, or rules of court, which in the different states of the Union are not perfectly similar, any further pursuit of this part of the subject would not comport with the design of this work.[1] And the same observation may be applied, once for all, to all points of practice in matters of evidence, which are regulated by local law.

§ 310. In order to secure the attendance of a witness in civil cases, it is requisite by stat. 5 Eliz. c. 9, that he "have tendered to him, according to his countenance or calling, his reasonable charges." Under this statute it is held necessary, in England, that his reasonable expenses, for going to and returning from the trial, and for his reasonable stay at the place, be tendered to him at the time of serving the *subpœna;* and, if he appears, he is not bound to give evidence until such charges are actually paid or tendered,[2] unless he resides, and is summoned to testify, within the weekly bills of mortality; in which case it is usual to leave a shilling with him, upon the delivery of the subpœna ticket. These expenses of a witness are allowed pursuant to a scale, graduated according to his situation in life.[3] But in this country these reasonable expenses are settled by statutes, at a fixed sum for each day's actual attendance, and for each mile's travel, from the residence of the witness[4] to the place of trial and back, without

[1] The English practice is stated in 2 Tidd's Prac. (9th edit.) 805–809; 1 Stark. Evid. 77 *et seq.*; 3 Chitty's Gen. Prac. 828–834; 2 Phil. Evid. 370–392. The American practice, in its principal features, may be collected from the cases cited in the United States Digest, vol. 3, tit. WITNESS, II.; Id. Suppt. vol. 2, tit. WITNESS, I.; 1 Paine & Duer's Practice, Part 2, ch. 7, § 4; Conklin's Practice, Part 2, ch. 2, § 7, pp. 253–293; Howe's Practice, 228–230.

[2] Newton *v.* Harland, 9 Dowl. 16.

[3] 2 Phil. Evid. pp. 375, 376; 2 Tidd's Pr. (9th edit.) p. 806. An additional compensation, for loss of time, was formerly allowed to medical men and attorneys; but that rule is now exploded. But a reasonable compensation paid to a foreign witness, who refused to come without it, and whose attendance was essential in the cause, will in general be allowed and taxed against the losing party. See Lonergan *v.* The Royal Exchange Assurance, 7 Bing. 725; Id. 729, s. c.; Collins *v.* Godefroy, 1 B. & Ad. 950. There is also a distinction between a witness to facts, and a witness selected by a party to give his opinion on a subject with which he is peculiarly conversant from his employment in life. The former is bound, as a matter of public duty, to testify to facts within his knowledge. The latter is under no such obligation; and the party who selects him must pay him for his time, before he will be compelled to testify. Webb *v.* Page, 1 Car. & Kir. 23.

[4] It has been held, that, for witnesses brought from another state, no fees can be taxed for travel, beyond the line of the state in which the cause is tried. Howland *v.* Lenox, 4 Johns. 311; Newman *v.* The Atlas Ins. Co. Phillip's Dig. 113; Melvin *v.* Whiting, 13 Pick. 190; White *v.* Judd, 1 Met. 293. But the reasons for these decisions are not stated, nor are they very easily perceived. In England, the early practice was to allow all the ex-

regard to the employment of the witness, or his rank in life. The sums paid are not alike in all the states, but the principle is believed to be everywhere the same. In some states, it is sufficient to tender to the witness his fees for travel, from his home to the place of trial, and one day's attendance, in order to compel him to appear upon the summons; but in others, the tender must include his fees for travel in returning.[1] Neither is the practice uniform in this country, as to the question whether the witness, having appeared, is bound to attend from day to day, until the trial is closed, without the payment of his daily fees; but the better opinion seems to be, that, without payment of his fees, he is not bound to submit to an examination.[2]

§ 311. In criminal cases, no tender of fees is in general necessary, on the part of the government, in order to compel its witnesses to attend; it being the duty of every citizen to obey a call of that description, and it being also a case, in which he is himself, in some sense, a party.[3] But his fees will in general be finally paid from the public treasury. In all such cases, the accused is entitled to have compulsory process for obtaining witnesses in his favor.[4] The payment or tender of fees, however, is not necessary in any case, in order to secure the attendance of the witness, if he has waived it; the provision being solely for his benefit.[5] But

penses of bringing over foreign witnesses, incurred in good faith; but a large sum being claimed in one case, an order was made in the Common Pleas, that no costs should be allowed, except while the witness was within the reach of process. Hagedorn *v.* Allnut, 3 Taunt. 379. This order was soon afterwards rescinded, and the old practice restored. Cotton *v.* Witt, 4 Taunt. 55. Since which the uniform course, both in that court and in B. R., has been to allow all the actual expenses of procuring the attendance of the witness, and of his return. Tremain *v.* Barrett, 6 Taunt. 88; 2 Tidd's Pr. 814; 2 Phil. Evid. 376 (9th edit). And see Hutchins *v.* The State, 8 Mis. 288. [See also Gunnison *v.* Gunnison, 41 N. H. 121.]

[1] The latter is the rule in the courts of the United States. See Conklin's Practice, pp. 265, 266; LL. U. S. 1799, ch. 125 [19], § 6, vol. 1, p. 571 (Story's edit.), [1 U. S. Stat. at Large (L. & B.'s edit.), p. 626.]

[2] 1 Paine & Duer's Practice, 497; Hallett *v.* Mears, 14 East, 15, 16, note (a); Mattocks *v.* Wheaton, 10 Verm. 493. [* In a recent case in New Hampshire, Bliss *v.* Brainard, 42 N. H. 255, it is said the witness, at the end of each day, has the right to return home, if his fees for the next day are not paid upon application to the party summoning him or to his attorney.]

[3] In *New York*, witnesses are bound to attend for the state, in all criminal prosecutions, and for the defendant, in any indictment, without any tender or payment of fees. 2 Rev. Stat. p. 729, § 65; Chamberlain's case, 4 Cowen, 49. In *Pennsylvania*, the person accused may have process for his witnesses before indictment. United States *v.* Moore, Wallace's R. 23. In *Massachusetts*, in capital cases, the prisoner may have process to bring in his witnesses at the expense of the commonwealth. Williams's case, 13 Mass. 501. In *England*, the court has power to order the payment of fees to witnesses for the crown, in all cases of felony; and, in some cases, to allow further compensation. Stat. 18 Geo. III., ch. 19; Phil. & Am. on Evid. 788, 789; 2 Phil. Evid. 380; 1 Stark. Evid. 82, 83.

[4] Const. U. S. Amendments, art. 6.

[5] Goodwin *v.* West, Cro. Car. 522, 540.

it is necessary in all civil cases, that the witness be summoned, in order to compel him to testify; for, otherwise, he is not obliged to answer the call, though he be present in court; but in criminal cases, a person present in court, though he have not been summoned, is bound to answer.[1] And where, in criminal cases, the witnesses for the prosecution are bound to attend upon the summons, without the payment or tender of fees, if, from poverty, the witness cannot obey the summons, he will not, as it seems, be guilty of a contempt.[2]

§ 312. If a witness is in custody, or is in the military or naval service, and therefore is not at liberty to attend without leave of his superior officer, which he cannot obtain, he may be brought into court to testify by a writ of *habeas corpus ad testificandum*. This writ is grantable at discretion, on motion in open court, or by any judge, at chambers, who has general authority to issue a writ of *habeas corpus*. The application, in civil cases, is made upon affidavit, stating the nature of the suit, and the materiality of the testimony, as the party is advised by his counsel and verily believes, together with the fact and general circumstances of restraint, which call for the issuing of the writ; and if he is not actually a prisoner, it should state his willingness to attend.[3] In criminal cases, no affidavit is deemed necessary on the part of the prosecuting attorney. The writ is left with the sheriff, if the witness is in custody; but if he is in the military or naval service, it is left with the officer in immediate command; to be served, obeyed, and returned, like any other writ of *habeas corpus*.[4] If the witness is a prisoner of war, he cannot be brought up but by an order from the Secretary of State; but a rule may be granted on the adverse party, to show cause why he should not consent either to admit the fact, or that the prisoner should be examined upon interrogatories.[5]

§ 313. There is another method by which the attendance of witnesses for the government, in criminal cases, is enforced, namely, by *recognizance*. This is the usual course upon all examinations, where the party accused is committed, or is bound over for trial. And any witness, whom the magistrate may order to

[1] Rex *v.* Sadler, 4 C. & P. 218; Blackburne *v.* Hargreave, 2 Lewin, Cr. Cas. 259; [Robinson *v.* Trull, 4 Cush. 249.]

[2] 2 Phil. Evid. 379, 383.

[3] Rex *v.* Roddam, Cowp. 672.

[4] 2 Phil. Evid. 374, 375; Conklin's Pr. 264; 1 Paine & Duer's Pr. 503, 504; 2 Tidd's Pr. 809.

[5] Furly *v.* Newnham, 2 Doug. 419.

recognize for his own appearance at the trial, if he refuses so to do, may be committed. Sureties are not usually demanded, though they may be required, at the magistrate's discretion; but if they cannot be obtained by the witness, when required, his own recognizance must be taken.[1]

§ 314. The *service* of a *subpœna* upon a witness ought always to be made in a *reasonable time* before trial, to enable him to put his affairs in such order, that his attendance upon the court may be as little detrimental as possible to his interest.[2] On this principle, a summons in the morning to attend in the afternoon of the same day has been held insufficient, though the witness lived in the same town, and very near to the place of trial. In the United States, the reasonableness of the time is generally fixed by statute, requiring an allowance of one day for every certain number of miles distance from the witness's residence to the place of trial; and this is usually twenty miles. But at least one day's notice is deemed necessary, however inconsiderable the distance may be.[3]

§ 315. As to the *manner of service*, in order to compel the attendance of the witness, it should be *personal*, since, otherwise, he cannot be chargeable with a contempt in not appearing upon the summons.[4] The *subpœna* is plainly of no force beyond the jurisdictional limits of the court in which the action is pending, and from which it issued; but the courts of the United States, sitting in any district, are empowered by statute,[5] to send *subpœnas* for witnesses, into any other district, provided that, in civil causes,

[1] 2 Hale, P. C. 282; Bennett *v.* Watson, 3 M. & S. 1; 1 Stark. Evid. 82; Roscoe's Crim. Evid. p. 87; Evans *v.* Rees, 12 Ad. & El. 55. [In the United States courts, and, generally in the several states, authority is given by statute, to commit a witness who refuses or fails to give the recognizance required by the court or magistrate; and the practice is in accordance with the authority, and an allowance is made to the witnesses for the time that they are so detained. Laws U. S. 1846, ch. 98, § 7 (9 Stat. at Large, L. & B.'s edit.), 73.]

[2] Hammond *v.* Stewart, 1 Stra. 510.

[3] Sims *v.* Kitchen, 5 Esp. 46; 2 Tidd's Pr. 806; 3 Chitty's Gen. Pr. 801; 1 Paine & Duer's Pr. 497; [Scammon *v.* Scammon, 33 N. H. 52.]

[4] In some of the United States, as well as in England, a subpœna ticket, which is a copy of the writ, or more properly a statement of its substance, duly certified, is delivered to the witness, at the same time that the writ is shown to him. 1 Paine & Duer's Pr. 496; 1 Tidd's Pr. 806; 1 Stark. Ev. 77; Phil. & Am. on Evid. 781, 782; 2 Phil. Evid. 373. But the general practice is believed to be, either to show the subpœna to the witness, or to serve him with an attested copy. The writ, being directed to the witness himself, may be shown or delivered to him by a private person, and the service proved by affidavit; or it may be served by the sheriff's officer, and proved by his official return.

[5] Stat. 1793, ch. 66, [22] § 6; 1 LL. U. S. p. 312 (Story's edit.), [1 U. S. Stats. at Large (L. & B.'s edit.), 335.]

the witness do not live at a greater distance than one hundred miles from the place of trial.[1]

§ 316. Witnesses as well as parties are *protected from arrest* while going to the place of trial, while attending there, for the purpose of testifying in the cause, and while returning home, *eundo, morando, et redeundo*.[2] A *subpœna* is not necessary to protection, if the witness have consented to go without one; nor is a writ of protection essential for this purpose; its principal use being to prevent the trouble of an arrest, and an application for discharge, by showing it to the arresting officer; and sometimes, especially where a writ of protection is shown, to subject the officer to punishment, for contempt.[3] Preventing, or using means to prevent a witness from attending court, who has been duly summoned, is also punishable as a contempt of court.[4] On the same principle, it is deemed as a contempt to serve process upon a witness, even by summons, if it be done in the immediate or constructive presence of the court upon which he is attending;[5] though any service elsewhere without personal restraint, it seems, is good. But this freedom from arrest is a personal privilege, which the party may waive; and if he willingly submits himself to the custody of the officer, he cannot afterwards object to the imprisonment, as unlawful.[6] The privilege of exemption from arrest does not extend through the whole sitting or term of the court, at which the witness is summoned to attend; but it continues during the space of time necessarily and reasonably employed in going to the place of trial, staying there until the trial is ended, and returning home again. In making this allowance

[1] In most of the states, there are provisions by statute, for taking the depositions of witnesses, who live more than a specified number of miles from the place of trial. But these regulations are made for the convenience of the parties, and do not absolve the witness from the obligation of personal attendance at the court, at whatever distance it be holden, if he resides within its jurisdiction, and is duly summoned. In *Georgia*, the depositions of *females* may be taken in all civil cases. Rev. St. 1815 (by Hotchkiss), p. 586.

[2] This rule of protection was laid down, upon deliberation, in the case of Meekins *v.* Smith, 1 H. Bl. 636, as extending to "all persons who had relation to a suit, which called for their attendance, whether they were compelled to attend by process or not (in which number bail were included), provided they came *bonâ fide*." Randall *v.* Gurney, 3 B. & Ald. 252; Hurst's case, 4 Dal. 387. It extends to a witness coming from abroad, without a subpœna. 1 Tidd's Pr. 195, 196; Norris *v.* Beach, 2 Johns. 294.

[3] Meekins *v.* Smith, 1 H. Bl. 636; Arding *v.* Flower, 8 T. R. 536; Norris *v.* Beach, 2 Johns. 294; United States *v.* Edme, 9 S. & R. 147; Sandford *v.* Chase, 3 Cowen, 381; Bours *v.* Tuckerman, 7 Johns. 538. [But see *ex parte* McNeil, 3 Mass. 288, and 6 Mass. 264, *contra*.]

[4] Commonwealth *v.* Freely, 2 Virg. Cas. 1.

[5] Cole *v.* Hawkins, Andrews, 275; Blight *v.* Fisher, 1 Peters, C. C. R. 41; Miles *v.* McCullough, 1 Binn. 77.

[6] Brown *v.* Getchell, 11 Mass. 11, 14; Geyer *v.* Irwin, 4 Dall. 107.

of time, the courts are disposed to be liberal; but unreasonable loitering and deviation from the way will not be permitted.[1] But a witness is not privileged from arrest by his bail, on his return from giving evidence; and if he has absconded from his bail, he may be retaken, even during his attendance at court.[2]

§ 317. This privilege is granted *in all cases* where the attendance of the party or witness is given in any matter pending *before a lawful tribunal* having jurisdiction of the cause. Thus it has been extended to a party attending on an arbitration, under a rule of court;[3] or on the execution of a writ of inquiry;[4] to a bankrupt and witnesses, attending before the commissioners, on notice;[5] and to a witness attending before a magistrate, to give his deposition under an order of court.[6]

§ 318. If a person thus clearly entitled to privilege is *unlawfully arrested*, the court, in which the cause is to be, or has been, tried, if it have power, will *discharge him upon motion;* and not put him to the necessity of suing out process for that purpose, or of filing common bail. But otherwise, and where the question of privilege is doubtful, the court will not discharge him out of custody upon motion, but will leave him to his remedy by writ; and in either case the trial will be put off until he is released.[7]

§ 319. Where a witness has been duly summoned, and his fees paid or tendered, or the payment or tender waived, if he wilfully neglects to appear, he is guilty of a *contempt* of the process of court, and may be proceeded against by an *attachment*.[8] It has sometimes been held necessary that the cause should be called on for trial, the jury sworn, and the witness called to testify;[9] but the better opinion is, that the witness is to be deemed guilty of

[1] Meekins *v.* Smith, 1 H. Bl. 636; Randall *v.* Gurney, 3 B. & Ald. 252; Willingham *v.* Matthews, 2 Marsh. 57; Lightfoot *v.* Cameron, 2 W. Bl. 1113; Selby *v.* Hills, 8 Bing. 166; Hurst's case, 4 Dall. 387; Smythe *v.* Banks, 4 Dall. 329; 1 Tidd's Pr. 195, 196, 197; Phil. & Am. on Evid. 782, 783; 2 Phil. Evid. 374.

[2] 1 Tidd's Pr. 197; *ex parte* Lyne, 3 Stark. R. 170.

[3] Spence *v.* Stuart, 3 East, 89; Sanford *v.* Chase, 3 Cowen, 381.

[4] Walters *v.* Rees, 4 J. B. Moore, 34.

[5] Arding *v.* Flower, 8 T. R. 534; 1 Tidd's Pr. 197.

[6] *Ex parte* Edme, 9 S. & R. 147. [*So one attending meeting of commissioners on estate of insolvent person deceased, is exempt from arrest on civil process. Wood *v.* Neale, 5 Gray, 538.]

[7] 1 Tidd's Pr. 197, 216; 2 Paine & Duer's Pr. 6, 10; Hurst's case, 4 Dall. 387; *ex parte* Edme, 9 S. & R. 147; Sanford *v.* Chase, 3 Cowen, 381; [Seaver *v.* Robinson, 3 Duer, 622.]

[8] Where two subpœnas were served the same day, on a witness, requiring his attendance at different places, distant from each other, it was held that he might make his election which he will obey. Icehour *v.* Martin, Busbee, Law, N. C. 478.]

[9] Bland *v.* Swafford, Peake's Cas. 60.

contempt, whenever it is distinctly shown that he is absent from court with intent to disobey the writ of *subpœna;* and that the calling of him in court is of no other use than to obtain clear evidence of his having neglected to appear; but that is not necessary, if it can be clearly shown by other means that he has disobeyed the order of court.[1] An attachment for contempt proceeds not upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the court;[2] and it is said, that it must be a perfectly clear case to call for the exercise of this extraordinary jurisdiction.[3] The motion for an attachment should therefore be brought forward as soon as possible, and the party applying must show, by affidavits or otherwise, that the *subpœna* was seasonably and personally served on the witness, that his fees were paid or tendered, or the tender expressly waived, and that every thing has been done which was necessary to call for his attendance.[4] But if it appears that the testimony of the witness could not have been material, the rule for an attachment will not be granted.[5] If a case of palpable contempt is shown, such as an express and positive refusal to attend, the court will grant an attachment in the first instance; otherwise, the usual course is to grant a rule to show cause.[6] It is hardly necessary to add, that if a witness, being present in court, refuses to be sworn or to testify, he is guilty of contempt. In all cases

[1] Barrow *v.* Humphreys, 3 B. & Ald. 598; 2 Tidd's Pr. 808.

[2] 3 B. & Ald. 600, per Best, J. Where a justice of the peace has power to bind a witness by recognizance to appear at a higher court, he may compel his attendance before himself for that purpose by attachment. Bennett *v.* Watson, 3 M. & S. 1; 2 Hale, P. C. 282; Evans *v.* Rees, 12 Ad. & El. 55; *supra*, § 313.

[3] Horne *v.* Smith, 6 Taunt. 10, 11; Garden *v.* Creswell, 2 M. & W. 319; Rex *v.* Ld. J. Russell, 7 Dowl. 693.

[4] 2 Tidd's Pr. 807, 808; Garden *v.* Creswell, 2 M. & W. 319; 1 Paine & Duer's Pr. 499, 500; Conkling's Pr. 265.

[5] Dicas *v.* Lawson, 1 Cr. M. & R. 934. [The court will not compel the attendance of an interpreter or expert, who has neglected to obey a *subpœna*, unless in case of necessity. In the matter of Roelker, Sprague's Decisions, 276.]

[6] Anon. Salk. 84; 4 Bl. Comm. 286, 287; Rex *v.* Jones, 1 Stra. 185; Jackson *v.* Mann, 2 Caines, 92; Andrews *v.* Andrews, 2 Johns. Cas. 109; Thomas *v.* Cummins, 1 Yates, 1; Conkling's Pr. 265; 1 Paine & Duer's Pr. 500; 2 Tidd's Pr. 807, 808. The party injured by the non-attendance of a witness has also his remedy, by action on the case for damages, at common law; and a further remedy, by action of debt, is given by Stat. 5 Eliz. ch. 9; but these are deemed foreign to the object of this work. [In Massachusetts, a statute (Rev. Stat. ch. 94, § 4) gives the aggrieved party an action against a person duly summoned and obliged to attend as a witness, if he fails to do so, for all damages occasioned by such failure. To maintain such action, the plaintiff must prove that the witness was duly summoned, and that his fees for travel and attendance were duly paid or tendered to him, according to the statute requisition; and it is not sufficient in such case, to prove a waiver on the part of the witness, of his right to be served with summons and to have his fees tendered him. Robinson *v.* Trull, 4 Cush. 249. See also Lane *v.* Cole, 12 Barb. 268, which was an action by an aggrieved party

of contempt, the punishment is by fine and imprisonment, at the discretion of the court.[1]

§ 320. If the witness *resides abroad*, out of the jurisdiction, and refuses to attend, or is *sick and unable to attend*, his testimony can be obtained only by taking his *deposition* before a magistrate, or before a commissioner duly authorized by an order of the court where the cause is pending; and if the commissioner is not a judge or magistrate, it is usual to require that he be first sworn.[2] This method of obtaining testimony from witnesses, in a foreign country, has always been familiar in the courts of admiralty; but it is also deemed to be within the inherent powers of all courts of justice. For, by the law of nations, courts of justice, of different countries, are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the court before which the action is pending, may send to the court, within whose jurisdiction the witness resides, a writ, either patent or close, usually termed a letter rogatory, or a commission *sub mutuæ vicissitudinis obtentu ac in juris subsidium*, from those words contained in it. By this instrument, the court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause their depositions to be taken in due course of law, for the furtherance of justice; with an offer, on the part of the tribunal making the request, to do the like for the other, in a similar case. The writ or commission is usually accompanied by interrogatories, filed by the parties on each side, to which the answers of the witnesses are desired. The commission is executed by the judge, who receives it, either by calling the witness before himself, or by the intervention of a commissioner for that purpose; and the original answers, duly signed and sworn to by the deponent, and properly authenticated, are returned with the commission to the court from which it issued.[3] The court of chancery has always freely exer-

against the defendant who was summoned to produce certain papers, which he did not produce, and for want of which the plaintiff was nonsuited. Knott *v.* Smith, 2 Sneed, 214; State *v.* Dill, Ib. 414; Nelson *v.* Ewell, 2 Swan, 271.] [*And an action will lie upon a contract to attend court and give testimony, although there be no allegation that the plaintiff had a good cause of action, but only that the party was compelled to withdraw the record on account of the absence of the witness. Yeatman *v.* Dempsey, 6 Jur. N. S. 778; S. C. 7 C. B., N. S. 628.]

[1] 4 Bl. Comm. 286, 287; Rex *v.* Beardmore, 2 Burr. 792.

[2] Ponsford *v.* O'Connor, 5 M. & W. 673; Clay *v.* Stephenson, 3 Ad. & El. 807.

[3] See Clerk's Praxis, tit. 27; Cunningham *v.* Otis, 1 Gal. 166; Hall's Adm. Pr. part 2, tit. 19, cum. add. and tit. 27, cum. add. pp. 37, 38, 55–60; Oughton's Ordo

cised this power, by a commission, either directed to foreign magistrates, by their official designation, or, more usually, to individuals by name; which latter course, the peculiar nature of its jurisdiction and proceedings enables it to induce the parties to adopt, by consent, where any doubt exists as to its inherent authority. The courts of common law in England seem not to have asserted this power in a direct manner, and of their own authority; but have been in the habit of using indirect means, to coerce the adverse party into a consent to the examination of witnesses, who were absent in foreign countries, under a commission for that purpose. These means of coercion were various; such as putting off the trial, or refusing to enter judgment, as in case of nonsuit, if the defendant was the recusant party; or by a stay of proceedings, till the party applying for the commission could have recourse to a court of equity, by instituting a new suit there, auxiliary to the suit at law.[1] But, subsequently, the learned judges appear not to have been satisfied that it was proper for them to compel a party, by indirect means, to do that which they had no authority to compel him to do directly; and they accordingly refused to put off a trial for that purpose.[2] This inconvenience was therefore remedied by statutes,[3] which provide that, in all cases of the absence

Judiciorum, vol. 1, pp. 150, 151, 152, tit. 95, 96. See also Id. pp. 139–149, tit. 88–94. The general practice, in the foreign continental courts, is, to retain the original deposition, which is entered of record, returning a copy duly authenticated. But in the common-law courts, the production of the original is generally required. Clay *v.* Stephenson, 7 Ad. & El. 185. The practice, however, is not uniform. See an early instance of letters rogatory, in 1 Roll. Abr. 530, pl. 15, temp. Ed. 1. The following form may be found in 1 Peters, C. C. R. 236, note (a).

UNITED STATES OF AMERICA.

District of ———, *ss.*

The president of the United States, to any judge or tribunal having jurisdiction of civil causes, in the city (or province) of ———, in the kingdom of ———, Greeting:

****
* *
* SEAL. *
* *
****

Whereas a certain suit is pending in our ——— Court for the district of ———, in which A. B. is plaintiff [or claimant, against the ship ———], and C. D. is defendant, and it has been suggested to us that there are witnesses residing within your jurisdiction, without whose testimony justice cannot completely be done between the said parties; we therefore request you that, in furtherance of justice, you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you by the said parties, or either of them, to appear before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time and place, by you to be fixed, and there to answer, on their oaths and affirmations, to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and returned to us under cover, duly closed and sealed up, together with these presents. And we shall be ready and willing to do the same for you in a similar case, when required. Witness, &c.

[1] Furly *v.* Newnham, Doug. 419; Anon. cited in Mostyn *v.* Fabrigas, Cowp. 174; 2 Tidd's Pr. 770, 810.

[2] Cailland *v.* Vaughan, 1 B. & P. 210. See also Grant *v.* Ridley, 5 Man. & Grang. 203, per Tindal, C. J.; Macaulay *v.* Shackell, 1 Bligh, 119, 130, 131, n. s.

[3] 13 Geo. III., c. 63, and 1 W. IV., c. 22; Report of Commissioners on Chancery

of witnesses, whether by sickness, or travelling out of the jurisdiction, or residence abroad, the courts, in their discretion, for the due administration of justice, may cause the witnesses to be examined under a commission issued for that purpose. In general, the examination is made by interrogatories, previously prepared; but, in proper cases, the witnesses may be examined *vivâ voce*, by the commissioner, who in that case writes down the testimony given; or he may be examined partly in that manner and partly upon interrogatories.[1]

§ 321. In the United States, provisions have existed in the statutes of the several states, from a very early period, for the taking of depositions to be used in civil actions in the courts of law, in all cases where the personal attendance of the witness could not be had, by reason of sickness or other inability to attend; and also in cases where the witness is about to sail on a foreign voyage, or to take a journey out of the jurisdiction, and not to return before the time of trial.[2] Similar provisions have also been made in many of the United States for taking the depositions of witnesses *in perpetuam rei memoriam*, without the aid of a court

Practice, p. 109; Second Report of Commissioners on Courts of Common Law, pp. 23, 24. [In Castelli *v.* Groome, 12 Eng. Law & Eq. R. 426 (16 Jur. 88), it was held that the court would not exercise its discretion to grant the commission to examine parties to the action under 1 W. IV., c. 22, unless it is shown, by the party applying therefor, that it is necessary to the due administration of justice; and that it is not enough to show that the plaintiff or defendant lives out of the jurisdiction of the court; Lord Campbell, C. J., saying, "it would lead to most vexatious consequences, if constant recourse could be had to this power; and it would be so, in all cases where the parties wished to avoid the process of examination here." Compton, J., said, "The only question in my mind was, whether it was discretionary or not to grant the rule, but that has been settled by Ducket *v.* Williams, 1 Cr. & J. 510, s. c. 9 Law J. Rep. Exch. 177, and it has always been held so. Formerly there was great difficulty in getting the commission allowed, and a plaintiff could only get it by resorting to equity. To remedy this inconvenience the act was passed." For cases under this statute see Bölin *v.* Mellidew, 5 Eng. Law & Eq. R. 387, as to practice in executing commissions abroad in administering oaths under foreign law; Lumley *v.* Gye, 22 Ib. 367, in a case where the mode of examination differs from the English practice, and issuing a fresh commission where the former commission was ineffectual, by reason of the refusal of the witness to answer. In Davis *v.* Barrett, 7 Ib. 207, the commissioners' return, which omitted to state that the commissioners and their clerks had taken the oaths, and where the commissioners had not signed the interrogatories, was allowed to be amended in these several particulars.]

[1] 2 Tidd's Pr. 810, 811; 1 Stark. Evid. 274–278; Phil. & Am. on Evid. pp. 796–800; 2 Phil. Evid. 386, 387, 388; Pole *v.* Rogers, 3 Bing. N. C. 780; [Solaman *v.* Cohen, 3 Eng. Law & Eq. R. 585.]

[2] See Stat. United States, 1812, ch. 25, § 3; [2 Stat. at Large (L. & B.'s edit.), 682.] In several of the United States, depositions may, in certain contingencies, be taken and used in *criminal* cases. See *Arkansas* Rev. Stat. 1837, ch. 44, p. 238; *Indiana* Rev. Stat. 1843, ch. 54, §§ 39, 41; *Missouri* Rev. Stat. 1845, ch. 138, §§ 11, 14; *Iowa* Rev. Code, 1851, ch. 190, 191. [In *Massachusetts*, the *defendant*, after an issue of fact is joined on the indictment, may have a commission to take the testimony of a material witness residing out of the state. Rev. Stat. ch. 136, § 32; Acts of 1851, ch. 71.]

of equity, in cases where no action is pending. In these latter cases there is some diversity in the statutory provisions, in regard to the magistrates before whom the depositions may be taken, and in regard to some of the modes of proceeding, the details of which are not within the scope of this treatise. It may suffice to state that, generally, notice must be previously given to all persons known to be interested in the subject-matter to which the testimony is to relate; that the names of the persons thus summoned must be mentioned in the magistrate's certificate or caption, appended to the deposition; and that the deposition is admissible only in case of the death or incapacity of the witness,[1] and against those only who have had opportunity to cross-examine, and those in privity with them.

§ 322. In regard, also, to the other class of depositions, namely, those taken in civil causes, under the statutes alluded to, there are similar diversities in the forms of proceeding. In some of the states, the judges of the courts of law are empowered to issue commissions, at chambers, in their discretion, for the examination of witnesses unable or not compellable to attend, from any cause whatever. In others, though with the like diversities in form, the party himself may, on application to any magistrate, cause the deposition of any witness to be taken, who is situated as described in the acts. In their essential features these statutes are nearly alike; and these features may be collected from that part of the Judiciary Act of the United States, and its supplements, which regulate this subject.[2] By that act, when the testimony of a person is necessary in any civil cause, pending in a court of the United States, and the person lives more than a hundred miles[3] from the place of trial, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district, and more than that distance from the place of trial, or is ancient, or very infirm, his deposition may be taken *de bene esse*, before any judge of any court of the United States, or before any chancellor or judge of any superior court of a state, or any judge of a county court, or court of common pleas, or any mayor or chief magistrate of any

[1] The rule is the same in equity, in regard to depositions taken *de bene esse*, because of the sickness of the witness. Weguelin *v.* Weguelin, 2 Curt. 263.

[2] Stats. 1789, ch. 20, § 30; Stat. 1793, ch. 22, § 6; [1 U. S. Stats. at Large (L. & B.'s edit.), 88, 335.] This provision is not peremptory; it only enables the party to take the deposition, if he pleases. Prouty *v.* Ruggles, 2 Story, R. 199; 4 Law Rep. 161.

[3] These distances are various in the similar statutes of the states, but are generally thirty miles, though in some cases less.

city[1] in the United States, not being of counsel, nor interested in the suit; provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking, and put interrogatories, if he think fit, be first served on him or his attorney, as either may be nearest, if either is within a hundred miles of the place of caption; allowing time, after the service of the notification, not less than at the rate of one day, Sundays exclusive, for every twenty miles' travel.[2] The witness is to be carefully examined and cautioned, and sworn or affirmed to testify the whole truth,[3] and must subscribe the testimony by him given, after it has been reduced to writing by the magistrate, or by the deponent in his presence. The deposition, so taken, must be retained by the magistrate, until he shall deliver it with his own hand into the court for which it is taken; or it must, together with a certificate of the causes or reasons for taking it, as above specified, and of the notice, if any, given to the adverse party, be by the magistrate sealed up, directed to the court, and remain under his seal until it is opened in court.[4] And such witnesses may be compelled to appear and depose as

[1] In the several states, this authority is generally delegated to justices of the peace.

[2] Under the Judiciary Act, § 30, there must be personal notice served upon the adverse party; service by leaving a copy at his place of abode is not sufficient. Carrington *v.* Stimson, 1 Curtis, Ct. Ct. 437. The magistrate in his return need not state the distance of the place of residence of the party or his attorney from the place where the deposition was taken. Voce *v.* Lawrence, 4 McLean, 203. To ascertain the proper notice in point of time to be given to the adverse party, the distance must be reckoned from the party's residence to the place of caption. Porter *v.* Pillsbury, 36 Maine, 278. Where the certificate states simply that the adverse party was not personally present, a copy of the notice and of the return of service thereof, should be annexed; and if it is not annexed, and it does not distinctly appear that the adverse party was present either in person or by counsel, the deposition will be rejected. Carleton *v.* Patterson, 9 Foster, 580; see also Bowman *v.* Sanborn, 5 Ib. 87.

[3] Where the state statute requires that the deponent shall be sworn to testify to the truth, the whole truth, &c., "*relating to the cause for which the deposition is to be taken*," the omission of the magistrate in his certificate to state that the witness was so sworn, makes the deposition inadmissible; and the defect is not cured by the addition that "after giving the deposition he was duly sworn thereto according to law." Parsons *v.* Huff, 38 Maine, 137; Brighton *v.* Walker, 35 Ib. 132; Fabyan *v.* Adams, 15 N. H. 371. It should distinctly appear that the oath was administered where the witness was examined. Erskine *v.* Boyd, 35 Maine, 511.

[4] The mode of transmission is not prescribed by the statute; and in practice it is usual to transmit depositions by post, whenever it is most convenient; in which case the postages are included in the taxed costs. Prouty *v.* Ruggles, 2 Story, R. 199; 4 Law Reporter, 161. Care must be taken, however, to inform the clerk, by a proper superscription, of the nature of the document enclosed to his care; for, if opened by him out of court, though by mistake, it will be rejected. Beal *v.* Thompson, 8 Cranch, 70. But see Law *v.* Law, 4 Greenl. 167. [A deposition not certified by the magistrate to have been signed by the deponent is admissible in the Federal Courts. Voce *v.* Lawrence, 4 McLean, 203; but unless it is certified to have been retained by the magistrate until sealed up and directed to the proper court, it is inadmissible in such courts. Shankwiker *v.* Reading, 1b. 420.]

above mentioned, in the same manner as to appear and testify in court. Depositions, thus taken, may be used at the trial by either party, whether the witness was or was not cross-examined,[1] if it shall appear, to the satisfaction of the court, that the witnesses are then dead, or gone out of the United States,[2] or more than a hundred miles from the place of trial, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court.

§ 323. The provisions of this act being in derogation of the common law, it has been held that they must be strictly complied with.[3] But if it appears on the face of the deposition, or the cer-

[1] Dwight *v.* Linton, 3 Rob. Louis. R. 57. [Where the testimony of a witness is substantially complete, a deposition (taken under a state statute), duly signed and certified, is not to be rejected, because the cross-examination was unfinished in consequence of the sickness or death of the witness. If not so advanced as to be substantially complete, it must be rejected. Thus, where it appeared on the face of the deposition that the cross-examination was not finished, the defendant having refused, in consequence of severe sickness, of which he soon afterwards died, to answer the nineteenth cross-interrogatory, which only asked for a more particular statement of facts to which the witness had testified, the deposition was held to have been properly admitted. Fuller *v.* Rice, 4 Gray, 343; Valton *v.* National Loan, &c., Society, 22 Barb. 9.]

[2] In proof of the absence of the witness, it has been held not enough to give evidence merely of inquiries and answers at his residence; but, that his absence must be shown by some one who knows the fact. Robinson *v.* Markis, 2 M. & Rob. 375. And see Hawkins *v.* Brown, 3 Rob. Louis. R. 310, [§ 323, note; Weed *v.* Kellogg, 6 McLean, 44. Where the cause of taking the deposition was that the deponent was about to leave the state, &c., and a subpœna had been issued at the time of the trial, to the deponent, to appear as a witness, upon which a constable of the place where the deponent resided, had returned that he made diligent inquiry and search for the witness, and could not find him, it was held to be sufficient proof of the deponent's absence, so that the deposition could be used. Kinney *v.* Berran, 6 Cush. 394.]

[3] Bell *v.* Morrison, 1 Peters, 355; the "Thomas & Henry" *v.* The United States, 1 Brockenbrough, 367; Nelson *v.* The United States, 1 Peters, C. C. R. 235. The use of *ex parte* depositions, taken without notice, under this statute, is not countenanced by the courts, where evidence of a more satisfactory character can be obtained. The views of the learned judges on this subject have been thus expressed by Mr. Justice Grier: — "While we are on this subject, it will not be improper to remark, that when the act of congress of 1789 was passed, permitting *ex parte* depositions, without notice, to be taken where the witness resides more than a hundred miles from the place of trial, such a provision may have been necessary. It then required nearly as much time, labor, and expense to travel one hundred miles as it does now to travel one thousand. Now testimony may be taken and returned from California, or any part of Europe, on commission, in two or three months; and in any of the states east of the Rocky Mountains in two or three weeks. There is now seldom any necessity for having recourse to this mode of taking testimony. Besides, it is contrary to the course of the common law; and, except in cases of mere formal proof (such as the signature or execution of an instrument of writing), or of some isolated fact (such as demand of a bill, or notice to an indorser), testimony thus taken is liable to great abuse. At best, it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him, can generally have so much or so little of the truth, or such a version of it as will suit his case. In closely contested cases of fact, testimony thus obtained must always be unsatisfactory and liable to suspicion, especially if the party has had time and opportunity to take it in the regular way. This provision of the act of congress should never be resorted to, unless in circumstances of absolute necessity,

tificate which accompanies it, that the magistrate before whom it was taken was duly authorized, within the statute, it is sufficient, in the first instance without any other proof of his authority;[1] and his certificate will be good evidence of all the facts therein stated, so as to entitle the deposition to be read, if the necessary facts are therein sufficiently disclosed.[2] In cases where, under the authority of an act of congress, the deposition of a witness is taken *de bene esse*, the party producing the deposition must show affirmatively that his inability to procure the personal attendance of the witness still continues; or, in other words, that the cause of taking the deposition remains in force. But this rule is not applied to cases where the witness resides more than a hundred miles from the place of trial, he being beyond the reach of compulsory process. If he resided beyond that distance when the deposition was taken, it is presumed that he continues so to do, until the party opposing its admission shows that he has removed within the reach of a *subpœna*.[3]

or in the excepted cases we have just mentioned." See Walsh *v.* Rogers, 13 How. s. c. R. 286, 287.

[1] Ruggles *v.* Bucknor, 1 Paine, 358; The Patapsco Ins. Co. *v.* Southgate, 5 Peters, 604; Fowler *v.* Merrill, 11 How. 375; [Palmer *v.* Fogg, 35 Maine, 368; Hoyt *v.* Hammekin, 14 How. U. S. 346; Fowler *v.* Merrill, 11 Ib. 375; Lyon *v.* Ely, 24 Conn. 507. Where depositions are taken before a mayor and are certified by him, though without an official seal, the court will presume that he was mayor, unless the contrary be shown. Price *v.* Morris, 5 McLean, 4; see also Wilkinson *v.* Yale, 6 McLean, 16. Where it is made the duty of the magistrate taking a deposition to certify the reason for taking it, his certificate of the cause of taking is *primâ facie* proof of the fact, and renders the deposition admissible, unless it is controlled by other evidence. West Boylston *v.* Sterling, 17 Pick. 126; Littlehale *v.* Dix, 11 Ib. 365. Nor is it necessary that it should appear by the deposition or the certificate in what manner, or by what evidence, the magistrate was satisfied of the existence of the cause of the taking. It is enough, if he certifies to the fact upon his official responsibility. Thus, where the magistrate duly certified that the deponent lived more than thirty miles from the place of trial, no evidence being offered to control the certificate, and the court not being bound to take judicial notice of the distance of one place from another, it was held that the deposition was rightly admitted. Littlehale *v.* Dix, *ub. supra*. Where the magistrate certifies that the "cause assigned by the plaintiff," who was the party taking the deposition, for taking the same, was the deponent's being about to leave the commonwealth, and not to return in time for the trial, it is proper that such party should show that the cause existed at the time of the trial. Kinney *v.* Berran, 6 Cush. 394.]

[2] Bell *v.* Morrison, 1 Peters, 356.

[3] The Patapsco Ins. Co. *v.* Southgate, 5 Peters, 604, 616, 617, 618; Pettibone *v.* Derringer, 4 Wash. 215; 1 Stark. Evid. 277. [Where a deposition is taken under the act of congress, without notice, the adverse party, if dissatisfied, should have it taken again. Goodhue *v.* Bartlett, 5 McLean, 186. Where the Federal Circuit Court adopts the law and practice of the state in taking depositions, it will be presumed to have adopted a modification thereof, which has been followed for a long time. But whatever be the state law, the act of congress is to prevail, which requires that the deponent should live one hundred miles from the court. Curtis *v.* Central Railroad, 6 McLean, 401.

A few cases are added, illustrating the rules of law and the practice of the courts in regard to admitting or rejecting depositions. Depositions of several witnesses, taken under one commission on one set of interrogatories, a part of which only

§. 324. By the act of Congress already cited,[1] the power of the courts of the United States, as courts of common law, to grant a *dedimus potestatem* to take depositions, whenever it may be necessary, in order to prevent a failure or delay of justice, is expressly recognized; and the circuit courts, when sitting as courts of equity, are empowered to direct depositions to be taken *in perpetuam rei memoriam*, according to the usages in chancery, where the matters to which they relate are cognizable in those courts. A later statute[2] has facilitated the taking of depositions in the former of these cases, by providing that when a commission shall be issued by a court of the United States for taking the testimony

are to be propounded to each witness, can be used in evidence. Fowler *v.* Merrill, 11 How. U. S. 375. If the words "before me," preceding the name of the magistrate before whom the deposition was taken and sworn, be omitted in the caption, the deposition is not admissible. Powers *v.* Shepard, 1 Foster, N. H. 60. Where one party takes a deposition on interrogatories, or portions of a deposition, for the purpose of meeting the testimony of a witness who has deposed, or testimony which he may expect the other party will produce, but does not intend to use the answers thereto, unless the other testimony is introduced, he must accompany the interrogatories with a distinct notice in writing that his purpose is merely to meet the testimony of his adversary's witness or witnesses; and if this is not done, the answers must be read to the jury if required by the other party. This is the most eligible rule in such cases, and will save to each party all his just rights, and prevent all unfairness and surprise. By Metcalf, J., in Linfield *v.* Old Colony R. R. Corp. 10 Cush. 570. See McKelvy *v.* DeWolfe, 20 Penn. State R. 374. A deposition taken under a commission duly issued on "interrogatories to be put to M. H. B. of Janesville, Wisconsin, laborer," but which purports by its caption to be the deposition of M. H. B., of Sandusky, Ohio, and in which the deponent states his occupation to be that of peddler, is admissible in evidence, notwithstanding the variance, if it appears that the deponent is the same person to whom the interrogatories are addressed. Smith *v.* Castles, 1 Gray, 108. The questions appended to a commission sent to Bremen were in English; the commissioners returned the answers in German, annexed to a German translation of the questions; the commission was objected to on the ground that the return should have been in English, or accompanied by an English translation; but the objection was overruled; and a sworn interpreter was permitted to translate the answers *viva voce* to the jury. Kuhtman *v.* Brown, 4 Rich. 479. Where a deposition is taken by a magistrate in another state, under a written agreement that it may be so taken upon the interrogatories and cross-interrogatories annexed to the agreement, such agreement operates only as a substitute for a commission to the magistrate named therein, and a waiver of objections to the interrogatories in point of form, and does not deprive either party of the right to object, at the trial, to the interrogatories and answers, as proving facts by incompetent evidence. Atlantic Mutual Ins. Co. *v.* Fitzpatrick, 2 Gray, 279; Lord *v.* Moore, 37 Maine, 208. And to exclude the deposition on the ground of the interest of the deponent, it is not necessary that the objection should be taken before the magistrate. Whitney *v.* Heywood, 6 Cush. 82; *infra*, § 421, note. Where the witnesss was interested at the time his deposition was taken, and a release to him was afterwards executed, the deposition was not admitted. Reed *v.* Rice, 25 Vt. 171; Ellis *v.* Smith, 10 Geo. 253. If the deponent is disqualified by reason of interest at the time of giving his deposition, and at the time of the trial the disqualification has been removed by statute, the deposition can be used in evidence. Haynes *v.* Rowe, 40 Maine, 181. Where, after the deposition is taken, he becomes interested in the event of the suit, by no act of his own, or of the party who offers his testimony, the deposition is admissible. Sabine *v.* Strong, 6 Met. 670.]

[1] Stat. 1789, ch. 20, § 30.

[2] Stat 1827, ch. 4. See the practice and course of proceeding in these cases, in 2 Paine & Duer's Pr. pp. 102–110; 2 Tidd's Pr. 810, 811, 812.

of a witness, at any place within the United States, or the territories thereof, the clerk of any court of the United States, for the district or territory where the place may be, may issue a *subpœna* for the attendance of the witness before the commissioner, provided the place be in the county where the witness resides, and not more than forty miles from his dwelling. And if the witness, being duly summoned, shall neglect or refuse to appear, or shall refuse to testify, any judge of the same court, upon proof of such contempt, may enforce obedience, or punish the disobedience, in the same manner as the courts of the United States may do, in case of disobedience to their own process of *subpœna ad testificandum*. Some of the states have made provision by law for the taking of depositions, to be used in suits pending in other states, by bringing the deponent within the operation of their own statutes against perjury; and national comity plainly requires the enactment of similar provisions in all civilized countries. But as yet they are far from being universal; and whether, in the absence of such provision, false swearing in such case is punishable as perjury, has been gravely doubted.[1] Where the production of papers is required, in the case of examinations under commissions issued from courts of the United States, any judge of a court of the United States may, by the same statute, order the clerk to issue a *subpœna duces tecum* requiring the witness to produce such papers to the commissioner, upon the affidavit of the applicant to his belief that the witness possesses the papers, and that they are material to his case; and may enforce the obedience and punish the disobedience of the witness, in the manner above stated.

§ 325. But independently of statutory provisions, chancery has power to sustain bills, filed for the purpose of preserving the evidence of witnesses *in perpetuam rei memoriam*, touching any matter which cannot be immediately investigated in a court of law, or where the evidence of a material witness is likely to be lost, by his death, or departure from the jurisdiction, or by any other cause, before the facts can be judicially investigated. The defendant, in such cases, is compelled to appear and answer, and the cause is brought to issue, and a commission for the examination of the witnesses is made out, executed, and returned, in the same manner as in other cases; but no relief being prayed, the suit is never

[1] Cailland *v.* Vaughan, 1 B. & B. 210.

brought to a hearing; nor will the court ordinarily permit the publication of the depositions, except in support of a suit or action; nor then, unless the witnesses are dead, or otherwise incapable of attending to be examined.[1]

[1] Smith's Chancery Prac. 284–286.

CHAPTER II.

OF THE COMPETENCY OF WITNESSES.

§ 359. Witness made defendant by mistake may be omitted on motion.
360. Witness for co-defendant in ejectment may be defaulted and testify.
361. Parties to the record examined in chancery, how and when.
362. General principles as to admission or exclusion of parties same in civil and criminal cases.
363. State must discharge a defendant before he can testify against others indicted with him.
364. When judges and attorneys may testify.
365. Persons deficient in understanding incompetent to testify.
366. Deaf and dumb persons may testify, after proof that they have sufficient understanding.
367. No precise age when children are excluded; presumed to be competent at fourteen.
368. Persons insensible to the obligations of an oath incompetent.
369. Belief in the being of God and a future state of rewards and punishments sufficient.
370. Defect of religious faith never presumed; must be shown by party objecting.
371. Witnesses must be sworn in the manner they deem binding.
372. *Persons infamous* incompetent.
373. What crimes render perpetrator infamons.
374. Persons so disqualified when a party may make certain affidavits.
375. Only the *judgment* is evidence of person's guilt to render him incompetent.
376. Conviction in one country does not render witness incompetent in another.
377. Disability from infamy removed by reversal of judgment and by pardon.
378. Where disability is annexed by statute to the conviction of a crime, pardon does not remove.
379. *Particeps criminis* not convicted and sentenced, not on that account incompetent.
380. Degree of credit to be given to his testimony exclusively for the jury.
381. Courts not agreed as to manner and extent of corroboration required.
382. Rule does not apply as to conspirators who early disclose the conspiracy.
383, 384. Party to a negotiable instrument competent witness to impeach it.
385. Weight of American authority against English rule.
386. Parties legally interested in result of cause incompetent to testify.
387. Interest must be real and not merely apprehended.
388. Witness under an honorary obligation not disqualified.
389. Interest must be in the event of the *cause*, and not in the question.
390. True test, the gain or loss by witness by the judgment.
391. Magnitude or degree of interest not regarded.
392. Illustrations of the nature of the interest which disqualifies.
393. Witness, made liable by adverse event of suit, incompetent.
394, 395. Illustrations of this rule.
396. Witness incompetent where his testimony by charging defendant discharges himself.
397. Obligation to indemnify against fact essential to judgment renders witness incompetent.
398. Implied warrantors not competent to prove title.
399. Parties to negotiable instrument competent in suits between other parties.
400. Possible interest of such witnesses goes only to credibility.
401. But certain interest renders incompetent.
402. Also liability for costs of suit.

§ 326. Although, in the ordinary affairs of life, temptations to practise deceit and falsehood may be comparatively few, and therefore men may ordinarily be disposed to believe the statements of each other; yet, in judicial investigations, the motives to pervert the truth and to perpetrate falsehood and fraud are so greatly multiplied, that if statements were received with the same undiscriminating freedom as in private life, the ends of justice could with far less certainty be attained. In private life, too, men can inquire and determine for themselves whom they will deal with, and in whom they will confide; but the situation of judges and jurors renders it difficult, if not impossible, in the narrow compass of a trial, to investigate the character of witnesses; and from the very nature of judicial proceedings, and the necessity of preventing the multiplication of issues to be tried, it often may happen that the testimony of a witness, unworthy of credit, may receive as much consideration as that of one worthy of the fullest confidence.

If no means were employed totally to exclude any contaminating influences from the fountains of justice, this evil would constantly occur. But the danger has always been felt, and always guarded against, in all civilized countries. And while all evidence is open to the objection of the adverse party, before it is admitted, it has been found necessary to the ends of justice, that certain kinds of evidence should be uniformly excluded.[1]

§ 327. In determining what evidence shall be admitted and weighed by the jury, and what shall not be received at all, or, in other words, in distinguishing between competent and incompetent witnesses, a principle seems to have been applied similar to that which distinguishes between conclusive and disputable presumptions of law,[2] namely, the experienced connection between the situation of the witness, and the truth or falsity of his testimony. Thus, the law excludes as incompetent, those persons whose evidence, in general, is found more likely than otherwise to mislead juries; receiving and weighing the testimony of others, and giving to it that degree of credit which it is found on examination to deserve. It is obviously impossible that any test of credibility can be infallible. All that can be done is to approximate to such a degree of certainty as will ordinarily meet the justice of the case. The question is not, whether any rule of exclusion may not sometimes shut out credible testimony; but whether it is expedient that there should be any rule of exclusion at all. If the purposes of justice require that the decision of causes should not be embarrassed by statements generally found to be deceptive, or totally false, there must be some rule designating the class of evidence to be excluded; and in this case, as in determining the ages of discretion, and of majority, and in deciding as to the liability of the wife, for crimes committed in company with the husband, and in numerous other instances, the common law has merely followed the common experience of mankind. It rejects the testimony (1.) of parties; (2.) of persons deficient in understanding; (3.) of persons insensible to the obligations of an oath; and (4.) of persons whose pecuniary interest is directly involved in the matter in issue; not because they may not sometimes state the truth, but because it would ordinarily be unsafe to rely on their testimony.[3]

[1] 4 Inst. 279.

[2] *Supra*, §§ 14, 15.

[3] "If it be objected, that interest in the matter in dispute might, from the bias it creates, be an exception to the credit, but that it ought not to be absolutely so to the

Other causes concur, in some of these cases, to render the persons incompetent, which will be mentioned in their proper places. We shall now proceed to consider, in their order, each of these classes of persons, held incompetent to testify; adding some observations on certain descriptions of persons, held incompetent in particular cases.

§ 328. But here it is proper to observe, that one of the main provisions of the law, for securing the purity and truth of oral evidence, is, that it be delivered under the *sanction of an oath.* Men in general are sensible of the motives and restraints of religion, and acknowledge their accountability to that Being, from whom no secrets are hid. In a Christian country it is presumed, that all the members of the community entertain the common faith, and are sensible to its influences; and the law founds itself on this presumption, while, in seeking for the best attainable evidence of every fact, in controversy, it lays hold on the conscience of the witness by this act of religion, namely, a public and solemn appeal to the Supreme Being for the truth of what he may utter. "The administration of an oath supposes that a moral and religious accountability is felt to a Supreme Being, and this is the sanction which the law requires upon the conscience, before it admits him to testify."[1] An oath is ordinarily defined to be a solemn invocation of the vengeance of the Deity upon the witness, if he do not declare the whole truth as far as he knows it;[2] or, a religious asseveration by which a person renounces the mercy, and imprecates the vengeance of Heaven, if he do not

competency, any more than the friendship or enmity of a party, whose evidence is offered, towards either of the parties in the cause, or many other considerations hereafter to be intimated; the general answer may be this, that in point of authority no distinction is more absolutely settled; and in point of theory, the existence of a direct interest is capable of being precisely proved; but its influence on the mind is of a nature not to discover itself to the jury; whence it hath been held expedient to adopt a general exception, by which witnesses so circumstanced are free from temptation, and the cause not exposed to the hazard of the very doubtful estimate, what quantity of interest in the question, in proportion to the character of the witness, in any instance, leaves his testimony entitled to belief. Some, indeed, are incapable of being biased even latently by the greatest interest; many would betray the most solemn obligation and public confidence for an interest very inconsiderable. An universal exclusion, where no line short of this could have been drawn, preserves infirmity from a snare, and integrity from suspicion; and keeps the current of evidence, thus far at least, clear and uninfected." 1 Gilb. Evid. by Lofft, pp. 223, 224.

[1] Wakefield *v.* Ross, 5 Mason, 18, per Story, J. See also Menochius, De Præsumpt. lib. 1, quæst. 1, n. 32, 33; Farinac. Opera, tom. 2, App. p. 162, n. 32, p. 281, n. 33; Bynkershoek, Observ. Juris Rom. lib. 6, cap. 2.

[2] 1 Stark. Evid. 22. The force and utility of this sanction were familiar to the Romans from the earliest times. The solemn oath was anciently taken by this formula, the witness holding a flint stone in

speak the truth."[1] But the correctness of this view of the nature of an oath has been justly questioned by a late writer,[2] on the ground that the imprecatory clause is not essential to the true idea of an oath, nor to the attainment of the object of the law in requiring this solemnity. The design of the oath is not to call the attention of God to man; but the attention of man to God;— not to call on Him to punish the wrongdoer; but on man to remember that He will. That this is all which the law requires is evident from the statutes in regard to Quakers, Moravians, and other classes of persons, conscientiously scrupulous of testifying under any other sanction, and of whom, therefore, no other declaration is required. Accordingly, an oath has been well defined, by the same writer, to be "an outward pledge, given by the juror" (or person taking it), "that his attestation or promise is made under an immediate sense of his responsibility to God."[3] A security to this extent, for the truth of testimony, is all that the law seems to have deemed necessary; and with less security than this, it is believed that the purposes of justice cannot be accomplished.

§ 329. And *first*, in regard to *parties*, the general rule of the common law is, that a *party to the record*, in a civil suit, *cannot be a witness* either for himself, or for a co-suitor in the cause.[4] The rule of the Roman law was the same. *Omnibus in re propriâ dicendi testimonii facultatem jura submoverunt.*[5] This rule of the common law is founded, not solely in the consideration of interest, but partly also in the general expediency of avoiding the multiplication of temptations to perjury. In some cases at law, and generally by the course of proceedings in equity, one party may

his right hand: *Si sciens fallo, tum me Diespiter, salva urbe arceque, bonis ejiciat, ut ego hanc lapidem.* Adam's Ant. 247; Cic. Fam. Ep. vii. 1, 12; 12 Law Mag. (Lond.) 272. The early Christians refused to utter any imprecation whatever; Tyler on Oaths, ch. 6; and accordingly, under the Christian Emperors, oaths were taken in the simple form of religious asseveration, *invocato Dei Omnipotentis nomine*, Cod. lib. 2, tit. 4, l. 41; *sacrosanctis evangeliis tactis*, Cod. lib. 3, tit. 1, l. 14. Constantine added in a rescript,—*Jurisjurandi religione testes, prius quam perhibeant testimonium, jamdudum arctari præcipimus.* Cod. lib. 4, tit. 20, l. 9. See also Omichund *v.* Barker, 1 Atk. 21, 48, per Ld. Hardwicke; Willes, 538, s. c.; 1 Phil. Evid. p. 8; Atcheson *v.* Everitt, Cowp. 389. The subject of oaths is very fully and ably treated by Mr. Tyler, in his book on Oaths, their Nature, Origin, and History. Lond. 1834.

[1] White's case, 2 Leach, Cr. Cas. 482.

[2] Tyler on Oaths, pp. 12, 13.

[3] Tyler on Oaths, p. 15. See also the report of the Lords' Committee, Id. Introd. p. xiv.; 3 Inst. 165; Fleta, lib. 5, c. 22; Fortescue, De Laud Leg. Angl. c. 26, p. 58.

[4] 3 Bl. Comm. 371; 1 Gilb. Evid. by Lofft, p. 221; Frear *v.* Evertson, 20 Johns. 142.

[5] Cod. lib. 4, tit. 20, l. 10. Nullus idoneus testis in re sua intelligitur. Dig. lib. 22, tit. 5, l. 10.

appeal to the conscience of the other, by calling him to answer interrogatories upon oath. But this act of the adversary may be regarded as an emphatic admission, that, in that instance, the party is worthy of credit, and that his known integrity is a sufficient guaranty against the danger of falsehood.[1] But where the party would volunteer his own oath, or a co-suitor, identified in interest with him, would offer it, this reason for the admission of

[1] In several of the United States, any party, in a suit at law, may compel the adverse party to appear and testify as a witness. In *Connecticut*, this may be done in all cases. Rev. Stat. 1849, tit. 1, § 142. So, in *Ohio*. Stat. March 23, 1850, §§ 1, 2. In *Michigan*, the applicant must first make affidavit that material facts in his case are known to the adverse party, and that he has no other proof of them, in which case he may be examined as to those facts. Rev. Stat. 1846, ch. 102, § 100. In *New York*, the adverse party may be called as a witness; and, if so, he may testify in his own behalf, to the same matters to which he is examined in chief; and if he testifies to new matter, the party calling him may also testify to such new matters. Rev. Stat. vol. 3, p. 769, 3d edit. The law is the same in *Wisconsin*. Rev. Stat. 1849, ch. 98, §§ 57, 60; [and in *New Jersey*, Nixon's Digest (1855), p. 187.] In *Missouri*, parties may summon each other as witnesses, in justices' courts; and, if the party so summoned refuses to attend or testify, the other party may give his own oath *in litem*. Rev. Stat. 1845, ch. 93, §§ 24, 25. [In *Massachusetts* (Acts, 1857, chap. 305), parties in all civil actions and proceedings, including probate and insolvency proceedings, suits in equity, and all divorce suits, except those in which a divorce is sought for the alleged criminal conduct of either party, may be admitted to testify in their own favor, and may be called as witnesses by the opposite party. In all actions in which the wife is a party, or one of the parties to the action, she and her husband are competent witnesses for or against each other, but they cannot testify as to private conversations with each other. No person so testifying is compelled to criminate himself; and if one of the original parties to the contract or cause of action then in issue and on trial, be dead, or is shown to the court to be insane; or when an executor or administrator is a party to the suit or proceeding, the other party cannot testify, except in the last-named case, as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator. The depositions of such parties may be taken, as of other witnesses, and the expense thereof taxed in the bill of costs. The laws relating to attesting witnesses to wills are not affected by the act. Parties are also, with certain exceptions, competent witnesses for either party; in *Maine*, Rev. Stat. (1857) ch. 82, §§ 78–83; in *New Hampshire*, Acts of 1857, ch. 1952, pamphlet edition of Laws, p. 1868; in *Vermont*, Acts of 1852, No. 13 (Nov. 23, 1852); Acts of 1853, No. 13 (December 6, 1853); in *Rhode Island*, Rev. Stat. (1857) ch. 187, § 34; in *Connecticut*, Pub. Stat. (Compilation of 1854) p. 95, § 141; in *Ohio*, Rev. Stat. (Curwen's edit.) vol. 3, p. 1986, tit. x. ch. 1, §§ 310–313.

[The Massachusetts Statute of 1856, ch. 188 (repealed by act of 1857, ch. 305), provided "where the original party to the contract or cause of action was dead," that the other party could not testify. In a *replevin* suit (Fischer *v.* Morse, Norfolk S. J. C. Oct. T. 1857, 20 Law Reporter, 414), for goods, the defendant in his answer claimed the replevied goods as assignee in insolvency of a third person now deceased. The plaintiff contended, that the insolvent (the third person) obtained the goods of him by fraud, and therefore acquired no title, and offered himself as witness; and it was held, that he was incompetent, — the original party to the cause of action being dead.

[The Connecticut Statute provides that no person shall be disqualified as a witness by reason of interest in the event of the suit whether as a party or otherwise. Under this statute the wife is held to be a competent witness for the husband. Merriam *v.* Hartford and N. H. R. R. Co., 20 Conn. 354, 363. For a similar decision in Vermont, see Rutland and B. R. R. Co. *v.* Simson's Adm'r, 19 Law Rep. 629. See to this point under the Massachusetts Statute of 1856, which provided that parties in all civil actions may testify, &c., without the additional clause as to husband and wife that is in the Act of 1857; (see *supra*,) Barber *v.* Goddard, 20 Law Rep. 408, and Snell *v.* Westport, Ib. 414,

the evidence totally fails;[1] "and it is not to be presumed that a man, who complains without cause, or defends without justice, should have honesty enough to confess it."[2]

§ 330. The rule of the common law goes still further in regard to *parties to the record* in *not compelling* them, in trials by jury, to give evidence for the opposite party, against themselves, either in civil or in criminal cases. Whatever may be said by theorists, as to the policy of the maxim, *Nemo tenetur seipsum prodere*, no inconvenience has been felt in its practical application. On the contrary, after centuries of experience, it is still applauded by judges, as "a rule founded in good sense and sound policy;"[3] and it certainly preserves the party from temptation to perjury. This rule extends to all the actual and real parties to the suit, whether they are named on the record as such or not.[4]

§ 331. Whether *corporators* are parties within the meaning of this rule is a point not perfectly clear. Corporations, it is to be observed, are classed into public or municipal, and private corporations. The former are composed of all the inhabitants of any of the local or territorial portions into which the country is divided in its political organization. Such are counties, towns, boroughs, local parishes, and the like. In these cases, the attribute of individuality is conferred on the entire mass of inhabitants, and again is modified, or taken away, at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of the inhabitants, though not ordinarily against it. They are termed *quasi* corporations; and are dependent on the public will, the inhabitants not, in general, deriving any private and personal rights under the act of incorporation;

which decide that the wife is a competent witness if a party to the suit, but not otherwise.]

[1] "For where a man, who is interested in the matter in question, would also prove it, it rather is a ground for distrust, than any just cause of belief; for men are generally so short-sighted, as to look to their own private benefit, which is near them, rather than to the good of the world, 'which, though on the sum of things really best for the individual,' is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it. It is also easy for persons, who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence; and therefore the law removes them from testimony, to prevent their sliding into perjury; and it can be no injury to truth to remove those from the jury, whose testimony may hurt themselves, and can never induce any rational belief." 1 Gilb. Evid. by Lofft, p. 223.

[2] 1 Gilb. Evid. by Lofft, p. 243.

[3] Worrall *v.* Jones, 7 Bing. 395, per Tindal, C. J.; Rex *v.* Woburn, 10 East, 403, per Lord Ellenborough, C. J.; Commonwealth *v.* Marsh, 10 Pick. 57.

[4] Rex *v.* Woburn, 10 East, 395; Mauran *v.* Lamb, 7 Cowen, 174; Appleton *v.* Boyd, 7 Mass. 131; Fenn *v.* Granger, 3 Campb. 177.

its office and object being not to grant private rights, but to regulate the manner of performing public duties.[1] These corporations sue and are sued by the name of "the Inhabitants of" such a place; each inhabitant is directly liable in his person to arrest, and in his goods to seizure and sale, on the execution, which may issue against the collective body, by that name; and of course each one is a party to the suit; and his admissions, it seems, are receivable in evidence, though their value, as we have seen, may be exceedingly light.[2] Being parties, it would seem naturally to follow, that these inhabitants were neither admissible as witnesses for themselves, nor compellable to testify against themselves; but considering the public nature of the suits, in which they are parties, and of the interest generally involved in them, the minuteness of the private and personal interest concerned, its contingent character, and the almost certain failure of justice, if the rule were carried out to such extent in its application, these inhabitants are admitted as competent witnesses in all cases, in which the rights and liabilities of the corporation only are in controversy. But where the inhabitants are individually and personally interested, it is otherwise.[3] Whether this exception to the general

[1] Angell & Ames on Corp. 16, 17; Rumford *v.* Wood, 13 Mass. 192. The observations in the text are applied to American corporations of a political character. Whether a municipal corporation can in every case be dissolved by an act of the legislature, and to what extent such act of dissolution may constitutionally operate, are questions, which it is not necessary here to discuss. See Willcock on Municipal Corporations, pt. 1, § 852; Terrett *v.* Taylor, 9 Cranch, 43, 51; Dartmouth College *v.* Woodward, 4 Wheat. 518, 629, 663; [Warren *v.* Charlestown, 2 Gray, 84, 100.]

[2] *Supra*, § 175, and note.

[3] Swift's Evid. 57; Rex *v.* Mayor of London, 2 Lev. 231. Thus, an inhabitant is not competent to prove a way by prescription for all the inhabitants; Odiorne *v.* Wade, 8 Pick. 518; nor a right, in all the inhabitants to take shell-fish; Lufkin *v.* Haskell, 3 Pick. 356; for in such cases, by the common law, the record would be evidence of the custom, in favor of the witness. [But see Look *v.* Bradley, 13 Met. 369, 372.] This ground of objection, however, is now removed in England, by Stat. 3 & 4 W. IV. c. 42. The same principle is applied to any private, joint, or common interest. Parker *v.* Mitchell, 11 Ad. & El. 788. See also Prewitt *v.* Tilley, 1 C. & P. 140; Ang. & Ames on Corp. 390–394; Connecticut *v* Bradish, 14 Mass. 296; Gould *v.* James, 6 Cowen, 369; Jacobson *v.* Fountain, 2 Johns. 170; Weller *v.* The Governors of the Foundling Hospital, Peake's Cas. 153; *infra*, § 405. In the English courts, a distinction is taken between *rated* and *ratable* inhabitants, the former being held inadmissible as witnesses, and the latter being held competent; and this distinction has been recognized in some of our own courts; though upon the grounds stated in the text, it does not seem applicable to our institutions, and is now generally disregarded. See Commonwealth *v.* Baird, 4 S. & R. 141; Falls *v.* Belknap, 1 Johns. 486, 491; Corwein *v.* Hames, 11 Johns. 76; Bloodgood *v.* Jamaica, 12 Johns. 285; *supra*, § 175, note, and the cases above cited. But in *England*, rated inhabitants are now by statutes made competent witnesses on indictments for non-repair of bridges; in actions against the hundred, under the statute of Winton; in actions for riotous assemblies; in actions against churchwardens for misapplication of funds; in summary convictions under 7 and 8 Geo. IV. c. 29, 30; on the trial of indictments under the general highway

rule was solely created by the statutes, which have been passed on this subject, or previously existed at common law, of which the statutes are declaratory, is not perfectly agreed.[1] In either case, the general reason and necessity, on which the exception is founded, seem to require, that where inhabitants are admissible as witnesses for the corporation, they should also be compellable to testify against it; but the point is still a vexed question.[2]

§ 332. *Private corporations*, in regard to our present inquiry, may be divided into two classes, namely, *pecuniary* or *moneyed institutions*, such as banks, insurance, and manufacturing companies, and the like, and institutions, or *societies for religious and charitable purposes*. In the former, membership is obtained by the purchase of stock or shares, without the act or assent of the corporation, except prospectively and generally, as provided in its charter, and by-laws; and the interest thus acquired is private, pecuniary, and vested, like ownership of any other property. In the latter, membership is conferred by special election; but the member has no private interest in the funds, the whole property being a trust for the benefit of others. But all these are equally corporations proper; and it is the corporation, and not the individual member, that is party to the record in all suits by or against it.[3] Hence it follows, that the declarations of the members are not admissible in evidence in such actions as the declarations of

act and the general turnpike act; and in matters relating to rates and cesses. Phil. & Am. on Evid. 133–138, 395; 1 Phil. Evid. 138–144. In the province of *New Brunswick*, rated inhabitants are now made competent witnesses in all cases where the town or parish may in any manner be affected, or where it may be interested in a pecuniary penalty, or where its officers, acting in its behalf, are parties. Stat. 9 Vict. cap. 4, March 7, 1846. In several of the United States, also, the inhabitants of counties and other municipal, territorial, or *quasi* corporations, are expressly declared by statutes, to be competent witnesses, in all suits in which the corporation is a party. See *Maine*, Rev Stat. 1840, ch. 115, § 75; *Massachusetts*, Rev. Stat. ch. 94, § 54; *Vermont*, Rev. Stat. 1839, ch. 31, § 18; *New York*, Rev. Stat. vol. 1, pp. 408, 439 (3d edit.); *Pennsylvania*, Dunl. Dig. pp. 215, 913, 1019, 1165; *Michigan*, Rev. Stat. 1846, ch. 102, § 81; *Wisconsin*, Rev. Stat. 1849, ch. 10, § 21; Id. ch. 98, § 49; *Virginia*, Rev. Stat. 1849, ch. 176, § 17; *Missouri*, Rev. Stat. 1845, ch. 34, art. 1, § 25. In *New Jersey*, they are admissible in suits for moneys to which the county or town is entitled. Rev. Stat. 1846, tit. 34, ch. 9, § 5. See Stewart *v.* Saybrook, Wright, 374; Barada *v.* Caundelet, 8 Miss. 644.

[1] *Supra*, § 175, and the cases cited in note. See also Phil. & Am. on Evid. p. 395, note (2); 1 Phil. Evid. 375; City Council *v.* King, 4 McCord, 487; Marsden *v.* Stansfield, 7 B. & C. 815; Rex *v.* Kirdford, 2 East, 559.

[2] In Rex *v.* Woburn, 10 East, 395, and Rex *v.* Hardwicke, 11 East, 578, 584, 586, 589, it was said that they were not compellable. See accordingly, Plattekill *v.* New Paltz, 15 Johns. 305.

[3] Merchants' Bank *v.* Cook, 4 Pick. 405. It has been held in *Maine*, that a corporator, or shareholder in a moneyed institution, is substantially a party, and therefore is not compellable to testify where the corporation is party to the record. Bank of Oldtown *v.* Houlton, 8 Shepl. 501. Shepley, J., dissenting.

parties,[1] though where a member or an officer is an agent of the corporation, his declarations may be admissible, as part of the *res gestæ*.[2]

§ 333. But the *members* or stockholders, in institutions created for private emolument, though not parties to the record, are *not* therefore *admissible as witnesses;* for, in matters in which the corporation is concerned, they of course have a direct, certain, and vested interest which necessarily excludes them.[3] Yet the *members* of *charitable and religious societies*, having no personal and private interest in the property holden by the corporation, *are competent witnesses* in any suit in which the corporation is a party. On this ground, a mere trustee of a savings bank, not being a stockholder or a depositor,[4] and a trustee of a society for the instruction of seamen,[5] and trustees of many other eleemosynary institutions, have been held admissible witnesses in such suits. But where a member of a private corporation is inadmissible as a witness generally, he may still be called upon to produce the

[1] City Bank *v.* Bateman, 7 Har. & Johns. 104, 109; Hartford Bank *v.* Hart, 3 Day, 491, 495; Magill *v.* Kauffman, 4 S. & R. 317; Stewart *v.* Huntingdon Bank, 11 S. & R. 267; Atlantic Ins. Co. *v.* Conard, 4 Wash. 663, 677; Fairfield Co. Turnpike Comp. *v.* Thorp, 13 Conn. 173.

[2] *Supra*, §§ 108, 113, 114.

[3] This rule extends to the members of all corporations, having a common fund distributable among the members, and in which they therefore have a private interest; the principle of exclusion applying to all cases where that private interest would be affected. Doe d. Mayor and Burgesses of Stafford *v.* Tooth, 3 Younge & Jer. 19; City Council *v.* King, 4 McCord, 487, 488; Davies *v.* Morgan, 1 Tyrwh. 457. Where a corporation would examine one of its members as a witness, he may be rendered competent, either by a sale of his stock or interest, where membership is gained or lost in that way; or, by being disfranchised; which is done by an information in the nature of a *quo warranto* against the member, who confesses the information, on which the plaintiff obtains judgment to disfranchise him. Mayor of Colchester *v.* ———, 1 P. Wms. 595. Where the action is against the corporation for a debt, and the stockholders are by statute made liable for such debt, and their property is liable to seizure upon the execution issued against the corporation, a member, once liable, remains so, notwithstanding his alienation of stock, or disfranchisement, and therefore is not a competent witness for the corporation in such action. Hovey *v.* The Mill-Dam Foundry, 21 Pick. 453. But where his liability to the execution issued against the corporation is not certain, but depends on a special order to be granted by the court, in its discretion, he is a competent witness. Needham *v.* Law, 12 M. & W. 560. The clerk of a corporation is a competent witness to identify its books and verify its records, although he be a member of the corporation, and interested in the suit. Wiggin *v.* Lowell, 8 Met. 301. In several of the United States, however, the members of private corporations are made competent witnesses by express statutes; and in others they are rendered so by force of general statutes, removing the objection of interest from all witnesses. *Supra*, § 331.

[4] Middletown Savings Bank *v.* Bates, 11 Conn. 519.

[5] Miller *v.* Mariner's Church, 7 Greenl. 51. See also Anderson *v.* Brock, 3 Greenl. 243; Wells *v.* Lane, 8 Johns. 462; Gilpin *v.* Vincent, 9 Johns. 219; Nayson *v.* Thatcher, 7 Mass. 398; Cornwell *v.* Isham, 1 Day, 35; Richardson *v.* Freeman, 6 Greenl. 57; Weller *v.* Foundling Hospital, Peake's Cas. 153; [Davies *v.* Morris, 17 Penn. St. R. 205.]

corporate documents, in an action against the corporation; for he is a mere depositary, and the party objecting to his competency is still entitled to inquire of him concerning the custody of the documents.[1] And if a trustee, or other member of an eleemosynary corporation, is liable to costs, this is an interest which renders him incompetent, even though he may have an ultimate remedy over.[2]

§ 334. The rule, by which parties are excluded from being witnesses for themselves, applies to the case of *husband and wife;* neither of them being admissible as a witness in a cause, civil or criminal, in which the other is a party.[3] This exclusion is founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society. For it is essential to the happiness of social life, that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence.[4]

§ 335. The principle of this rule requires its application to all cases, in which *the interests* of the other party are *involved.* And therefore, the wife is not a competent witness against any co-defendant, tried with her husband, if the testimony concern the husband, though it be not directly given against him.[5] Nor is

[1] Rex *v.* Inhabitants of Netherthong, 2 M. & S. 237; Wilcock on Municipal Corp. 309; Wiggin *v.* Lowell, 8 Met. 301.

[2] Rex *v.* St. Mary Magdalen, Bermondsey, 3 East, 7.

[3] An exception or qualification of this rule is admitted, in cases where the husband's account-books have been kept by the wife, and are offered in evidence in an action brought by him for goods sold, &c. Here the wife is held a competent witness, to testify that she made the entries by his direction and in his presence; after which his own suppletory oath may be received, as to the times when the charges were made, and that they are just and true. Littlefield *v.* Rice, 10 Met. 287. And see Stanton *v.* Wilson, 3 Day, 37; Smith *v.* Sanford, 12 Pick. 139. In the principal case, the correctness of the contrary decision in Carr *v.* Cornell, 4 Verm. 116, was denied. In *Iowa*, husband and wife are competent witnesses for, but not against each other, in criminal prosecutions. Code of 1851, art. 2391.

[4] Stein *v.* Bowman, 13 Peters, 223, per McLean, J.; *supra*, § 254; Co. Lit. 6, b.; Davis *v.* Dinwoody, 4 T. R. 678; Barker *v.* Dixie, Cas. temp. Hardw. 264; Bentley *v.* Cooke, 3 Doug. 422, per Ld. Mansfield. The rule is the same in equity. Vowles *v.* Young, 13 Ves. 144. So is the law of Scotland. Alison's Practice, p. 461. See also 2 Kent, Comm. 179, 180; Commonwealth *v.* Marsh, 10 Pick. 57; Robbins *v.* King, 2 Leigh, Com. R. 142, 144; Snyder *v.* Snyder, 6 Binn. 488; Corse *v.* Patterson, 6 Har. & Johns. 153; Barbat *v.* Allen, 7 Exchr. 609.

[5] Hale, P. C. 301; Dalt. Just. c. 111; Rex *v.* Hood, 1 Mood. Cr. Cas. 281; Rex *v.* Smith, Id. 289. [The husband is not a competent witness for or against the trustee of the wife's separate estate, in a suit between the trustee and a third person in regard to the trust estate. Hasbrouck *v.* Vandervort, 5 Selden, 153.]

she a witness for a co-defendant, if her testimony, as in the case of a conspiracy,[1] would tend directly to her husband's acquittal; nor where, as in the case of an assault,[2] the interests of all the defendants are inseparable; nor in any suit in which the rights of her husband, though not a party, would be concluded by any verdict therein; nor may she, in a suit between others, testify to any matter for which, if true, her husband may be indicted.[3] Yet where the grounds of defence are several and distinct, and in no manner dependent on each other, no reason is perceived why the wife of one defendant should not be admitted as a witness for another.[4]

§ 336. It makes no difference *at what time the relation* of husband and wife *commenced;* the principle of exclusion being applied in its full extent, wherever the interests of either of them are directly concerned. Thus, where the defendant married one of the plaintiff's witnesses, after she was actually summoned to testify in the suit, she was held incompetent to give evidence.[5] Nor is there any difference in principle between the admissibility of the husband and that of the wife, where the other is a party.[6] And when, in any case, they are admissible against each other, they are also admissible for each other.[7]

§ 337. Neither is it material, that this relation *no longer exists.* The great object of the rule is to secure domestic happiness, by

[1] Rex *v.* Locker, 5 Esp. 107, per Ld. Ellenborough, who said it was a clear rule of the law of England. The State *v.* Burlingham, 3 Shepl. 104; [Commonwealth *v.* Robinson, 1 Gray, 555, 559.] But where several are jointly indicted for an offence, which might have been committed either by one or more, and they are tried separately, it has been held that the wife of one is a competent witness for the others. The Commonwealth *v.* Manson, 2 Ashm. 31; The State *v.* Worthing, 1 Redington, 62; *infra*, § 363, note. But see Pullen *v.* The People, 1 Doug. Michigan, R. 48.

[2] Rex *v.* Frederic, 2 Stra. 1095. [See State *v.* Worthing, 31 Maine, 62; *infra*, § 363, note.]

[3] Den d. Stewart *v.* Johnson, 3 Harrison, 88.

[4] Phil. & Am. on Evid. 160, n. (2); 1 Phil. Evid. 75, n. (1). But where the wife of one prisoner was called to prove an *alibi* in favor of another jointly indicted, she was held incompetent, on the ground that her evidence went to weaken that of the witness against her husband, by showing that that witness was mistaken in a material fact. Rex *v.* Smith, 1 Mood. Cr. Cas. 289. If the conviction of a prisoner, *against* whom she is called, will strengthen the hope of pardon for her husband, who is already convicted, this goes only to her credibility. Rex *v.* Rudd, 1 Leach, 135, 151. Where one of two persons, separately indicted for the same larceny, has been convicted, his wife is a competent witness against the other. Regina *v.* Williams, 8 C. & P. 284.

[5] Pedley *v.* Wellesley, 3 C. & P. 558. This case forms an exception to the general rule, that neither a witness nor a party can, by his own act, deprive the other party of a right to the testimony of the witness. See *supra*, § 167; *infra*, § 418.

[6] Rex *v.* Serjeant, 1 Ry. & M. 352. In this case, the husband was, on this ground, held incompetent as a witness against the wife, upon an indictment against her and others for conspiracy, in procuring him to marry her.

[7] Rex *v.* Serjeant, 1 Ry. & M. 352.

placing the protecting seal of the law upon all confidential communications between husband and wife; and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires, cannot be afterwards divulged in testimony, even though the other party be no longer living.[1] And even where a wife, who had been divorced by act of parliament, and had married another person, was offered as a witness by the plaintiff, to prove a contract against her former husband, Lord Alvanley held her clearly incompetent; adding, with his characteristic energy, — "it never shall be endured, that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved."[2]

§ 338. This rule, in its spirit and extent, is analogous to that which excludes confidential communications made by a client to his attorney, and which has been already considered.[3] Accordingly, the wife, after the death of the husband, has been held competent to prove facts coming to her *knowledge from other sources*, and not by means of her situation as a wife, notwithstanding they related to the transactions of her husband.[4]

339. This rule of protection is extended only to *lawful marriages*, or at least to such as are innocent in the eye of the law. If the cohabitation is clearly of an immoral character, as, for example, in the case of a kept mistress, the parties are competent witnesses for and against each other.[5] On the other hand, upon a trial for polygamy, the first marriage being proved *and not controverted*, the woman, with whom the second marriage was had, is a competent

[1] Stein *v.* Bowman, 13 Peters, 209.

[2] Monroe *v.* Twistleton, Peake's Evid. App. lxxxvii. [xci.] expounded and confirmed in Aveson *v.* Ld. Kinnaird, 6 East, 192, 193, per Ld. Ellenborough, and in Doker *v.* Hasler, Ry. & M. 198, per Best, C. J.; Stein *v.* Bowman, 13 Peters, 223. In the case of Beveridge *v.* Minter, 1 C. & P. 364, in which the widow of a deceased promisor was admitted by Abbott, C. J., as a witness for the plaintiff to prove the promise, in an action against her husband's executors, the principle of the rule does not seem to have received any consideration; and the point was not saved, the verdict being for the defendants. See also Terry *v.* Belcher, 1 Bailey's R. 568, that the rule excludes the testimony of a husband or wife separated from each other, under articles. See further, *supra*, § 254; The State *v.* Jolly, 3 Dev. & Bat. 110; Barnes *v.* Camack, 1 Barb. 392. [In an action on the case brought by a husband for criminal conversation with his wife, the latter, after a divorce from the bonds of matrimony, is a competent witness in favor of the husband, to prove the charge in the declaration. Dickerman *v.* Graves, 6 Cush. 308; *infra*, § 344, note.]

[3] *Supra*, §§ 240, 243, 244, 338.

[4] Coffin *v.* Jones, 13 Pick. 445; Williams *v.* Baldwin, 7 Verm. 506; Cornell *v.* Vanartsdalen, 4 Barr, 364; Wells *v.* Tucker, 3 Binn. 366. And see Saunders *v.* Hendrix, 5 Ala. 224; McGuire *v.* Maloney, 1 B. Monr. 224.

[5] Batthews *v.* Galindo, 4 Bing. 610.

witness; for the second marriage is void.[1] But if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admitted.[2] It seems, however, that a reputed or supposed wife may be examined on the *voir dire*, to facts showing the invalidity of the marriage.[3] Whether a woman is admissible in favor of a man, with whom she has cohabited for a long time as his wife, whom he has constantly represented and acknowledged as such, and by whom he has had children, has been declared to be at least doubtful.[4] Lord Kenyon rejected such a witness, when offered by the prisoner, in a capital case tried before him;[5] and in a later case, in which his decisions were mentioned as entitled to be held in respect and reverence, an arbitrator rejected a witness similarly situated; and the court, abstaining from any opinion as to her competency, confirmed the award, on the ground that the law and fact had both been submitted to the arbitrator.[6] It would doubtless be incompetent for another person to offer the testimony of an acknowledged wife, on the ground that the parties were never legally married, if that relation were always recognized and believed to be lawful by the parties. But where the parties had lived together as man and wife, believing themselves lawfully married; but had separated on discovering that a prior husband, supposed to be dead, was still living; the woman was held a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation.[7]

[1] Bull. N. P. 287.

[2] If the fact of the second marriage is in controversy, the same principle, it seems, will exclude the second wife also. See 2 Stark. Evid. 400; Grigg's case, T. Raym. 1. But it seems, that the wife, though inadmissible as a witness, may be *produced* in court for the purpose of being *identified*, although the proof thus furnished may affix a criminal charge upon the husband; as, for example, to show that she was the person to whom he was first married; or, who passed a note, which he is charged with having stolen. Alison's Pr. p. 463.

[3] Peat's case, 2 Lew. Cr. Cas. 288; Wakefield's case, Id. 279.

[4] 1 Price, 88, 89, per Thompson, C. B. If a woman sue as a feme sole, her husband is not admissible as a witness for the defendant, to prove her a feme covert, thereby to nonsuit her. Bentley *v.* Cooke, Tr. 24 Geo. III., B. R., cited 2 T. R. 265, 269; 3 Doug. 422, s. c.

[5] Anon. cited by Richards, B., in 1 Price, 83.

[6] Campbell *v.* Twemlow, 1 Price, 81, 88, 90, 91. Richards, B., observed, that he should certainly have done as the arbitrator did. To admit the witness in such a case would both encourage immorality, and enable the parties at their pleasure to perpetrate fraud, by admitting or denying the marriage, as may suit their convenience. Hence, cohabitation and acknowledgment, as husband and wife, are held conclusive against the parties, in all cases, except where the fact or the incidents of marriage, such as legitimacy and inheritance, are directly in controversy. See also Divoll *v.* Leadbetter, 4 Pick. 220.

[7] Wells *v.* Fletcher, 5 C. & P. 12; Wells *v.* Fisher, 1 M. & R. 99, and note.

§ 340. Whether the rule may be relaxed, so as to admit the wife to testify against the husband, *by his consent*, the authorities are not agreed. Lord Hardwicke was of opinion that she was not admissible, even with the husband's consent;[1] and this opinion has been followed in this country;[2] apparently upon the ground, that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule, the public having also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent. The very great temptation to perjury, in such case, is not to be overlooked.[3] But Lord Chief Justice Best, in a case before him,[4] said he would receive the evidence of the wife, if her husband consented; apparently regarding only the interest of the husband as the ground of her exclusion, as he cited a case, where Lord Mansfield had once permitted a plaintiff to be examined with his own consent.

§ 341. Where the husband or wife is not a party to the record, but yet has an *interest directly involved* in the suit, and is therefore incompetent to testify, the other also is incompetent. Thus, the wife of a bankrupt cannot be called to prove the fact of his bankruptcy.[5] And the husband cannot be a witness for or against his wife, in a question touching her separate estate, even though there are other parties, in respect of whom he would be competent.[6] So, also, where the one party, though a competent witness in the cause, is not bound to answer a particular question, because the answer would directly and certainly expose him or her to a criminal prosecution and conviction, the other, it seems, is *not obliged* to answer the same question.[7] The declarations of husband

[1] Barker *v.* Dixie, Cas. temp. Hardw. 264; Sedgwick *v.* Walkins, 1 Ves. 49; Grigg's case, T. Raym. 1.

[2] Randall's case, 5 City Hall Rec. 141, 153, 154. See also Colbern's case, 1 Wheeler's Crim. Cas. 479.

[3] Davis *v.* Dinwoody, 4 T. R. 679, per Lord Kenyon.

[4] Pedley *v.* Wellesley, 3 C. & P. 558.

[5] *Ex parte* James, 1 P. Wms. 610, 611. But she is made competent by statute, to make discovery of his estate. 6 Geo. IV., c. 16, § 37.

[6] 1 Burr. 424, per Lord Mansfield; Davis *v.* Dinwoody, 4 T. R. 678; Snyder *v.* Snyder, 6 Binn. 483; Langley *v.* Fisher, 5 Beav. 443. But where the interest is contingent and uncertain, he is admissible. Richardson *v.* Learned, 10 Pick. 261. See further Hatfield *v.* Thorp, 5 B. & Ald. 589; Cornish *v.* Pugh, 8 D. & R. 65; 12 Vin. Abr. Evidence, B. If an attesting witness to a will afterwards marries a female legatee, the legacy not being given to her separate use, he is inadmissible to prove the will. Mackenzie *v.* Yeo, 2 Curt. 509. The wife of an executor is also incompetent. Young *v.* Richard, Id. 371. But where the statute declares the legacy void which is given to an attesting witness of a will, it has been held, that if the husband is a legatee and the wife is a witness, the legacy is void, and the wife is admissible. Winslow *v.* Kimball, 12 Shepl. 493.

[7] See Phil. & Am. on Evid. 168; Den *v.* Johnson, 3 Harr. 87.

and wife are subject to the same rules of exclusion which govern their testimony as witnesses.[1]

§ 342. But though the husband and wife are not admissible as witnesses against each other, where either is directly interested in the event of the proceeding, whether civil or criminal; yet *in collateral proceedings*, not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may *tend to criminate*, or may contradict the other, or may subject the other to a legal demand.[2] Thus, where, in a question upon a female pauper's settlement, a man testified that he was married to the pauper upon a certain day, and another woman, being called to prove her own marriage with the same man on a previous day, was objected to as incompetent, she was held clearly admissible for that purpose; for though, if the testimony of both was true, the husband was chargeable with the crime of bigamy, yet neither the evidence, nor the record in the present case, could be received in evidence against him upon that charge, it being *res inter alios acta*, and neither the husband nor the wife having any interest in the decision.[3] So, where the action was by the indorsee of a bill

[1] Alban *v.* Pritchett, 6 T. R. 680; Denn *v.* White, 7 T. R. 112; Kelly *v.* Small, 2 Esp. 716; Bull. N. P. 28; Winsmore *v.* Greenbank, Willes, 577. Whether, where the husband and wife are jointly indicted for a joint offence, or are otherwise joint parties, their declarations are mutually receivable against each other, is still questioned; the general rule, as to persons jointly concerned, being in favor of their admissibility, and the policy of the law of husband and wife being against it. See Commonwealth *v.* Robbins, 3 Pick. 63; Commonwealth *v.* Briggs, 5 Pick. 429; Evans *v.* Smith, 5 Monroe, 363, 364; Turner *v.* Coe, 5 Conn. 93. The declarations of the wife, however, are admissible for or against the husband, wherever they constitute part of the *res gestæ* which are material to be proved; as, where he obtained insurance on her life as a person in health, she being in fact diseased. Averson *v.* Lord Kinnaird, 6 East, 188; or, in an action by him against another for beating her, Thompson *v.* Freeman, Skin. 402; or, for enticing her away, Gilchrist *v.* Bale, 8 Watts, 355; or, in an action against him for her board, he having turned her out of doors, Walton *v.* Green, 1 C. & P. 621. So, where she acted as his agent, *supra*, § 334, n.; Thomas *v.* Hargrave, Wright, 595. But her declarations made after marriage, in respect to a debt previously due by her, are not admissible for the creditor, in an action against the husband and wife, for the recovery of that debt. Brown *v.* Laselle, 6 Blackf. 147.

[2] Fitch *v.* Hill, 11 Mass. 286; Baring *v.* Reeder, 1 Hen. & Mun. 154, 168, per Roane, J. In Griffin *v.* Brown, 2 Pick. 308, speaking of the cases cited to this point, Parker, C. J., said: "They establish this principle, that the wife may be a witness to excuse a party sued for a supposed liability, although the effect of her testimony is to charge her husband upon the same debt, in an action afterwards to be brought against him. And the reason is, that the verdict in the action, in which she testifies, cannot be used in the action against her husband; so that, although her testimony goes to show that he is chargeable, yet he cannot be prejudiced by it. And it may be observed, that, in these very cases, the husband himself would be a competent witness, if he were willing to testify, for his evidence would be a confession against himself." Williams *v.* Johnson, 1 Stra. 504; Vowles *v.* Young, 13 Ves. 144; 2 Stark. Evid. 401. See also Mr. Hargrave's note [29] to Co. Lit. 6 b.

[3] Rex *v.* Bathwick, 2 B. & Ad. 639, 647; Rex *v.* All Saints, 6 M. & S. 194, S. P. In this case, the previous decision

of exchange, against the acceptor, and the defence was, that it had been fraudulently altered by the drawer, after the acceptance; the wife of the drawer was held a competent witness to prove the alteration.[1]

§ 343. To this general rule, excluding the husband and wife as witnesses, there are *some exceptions;* which are allowed from the necessity of the case, partly for the protection of the wife in her life and liberty, and partly for the sake of public justice. But the necessity which calls for this exception for the wife's security is described to mean, "not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed, without remedy, to personal injury."[2] Thus, a woman is a competent witness against a man indicted for forcible abduction and marriage, if the force were continuing upon her until the marriage; of which fact she is also a competent witness; and this, by the weight of the authorities, notwithstanding her subsequent assent and voluntary cohabitation; for otherwise, the offender would take advantage of his wrong.[3] So, she is a competent witness against him on an indictment for a rape, committed on her own person;[4] or, for an assault and battery upon her;[5] or, for maliciously shooting her.[6] She may also exhibit articles of the peace against him; in which case her affidavit shall not be allowed to be controlled and overthrown by his own.[7] Indeed, Mr. East considered it to be settled, that

in Rex *v.* Cliviger, 2 T. R. 263, to the effect, that a wife was in every case incompetent to give evidence, even *tending* to criminate her husband, was considered and restricted; Lord Ellenborough remarking, that the rule was there laid down "somewhat too largely." In Rex *v.* Bathwick, it was held to be "undoubtedly true in the case of a direct charge and proceeding against him for any offence," but was denied in its application to collateral matters. But on the trial of a man for the crime of adultery, the husband of the woman with whom the crime was alleged to have been committed, has been held not to be admissible as a witness for the prosecution, as his testimony would go directly to charge the crime upon his wife. The State *v.* Welch, 13 Shepl. 30.

[1] Henman *v.* Dickenson, 5 Bing. 183.

[2] Bentley *v.* Cooke, 3 Doug. 422, per Ld. Mansfield. In Sedgwick *v.* Walkins, 1 Ves. 49, Ld. Thurlow spoke of this necessity as extending only to security of the peace, and not to an indictment.

[3] 1 East's P. C. 454; Brown's case, 1 Ventr. 243; 1 Russ. on Crimes, 572; Wakefield's case, 2 Lewin, Cr. Cas. 1, 20, 279. See also Regina *v.* Yore, 1 Jebb & Symes, R. 563, 572; Perry's case, cited in McNally's Evid. 181; Rex *v.* Serjeant, Ry. & M. 352; 1 Hawk. P. C. c. 41, § 13; 2 Russ. on Crimes, 605, 606. This case may be considered anomalous; for she can hardly be said to be his wife, the marriage contract having been obtained by force. 1 Bl. Comm. 443; McNally's Evid. 179, 180; 3 Chitty's Crim. Law, 817, note (y); Roscoe's Crim. Evid. 115.

[4] Ld. Audley's case, 3 Howell's St. Tr. 402, 413; Hutton, 115, 116; Bull. N. P. 287.

[5] Lady Lawley's case, Bull. N. P. 287; Rex *v.* Azire, 1 Stra. 633; Soule's case, 5 Greenl. 407; The State *v.* Davis, 3 Brevard, 3.

[6] Whitehouse's case, cited 2 Russ. on Crimes, 606.

[7] Rex *v.* Doherty, 13 East, 171; Lord Vane's case, Id. note (a); 2 Stra. 1202;

"in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other."[1] But Mr. Justice Holroyd thought that the wife could only be admitted to prove facts, which could not be proved by any other witness.[2]

§ 344. The wife has also, on the same ground of necessity, been sometimes admitted as a witness to testify to *secret facts*, which no one but herself could know. Thus upon an appeal against an order of filiation, in the case of a married woman, she was held a competent witness to prove her criminal connection with the defendant, though her husband was interested in the event;[3] but for reasons of public decency and morality, she cannot be allowed to say, after marriage, that she had no connection with her husband, and that therefore her offspring is spurious.[4]

§ 345. In cases of *high treason*, the question whether the wife is admissible as a witness against her husband has been much discussed, and opinions of great weight have been given on both sides. The affirmative of the question is maintained,[5] on the ground of the extreme necessity of the case, and the nature of the offence, tending as it does to the destruction of many lives, the subversion of government, and the sacrifice of social happiness. For the same reasons, also, it is said, that, if the wife should commit this crime, no plea of coverture shall excuse her; no presumption of the husband's coercion shall extenuate her guilt.[6] But, on the other hand, it is argued, that, as she is not bound to

Rex *v.* Earl Ferrers, 1 Burr. 635. Her affidavit is also admissible, on an application for an information against him for an attempt to take her by force, contrary to articles of separation; Lady Lawley's case, Bull. N. P. 287; or, in a habeas corpus sued out by him for the same object. Rex *v.* Mead, 1 Burr. 542.

[1] 1 East's P. C. 455. In Wakefield's case, 2 Lewin, Cr. Cas. 287, Hullock, B., expressed himself to the same effect, speaking of the admissibility of the wife only. 2 Hawk. P. C. c. 46, § 77; The People *ex rel.*; Ordronaux *v.* Chegaray, 18 Wend. 642.

[2] In Rex *v.* Jagger, cited 2 Russ. on Crimes, 606. [The wife is not a competent witness against the husband, in an indictment against him for subornation of perjury to wrong her in a judicial proceeding. People *v.* Carpenter, 9 Barb. 580.]

[3] Rex *v.* Reading, Cas. temp. Hardw. 79, 82; Rex *v.* Luffe, 8 East, 193; Commonwealth *v.* Shepherd, 6 Binn. 283; The State *v.* Pettaway, 3 Hawks, 623. So, after divorce *a vinculo*, the wife may be a witness for her late husband, in an action brought by him against a third person, for criminal conversation with her during the marriage. Ratcliff *v.* Wales, 1 Hill, N. Y. Rep. 63; Dickerman *v.* Graves, 6 Cush. 308. So, it has been held, that on an indictment against him for an assault and battery upon her, she is a competent witness for him, to disprove the charge. The State *v.* Neil, 6 Ala. 685.

[4] Cope *v.* Cope, 1 M. & Rob. 269, 274; Goodright *v.* Moss, Cowp. 594; *supra*, § 28.

[5] These authorities may be said to favor the affirmative of the question: — 2 Russ. on Crimes, 607; Bull. N. P. 286; 1 Gilb. Evid. by Loft, 252; Mary Grigg's case, T. Raym. 1; 2 Stark. Evid. 404.

[6] 4 Bl. Comm. 29.

discover her husband's treason,[1] by parity of reason she is not compellable to testify against him.[2] The latter is deemed, by the later text-writers, to be the better opinion.[3]

§ 346. Upon the same principle on which the testimony of the husband or wife is sometimes admitted as well as for some other reasons already stated,[4] the *dying declarations* of either are admissible, where the other party is charged with the murder of the declarant.[5]

§ 347. The rule, excluding parties from being witnesses, applies to all cases where the party has any interest at stake in the suit, although it be only a liability to costs. Such is the case of a *prochein ami*,[6] a *guardian*, an *executor* or *administrator;* and so also of *trustees* and the *officers of corporations*, whether public or private, wherever they are liable in the first instance for the costs, though they may have a remedy for re-imbursement out of the public or trust funds.[7]

§ 348. But to the general rule, in regard to parties, there are some *exceptions* in which the *party's own oath* may be received as competent testimony. One class of these exceptions, namely, that in which the oath *in litem* is received, has long been familiar in courts administering remedial justice, according to the course of the Roman law, though in the common law tribunals its use has been less frequent and more restricted. The oath *in litem* is admitted in two classes of cases: first, where it has been already proved that the party against whom it is offered has been guilty of some *fraud* or other *tortious and unwarrantable act of intermeddling* with the complainant's goods, and no other evidence can be had of the amount of damages; and, secondly, where, on general grounds of public policy, it is deemed essential to the purposes of

[1] 1 Brownl. 47.

[2] 1 Hale's P. C. 48, 301; 2 Hawk. P. C. ch. 46, § 82; 2 Bac. Ab. 578, tit. *Evid.* A. 1; 1 Chitty's Crim. Law, 595; McNally's Evid. 181.

[3] Roscoe's Crim. Evid. 114; Phil. & Am. on Evid. 161; 1 Phil. Evid. 71. See also 2 Stark. Evid. 404, note (b).

[4] *Supra*, § 156.

[5] Rex *v.* Woodcock, 2 Leach, 563; McNally's Evid. 174; Stoop's case, Addis. 381; The People *v.* Green, 1 Denio, R. 614.

[6] In *Massachusetts*, by force of the statutes respecting costs, a *prochein ami* is not liable to costs; Crandall *v.* Slaid, 11 Met. 288; and would therefore seem to be a competent witness. And by Stat. 1839, ch. 107, § 2, an executor, administrator, guardian, or trustee, though a party, if liable only to costs, is made competent to testify to any matter known to him, "before he assumed the trust of his appointment." In *Virginia*, any such trustee is admissible as a witness, generally, provided some other person shall first stipulate in his stead for the costs to which he may be liable. Rev. Stat. 1849, ch. 176, § 18.

[7] Hopkins *v.* Neal, 2 Stra. 1026; James *v.* Hatfield, 1 Stra. 548; 1 Gilb. Evid. by Lofft, p. 225; Rex *v.* St. Mary Magdalen,

justice.[1] An example of the former class is given in the case of the bailiffs, who, in the service of an execution, having discovered a sum of money secretly hidden in a wall, took it away and *embezzled* it, and did great spoil to the debtor's goods; for which they were holden not only to refund the money, but to make good such other damage as the plaintiff would swear he had sustained.[2] So, where a man *ran away* with a casket of jewels, he was ordered to answer in equity, and the injured party's oath was allowed as evidence, in *odium spoliatoris*.[3] The rule is the same at law. Thus, where a shipmaster received on board his vessel a trunk of goods, to be carried to another port, but on the passage he *broke open* the trunk and *rifled* it of its contents; in an action by the owner of the goods against the shipmaster, the plaintiff, proving *aliunde* the delivery of the trunk and its violation, was held competent as a witness, on the ground of necessity, to testify to the particular contents of the trunk.[4] And, on the same principle,

Bermondsey, 3 East, 7; Whitmore *v.* Wilks, 1 Mood. & M. 220, 221; Gresley on Evid. 242, 243, 244; Bellew *v.* Russell, 1 Ball & Beat. 99; Wolley *v.* Brownhill, 13 Price, 513, 514, per Hullock, B.; Barrett *v.* Gore, 3 Atk. 401; Fountain *v.* Coke, 1 Mod. 107; Goodtitle *v.* Welford, 1 Doug. 139. In this country, where the party to the record is, in almost every case, liable to costs in the first instance, in suits at law, he can hardly ever be competent as a witness. Fox *v.* Adams, 16 Mass. 118, 121; Sears *v.* Dillingham, 12 Mass. 360. See also Willis on Trustees, pp. 227, 228, 229; Frear *v.* Evertson, 20 Johns. 142; Bellamy *v.* Cains, 3 Rich. 354; [*supra*, § 329 and note.]

[1] Tait on Evid. 280.

[2] Childrens *v.* Saxby, 1 Vern. 207; 1 Eq. Ca. Ab. 229, s. c.

[3] Anon. cited per the Lord Keeper, in E. Ind. Co. *v.* Evans, 1 Vern. 308. On the same principle in a case of gross fraud, chancery will give costs, to be ascertained by the party's own oath. Dyer *v.* Tymewell, 2 Vern. 122.

[4] Herman *v.* Drinkwater, 1 Greenl. 27. See also Sneider *v.* Geiss, 1 Yeates, 34; Anon. *Coram* Montague, B., 12 Vin. Abr. 24, *Witnesses*, I. pl. 34. *Sed vid.* Bingham *v.* Rogers, 6 Watts & Serg. 495. The case of Herman *v.* Drinkwater was cited and tacitly re-affirmed by the court in Gilmore *v.* Bowden, 3 Fairf. 412; the admissibility of the party as a witness being placed on the ground of necessity. But it is to be observed that, in Herman *v.* Drinkwater, the defendant was guilty of gross fraud, at least, if not of larceny. It was on this ground of gross fraud and misconduct that the rule in this case was agreed to in Snow *v.* The Eastern Railroad Co. 12 Met. 44; the court denying its application in cases of necessity alone, and in the absence of fraud. Therefore, where an action on the case was brought by a passenger against a railway company, for the loss of his trunk by their negligence, there being no allegation or proof of fraud or tortious act, the court held, that the plaintiff was not admissible as a witness, to testify to the contents of his trunk. Ibid. As this decision, which has been reported since the last edition of this work, is at variance with that of Clark *v.* Spence, cited in the next note, the following observations of the court should be read by the student in this connection: "The law of evidence is not of a fleeting character; and though new cases are occurring, calling for its application, yet the law itself rests on the foundation of the ancient common law, one of the fundamental rules of which is, that no person shall be a witness in his own case. This rule has existed for ages, with very little modification, and has yielded only where, from the nature of the case, other evidence was not to be obtained, and there would be a failure of justice without the oath of the party. These are exceptions to the rule, and form a rule of themselves. In some cases, the admission of the party's oath is in aid of the trial; and in others, it bears directly on the subject in controversy. Thus the oath of the party is admitted in respect to

the bailor, though a plaintiff, has been admitted a competent witness to prove the contents of a trunk, lost by the negligence of the bailee.[1] Such evidence is admitted not solely on the ground of

a lost deed, or other paper, preparatory to the offering of secondary evidence to prove its contents; and also for the purpose of procuring a continuance of a suit, in order to obtain testimony; and for other reasons. So the oath of a party is admitted to prove the truth of entries in his book, of goods delivered in small amounts, or of daily labor performed, when the parties, from their situation, have no evidence but their accounts, and from the nature of the traffic or service, cannot have, as a general thing. So, in complaints under the bastardy act, where the offence is secret, but yet there is full proof of the fact, the oath of the woman is admitted to charge the individual. In cases, also, where robberies or larcenies have been committed, and where no other evidence exists but that of the party robbed or plundered, he has been admitted as a witness to prove his loss; as it is said the law so abhors the act that the party injured shall have an extraordinary remedy in *odium spoliatoris*. Upon this principle, in an action against the hundred, under the statute of Winton, the person robbed was admitted as a witness, to prove his loss and the amount of it. Bull. N. P. 187; Esp. on Penal Stats. 211; 1 Phil. Ev. ch. 5, § 2; 2 Stark. Evid. 681; Porter *v.* Hundred of Regland, Peake's Add. Cas. 203. So in equity, where a man ran away with a casket of jewels, the party injured was admitted as a witness. East India Co. *v.* Evans, 1 Vern. 308. A case has also been decided in Maine, Herman *v.* Drinkwater, 1 Greenl. 27, where the plaintiff was admitted to testify. In that case, a shipmaster received a trunk of goods in London, belonging to the plaintiff, to be carried in his ship to New York, and on board which the plaintiff had engaged his passage. The master sailed, designedly leaving the plaintiff, and proceeded to Portland instead of New York. He there broke open and plundered the trunk. These facts were found *aliunde*, and the plaintiff was allowed to testify as to the contents of the trunk. These cases proceed upon the criminal character of the act, and are limited in their nature. The present case does not fall within the principle. Here was no robbery, no tortious taking away by the defendants, no fraud committed. It is simply a case of negligence on the part of carriers. The case is not brought within any exception to the common rule, and is a case of defective proof on the part of the plaintiff, not arising from necessity, but from want of caution. To admit the plaintiff's oath, in cases of this nature, would lead, we think, to much greater mischiefs, in the temptation to frauds and perjuries, than can arise from excluding it. If the party about to travel places valuable articles in his trunk, he should put them under the special charge of the carrier, with a statement of what they are, and of their value, or provide other evidence, beforehand, of the articles taken by him. If he omits to do this, he then takes the chance of loss, as to the value of the articles, and is guilty, in a degree, of negligence, — the very thing with which he attempts to charge the carrier. Occasional evils only have occurred, from such losses, through failure of proof; the relation of carriers to the party being such that the losses are usually adjusted by compromise. And there is nothing to lead us to innovate on the existing rules of evidence. No new case is presented; no facts which have not repeatedly occurred; no new combination of circumstances." See 12 Met. 46, 47. [See also Wright *v.* Caldwell, 3 Mich. 51.]

[1] Clark *v.* Spence, 10 Watts, R. 335; Story on Bailm. § 454, note (3d edit.). In this case, the doctrine in the text was more fully expounded by Rogers, J., in the following terms: "A party is not competent to testify in his own cause; but, like every other general rule, this has its exceptions. Necessity, either physical or moral, dispenses with the ordinary rules of evidence. In 12 Vin. 24, pl. 32, it is laid down, that on a trial at Bodmyr, *coram* Montague, B., against a common carrier, a question arose about the things in a box, and he declared that this was one of those cases where the party himself might be a witness *ex necessitate rei*. For every one did not show what he put in his box. The same principle is recognized in decisions which have been had on the statute of Hue and Cry in England, where the party robbed is admitted as a witness *ex necessitate*. Bull. N. P. 181. So, in Herman *v.* Drinkwater, 1 Greenl. R. 27, a shipmaster having received a trunk of goods on board his vessel, to be carried to another port, which, on the passage, he broke open and rifled of its contents; the owner of the goods, proving the delivery of the trunk and its violation, was admitted as a witness in an action for the goods, against the ship-

the just odium entertained, both in equity and at law, against spoliation, but also because, from the necessity of the case and the nature of the subject, no proof can otherwise be expected; it not being usual even for the most prudent persons, in such cases, to exhibit the contents of their trunks to strangers, or to provide other evidence of their value. For, where the law can have no force but by the evidence of the person in interest, there the rules of the common law, respecting evidence in general, are presumed to be laid aside; or rather, the subordinate are silenced by the most transcendent and universal rule, that in all cases that evidence is good, than which the nature of the subject presumes none better to be attainable.[1]

§ 349. Upon the same necessity, the party is admitted in divers other cases to prove the facts, which, from their nature none but a party could be likely to know. But in such cases, *a foundation must first be laid* for the party's oath, by proving the other facts of the case down to the period to which the party is to speak. As, for example, if a deed or other material instrument of evidence is lost, it must first be proved, as we shall hereafter show, that such a document existed; after which the party's own oath may be received to the fact and circumstances of its loss, provided it was lost out of his own custody.[2] To this head of necessity

master, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained. That a party then can be admitted, under certain circumstances, to prove the contents of a box or trunk, must be admitted. But while we acknowledge the exception, we must be careful not to extend it beyond its legitimate limits. It is admitted from necessity, and perhaps on a principle of convenience, because, as is said in Vesey, every one does not show what he puts in a box. This applies with great force to wearing apparel, and to every article which is necessary or convenient to the traveller, which, in most cases, are packed by the party himself, or his wife, and which, therefore, would admit of no other proof. A lady's jewelry would come in this class, and it is easier to conceive than to enumerate other articles, which come within the same category. Nor would it be right to restrict the list of articles, which may be so proved, within narrow limits, as the jury will be the judges of the credit to be attached to the witness, and be able, in most cases, to prevent any injury to the defendant. It would seem to me to be of no consequence, whether the article was sent by a carrier, or accompanied the traveller. The case of Herman *v.* Drinkwater, I would remark, was decided under very aggravated circumstances, and was rightly ruled. But it must be understood, that such proof can be admitted, merely because no other evidence of the fact can be obtained. For, if a merchant, sending goods to his correspondent, chooses to pack them himself, his neglect to furnish himself with the ordinary proof is no reason for dispensing with the rule of evidence, which requires disinterested testimony. It is not of the usual course of business, and there must be something peculiar and extraordinary in the circumstances of the case, which would justify the court in admitting the oath of the party." See 10 Watts, R. 336, 337. See also acc. David *v.* Moore, 2 Watts & Serg. 230; Whitesell *v.* Crane, 8 Watts & Serg. 369; McGill *v.* Rowand, 3 Barr, 451; County *v.* Leidy, 10 Barr, 45.

[1] Gilb. Evid. by Lofft, pp. 244, 245; *supra*, § 82.

[2] *Infra*, § 558; Tayloe *v.* Riggs, 1 Peters, 591, 596; Patterson *v.* Winn, 5 Peters,

may be referred the admission of the party robbed, as a witness for himself, in an action against the hundred, upon the statute of Winton.[1] So, also, in questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which in their nature are preliminary to the principal subject of controversy, and are addressed to the court, the oath of the party is received.[2] Of this nature is his affidavit of the materiality of a witness; of diligent search made for a witness, or for a paper; of his inability to attend; of the death of a subscribing witness; and so of other matters, of which the books of practice abound in examples.

§ 350. The second class of cases, in which the oath *in litem* is admitted, consists of those in which public necessity or expediency has required it. Some cases of this class have their foundation in the edict of the Roman Prætor; *Nautæ*, *caupones*, *stabularii*, *quod cujusque salvum fore receperint*, *nisi restituent*, *in eos judicium dabo*.[3] Though the terms of the edict comprehended only ship-masters, innkeepers, and stable-keepers, yet its principle has been held to extend to other bailees, against whom, when guilty of a breach of the trust confided to them, damages were awarded upon the oath of the party injured, *per modum pœnæ* to the defendant, and from the necessity of the case.[4] But the common law has

240, 242; Riggs *v.* Taylor, 9 Wheat. 486; Taunton Bank *v.* Richardson, 5 Pick. 436, 442; Poignard *v.* Smith, 8 Pick. 278; Page *v.* Page, 15 Pick. 368, 374, 375; Chamberlain *v.* Gorham, 20 Johns. 144; Jackson *v.* Frier, 16 Johns. 193; Douglass *v.* Saunderson, 2 Dall. 116; 1 Yeates, 15, s. c.; Meeker *v.* Jackson, 3 Yeates, 442; Blanton *v.* Miller, 1 Hayw. 4; Seekright *v.* Bogan, Id. 178, n.; Smiley *v.* Dewey, 17 Ohio, 156. In *Connecticut*, the party has been adjudged incompetent. Coleman *v.* Wolcott, 4 Day, 388. But this decision has since been overruled; and it is now held, that a party to the suit is an admissible witness, to prove to the court that an instrument, which it is necessary to produce at the trial, is destroyed or lost, so as to let in secondary evidence; that there is no distinction, in this respect, between cases where the action is upon the instrument, and those where the question arises indirectly; and that it is of no importance, in the order of exhibiting the evidence, which fact is first proved, whether the fact of the existence and contents of the instrument, or the fact of its destruction or loss. Fitch *v.* Bogue, 19 Conn. 285. In the prosecutions for bastardy, whether by the female herself, or by the town or parish officers, she is competent to testify to facts within her own exclusive knowledge, though in most of the United States, the terms of her admission are prescribed by statute. Browne *v.* Simpson, 2 Mass. 441; Judson *v.* Blanchard, 4 Conn. 557; Davis *v.* Salisbury, 1 Day, 278; Mariner *v.* Dyer, 2 Greenl. 172; Anon. 3 N. Hamp. 135; Mather *v.* Clark, 2 Aik. 209; The State *v.* Coatney, 8 Yerg. 210.

[1] Bull. N. P. 187, 289.

[2] 1 Peters, 596, 597, per Marshall, C. J. See also Anon. Cro. Jac. 429; Cook *v.* Remington, 6 Mod. 237; Ward *v.* Apprice, Id. 264; Scoresby *v.* Sparrow, 2 Stra. 1186; Jevans *v.* Harridge, 1 Saund. 9; Forbes *v.* Wale, 1 W. Bl. 532; 1 Esp. 278, s. c.; Fortescue and Coake's case, Godb. 193; Anon. Godb. 326; 2 Stark Evid. 580, note (2), 6th Am. edit.; *infra*, § 558.

[3] Dig. lib. 4, tit. 9, l. 1

[4] This head of evidence is recognized in the courts of Scotland, and is fully explained in Tait on Evid. pp. 280–287. In Lower Canada, the courts are bound to admit the decisory oath (*serment décisoire*)

not admitted the oath of the party upon the ground of the Prætor's edict; but has confined its admission strictly to those cases where, from their nature, no other evidence was attainable.[1] Thus, in cases of necessity, where a statute can receive no execution, unless the party interested be a witness, there he must be allowed to testify; for the statute must not be rendered ineffectual by the impossibility of proof.[2]

§ 351. Another exception is allowed in equity, by which the *answer* of the defendant, so far as it is strictly responsive to the bill, is admitted as evidence in his favor as well as against him. The reason is, that the plaintiff, by appealing to the conscience of the defendant, admits that his answer is worthy of credit, as to the matter of the inquiry. It is not conclusive evidence; but is treated like the testimony of any other witness, and is decisive of the question only where it is not outweighed by other evidence.[3]

§ 352. So also the oath of the party, taken *diverso intuitu*, may sometimes be admitted at law in his favor. Thus, in considering the question of the originality of an invention, the letters-patent being in the case, the oath of the inventor, made prior to the issuing of the letters-patent, that he was the true and first inventor, may be opposed to the oath of a witness, whose testimony is offered to show that the invention was not original.[4] So, upon the trial of an action for malicious prosecution, in causing the plaintiff to be indicted, proof of the evidence given by the defendant on the trial of the indictment is said to be admissible in proof of probable cause.[5] And generally, the certificate of an officer, when by law it is evidence for others, is competent evidence for himself, if, at the time of making it, he was authorized to do the act therein certified.[6]

of the parties, in commercial matters, whenever either of them shall exact it of the other. Rev. Stat. 1845, p. 143.

[1] Wager of law is hardly an exception to this rule of the common law, since it was ordinarily allowed only in cases where the transaction was one of personal and private trust and confidence between the parties. See 3 Bl. Comm. 345, 346.

[2] The United States *v.* Murphy, 16 Peters, R. 203. See *infra*, § 412.

[3] 2 Story on Eq. Jur. § 1528; Clark *v.* Van Reimsdyk, 9 Cranch, 160. But the answer of an infant can never be read against him; nor can that of a *feme covert*, answering jointly with her husband. Gresley on Evid. p. 24. An arbitrator has no right to admit a party in the cause as a witness, unless he has specific authority so to do. Smith *v.* Sparrow, 11 Jur. 126.

[4] Alden *v.* Dewey, 1 Story, R. 336; 3 Law Reporter, 383, s. c.; Pettibone *v.* Derringer, 4 Wash. R. 215.

[5] Bull. N. P. 14; Johnson *v.* Browning, 6 Mod. 216. "For otherwise," said Holt, C. J., "one that should be robbed, &c., would be under an intolerable mischief; for if he prosecuted for such robbery, &c., and the party should at any rate be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without a possibility of making a good defence, though the cause of prosecution were never so pregnant."

[6] McKnight *v.* Lewis, 5 Barb. S. C. R. 181; McCully *v.* Malcolm, 9 Humph. 187.

§ 353. The rule which excludes the party to the suit from being admitted as a witness is also a rule of protection, no person who is a party to the record being *compellable* to testify.[1] It is only when he consents to be examined, that he is admissible in any case; nor then, unless under the circumstances presently to be mentioned. If he is only a nominal party, the consent of the real party in interest must be obtained before he can be examined.[2] Nor can one who is substantially a party to the record be compelled to testify, though he be not nominally a party.[3]

§ 354. It has been said, that where one of several *co-plaintiffs voluntarily* comes forward as a witness for the adverse party, he is admissible, without or even against the consent of his fellows; upon the ground, that he is testifying against his own interest, that the privilege of exemption is personal and several, and not mutual and joint, and that his declarations out of court being admissible, *à fortiori*, they ought to be received, when made in court under oath.[4] But the better opinion is, and so it has been resolved,[5] that such a rule would hold out to parties a strong

So, the account of sales, rendered by a consignee, may be evidence for some purposes, in his favor, against the consignor. Mertens *v.* Nottebohms, 4 Grant, 163.

[1] Rex *v.* Woburn, 10 East, 395; Worrall *v.* Jones, 7 Bing. 395; Fenn *v.* Granger, 3 Campb. 177; Mant *v.* Mainwaring, 8 Taunt. 139.

[2] Frear *v.* Evertson, 20 Johns. 142. And see The People *v.* Irving, 1 Wend. 20; Commonwealth *v.* Marsh, 21 Pick. 57, per Wilde, J.; Columbian Manuf. Co. *v.* Dutch, 13 Pick. 125; Bradlee *v.* Neal, 16 Pick. 501. In *Connecticut* and *Vermont*, where the declarations of the assignor of a chose in action are still held admissible to impeach it in the hands of the assignee, in an action brought in the name of the former for the benefit of the latter, the defendant is permitted to read the deposition of the nominal plaintiff, voluntarily given, though objected to by the party in interest. Woodruff *v.* Westcott, 12 Conn. 134; Johnson *v.* Blackman, 11 Conn. 342; Sargeant *v.* Sargeant, 3 Wash. 371. See *supra*, 190.

[3] Mauran *v.* Lamb, 7 Cowen, 174; Rex *v.* Woburn, 10 East, 403, per Ld. Ellenborough. In several of the United States it is enacted that the parties, in actions at law, as well as in equity, may interrogate each other as witnesses. See *Massachusetts*, Stat. 1852, c. 312, § 61–75; *New York*, Code of Practice, §§ 344, 349, 350; *Texas*, Hartley's Dig., Arts. 735, 739; *California*, Rev. Stat. 1850, c. 142, § 296–303; [*supra*, § 329 and note.] See vol. 3, § 317.

[4] Phil. & Am. on Evid. 158; 1 Phil. Evid. 60. The cases which are usually cited to support this opinion, are Norden *v.* Williamson, 1 Taunt. 377; Fenn *v.* Granger, 3 Campb. 177, and Worrall *v.* Jones, 7 Bing. 395. But in the first of these cases, no objection appears to have been made on behalf of the other co-plaintiff, that his consent was necessary; but the decision is expressly placed on the ground, that neither party objected at the time. In Fenn *v.* Granger, Ld. Ellenborough would have rejected the witness, but the objection was waived. In Worrall *v.* Jones, the naked question was, whether a defendant who has suffered judgment by default, and has no interest in the event of the suit, is admissible as a witness for the plaintiff, by his own consent, where "the *only* objection to his admissibility is this, that he is party to the record." See also Willings *v.* Consequa, 1 Peters, C. C. R. 307, per Washington, J.; Paine *v.* Tilden, 3 Washb. 554; [Wills *v.* Judd, 26 Vt. 617.]

[5] Scott *v.* Lloyd, 12 Peters, 149. See also 2 Stark. Evid. 580, note (e); Bridges *v.* Armour, 5 How. S. C. R. 91; Evans *v.* Gibbs, 6 Humph. 405; Sargeant *v.* Sargeant, 3 Washb. 371.

temptation to perjury; that it is not supported by principle or authority, and that therefore the party is not admissible, without the consent of all parties to the record, for that the privilege is mutual and joint, and not several. It may also be observed, that the declarations of one of several parties are not always admissible against his fellows, and that when admitted, they are often susceptible of explanation or contradiction, where testimony under oath could not be resisted.

§ 355. Hitherto, in treating of the admissibility of parties to the record as witnesses, they have been considered as still retaining their original situation, assumed at the commencement of the suit. But as the situation of some of the defendants, where there are several in the same suit, may be *essentially changed* in the course of its progress, by default, or *nolle prosequi*, and sometimes by verdict, their case deserves a distinct consideration. This question has arisen in cases where the testimony of a defendant, thus situated, is material to the defence of his fellows. And here the general doctrine is, that where the suit is ended as to one of several defendants, and he has no direct interest in its event as to the others, he is a competent witness for them, his own fate being at all events certain.[1]

§ 356. In *actions on contracts*, the operation of this rule was formerly excluded; for the contract being laid jointly, the judgment by default against one of several defendants it was thought, would operate against him, only in the event of a verdict against the others; and accordingly he has been held inadmissible in such actions, as a witness in their favor.[2] On a similar principle, a defendant thus situated has been held not a competent witness for the plaintiff; on the ground that, by suffering judgment by default, he admitted that he was liable to the plaintiff's demand, and was therefore directly interested in throwing part of that burden on another person.[3] But in another case, where the action was upon a bond, and the principal suffered judgment by default, he was admitted as a witness for the plaintiff, against one of the other defendants, his surety; though here the point submitted to the court was narrowed to the mere abstract question, whether a

[1] *Infra*, §§ 358, 359, 360, 363.

[2] Mant *v.* Mainwaring, 8 Taunt. 139; Brown *v.* Brown, 4 Taunt. 752; Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Columbia Man. Co. *v.* Dutch, 13 Pick. 125; Mills *v.* Lee, 4 Hill, R. 549; [Thornton *v.* Blaisdell, 37 Maine, 199; King *v.* Lowry, 20 Barb. 532.]

[3] Green *v.* Sutton, 2 M. & Rob. 269.

party to the record was, on that account alone, precluded from being a witness, he having no interest in the event.[1] But the whole subject has more recently been reviewed in England, and the rule established, that where one of two joint defendants in an action on contract, has suffered judgment by default he may, *if not otherwise interested in procuring a verdict for the plaintiff*, be called by him as a witness against the other defendant.[2] So, if the *defence*, in an action *ex contractu* against several, goes merely to the personal discharge of the party pleading it, and not to that of the others, and the plaintiff thereupon enters a *nolle prosequi* as to him, which in such cases he may well do, such defendant is no longer a party upon the record, and is therefore competent as a witness, if not otherwise disqualified. Thus, where the plea by one of several defendants is bankruptcy,[3] or, that he was never executor, or, as it seems by the later and better opinions, infancy or coverture,[4] the plaintiff may enter a *nolle prosequi* as to such party, who, being thus disengaged from the record, may be called

[1] Worrall *v.* Jones, 7 Bing. 395. See Foxcroft *v.* Nevens, 4 Greenl. 72, *contra*. In a case before Le Blanc, J., he refused to permit one defendant, who had suffered judgment to go by default, to be called by the plaintiff to inculpate the others, even in an action of trespass. Chapman *v.* Graves, 2 Campb. 333, 334, note. See acc. Supervisors of Chenango *v.* Birdsall, 4 Wend. 456, 457. The general rule is, that a party to the record can, in no case, be examined as a witness; a rule founded principally on the policy of preventing perjury, and the hardship of calling on a party to charge himself. Frazier *v.* Laughlin, 1 Gilm. 347; Flint *v.* Allyn, 12 Verm. 615; Kennedy *v.* Niles, 2 Shepl. 54; Stone *v.* Bibb, 2 Ala. 100. And this rule is strictly enforced against plaintiffs, because the joining of so many defendants is generally their own act, though sometimes it is a matter of necessity. 2 Stark. Evid. 581, note (a); Blackett *v.* Weir, 5 B. & C. 387; Barrett *v.* Gore, 3 Atk. 401; Bull. N. P. 285; Cas. temp. Hardw. 163.

[2] Pipe *v.* Steel, 2 Ad. & El. 733, N. S.; Cupper *v.* Newark, 2 C. & K. 24 Thus, he has been admitted, with his own consent, as a witness to prove that he is the principal debtor, and that the signatures of the other defendants, who are his sureties, are genuine. Mevey *v.* Matthews, 9 Barr, 112. But generally he is interested; either to defeat the action against both, or to throw on the other defendant a portion of the demand, or to reduce the amount to be recovered. Bowman *v.* Noyes, 12 N. Hamp. 302; George *v.* Sargeant, Id. 313; Vinal *v.* Burrill, 18 Pick. 29; Bull *v.* Strong, 8 Met. 8; Walton *v.* Tomlin, 1 Ired. 593; Turner *v.* Lazarus, 6 Ala. 875; [Manchester Bank *v.* Moore, 19 N. H. 564; Kincaid *v.* Purcell, 1 Carter, 324.]

[3] Noke *v.* Ingham, 1 Wils. 89; 1 Tidd's Pr. 602; 1 Saund. 207, a. But see Mills *v.* Lee, 4 Hill, R. 549.

[4] 1 Paine & Duer's Pr. 642, 643; Woodward *v.* Newhall, 1 Pick. 500; Hartness *v.* Thompson, 5 Johns. 160; Pell *v.* Pell, 20 Johns. 126; Burgess *v.* Merrill, 4 Taunt. 468. The ground is, that these pleas are not in bar of the entire action, but only in bar as to the party pleading; and thus the case is brought within the general principle, that where the plea goes only to the personal discharge of the party pleading it, the plaintiff may enter a *nolle prosequi*. 1 Pick. 501, 502. See also Minor *v.* The Mechanics' Bank of Alexandria, 1 Peters, 74. So, if the cause is otherwise adjudicated in favor of one of the defendants, upon a plea personal to himself, whether it be by the common law, or by virtue of a statute authorizing a separate finding in favor of one defendant, in an action upon a joint contract, the result is the same. Blake *v.* Ladd, 10 New Hamp. 190; Essex Bank *v.* Rix, Id. 201; Brooks *v.* M'Kenney, 4 Scam. 309. And see Campbell *v.* Hood, 6 Mis. 211.

as a witness, the suit still proceeding against the others.[1] The mere pleading of the bankruptcy, or other matter of personal discharge, is not alone sufficient to render the party a competent witness; and it has been held, that he is not entitled to a previous verdict upon that plea, for the purpose of testifying for the others.[2]

§ 357. In *actions on torts*, these being in their nature and legal consequences several, as well as ordinarily joint, and there being no contribution among wrongdoers, it has not been deemed necessary to exclude a material witness for the defendants, merely because the plaintiff has joined him with them in the suit, if the suit, as to him, is already determined, and he has no longer any legal interest in the event.[3] Accordingly, a defendant in an action for a tort, who has suffered judgment to go by *default*, has uniformly been held admissible as a witness for his co-defendants.[4] Whether, being admitted as a witness, he is competent to testify to the amount of damages, which are generally assessed entire against all who are found guilty,[5] may well be doubted.[6] And

[1] McIver *v.* Humble, 16 East, 171, per Le Blanc, J., cited 7 Taunt. 607, per Park, J.; Moody *v.* King, 2 B. & C. 558; Aflalo *v.* Fourdrinier, 6 Bing. 306. But see Irwin *v.* Shumaker, 4 Barr, 199.

[2] Raven *v.* Dunning, 3 Esp. 25; Emmett *v.* Butler, 7 Taunt. 599; 1 Moore, 332, s. c.; Schermerhorn *v.* Schermerhorn, 1 Wend. 119. But in a later case, since the 49 G. III., c. 121, Park, J., permitted a verdict to be returned upon the plea, in order to admit the witness. Bate *v.* Russell, 1 Mood. & M. 332. Where, by statute, the plaintiff, in an action on a parol contract against several, may have judgment against one or more of the defendants, according to his proof, there it has been held, that a defendant who has been defaulted is, with his consent, a competent witness in favor of his co-defendants. Bradlee *v.* Neal, 16 Pick. 501. But this has since been questioned, on the ground that his interest is to reduce the demand of the plaintiff against the others to nominal damages, in order that no greater damages may be assessed against him upon his default. Vinal *v.* Burrill, 18 Pick. 29. [Vinal *v.* Burrill is distinguished from Bradlee *v.* Neal, by Shaw, C. J., in Gerrish *v.* Cummings, 4 Cush. 392.]

[3] As, if one has been separately tried and acquitted. Carpenter *v.* Crane, 5 Black, 119.

[4] Ward *v.* Haydon, 2 Esp. 552, approved in Hawkesworth *v.* Showler, 12 M. & W. 48; Chapman *v.* Graves, 2 Campb. 334, per Le Blanc, J.; Commonwealth *v.* Marsh, 10 Pick. 57, 58. A defendant, in such case, is also a competent witness for the plaintiff. Hadrick *v.* Heslop, 12 Jur. 600; 17 Law J., N. S. 313; 12 Ad. & El. 266, N. S. The wife of one joint trespasser is not admissible as a witness for the other, though the case is already fully proved against her husband, if he is still a party to the record. Hawkesworth *v.* Showler, 12 M. & W. 45.

[5] 2 Tidd's Pr. 896.

[6] In Mash *v.* Smith, 1 C. & P. 577, Best, C. J., was of opinion, that the witness ought not to be admitted at all, on the ground that his evidence might give a different complexion to the case, and thus go to reduce the damages against himself; but on the authority of Ward *v.* Haydon, and Chapman *v.* Graves, he thought it best to receive the witness, giving leave to the opposing party to move for a new trial. But the point was not moved; and the report does not show which way was the verdict. It has, however, more recently been held in England, that a defendant in trespass, who has suffered judgment by default, is not a competent witness for his co-defendant, where the jury are summoned as well to try the issue against the one, as to assess damages

indeed the rule, admitting a defendant as witness for his fellows in any case, must, as it should seem, be limited strictly to the case where his testimony cannot directly make for himself; for if the plea set up by the other defendants is of such a nature, as to show that the plaintiff has no cause of action against any of the defendants in the suit, the one who suffers judgment by default will be entitled to the benefit of the defence, if established, and therefore is as directly interested as if the action were upon a joint contract. It is, therefore, only where the plea operates solely in discharge of the party pleading it, that another defendant, who has suffered judgment to go by default, is admissible as a witness.[1]

§ 358. If the person, who is a material witness for the defendants, has been improperly joined with them in the suit, for the purpose of excluding his testimony, the jury will be directed to find a *separate verdict* in his favor; in which case, the cause being at an end with respect to him, he may be admitted a witness for the other defendants. But this can be allowed only where there is no evidence whatever against him, for then only does it appear that he was improperly joined, through the artifice and fraud of the plaintiff. But if there be any evidence against him, though, in the judge's opinion, not enough for his conviction, he cannot be admitted as a witness for his fellows, because his guilt or innocence must wait the event of the verdict, the jury being the sole judges of the fact.[2] In what stage of the cause the party, thus improperly joined, might be acquitted, and whether before the close of the case on the part of the other defendants, was formerly uncertain; but it is now settled, that the application to a judge, *in the course of a cause*, to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion; and that discretion is to be regulated, not merely by the fact that, at the close of the plaintiff's case, no evidence appears to affect them,

against the other. Thorpe *v.* Barber, 5 M. G. & Sc. 675; 17 Law Journ. N. S. 113. And see Ballard *v.* Noaks, 2 Pike, 45. [Where one of two defendants in an action of trover is defaulted, he is not a competent witness on the trial for the other, on the ground of interest, even though called to testify to matters not connected with the question of damages; because, if admissible at all, he is liable to be examined upon all matters pertinent to the issue on trial. Gerrish *v.* Cummings, 4 Cush. 391; Chase *v.* Lovering, 7 Foster, 295.]

[1] 2 Tidd's Pr. 895; Briggs *v.* Greenfield *et al.* 1 Str. 610; 8 Mod. 217; 2 Ld. Raym. 1372, S. C.; Phil. & Am. on Evid. 53, note (3); 1 Phil. Evid. 52, n. (1); Bowman *v.* Noyes, 12 N. Hamp. R. 302.

[2] 1 Gilb. Evid. by Lofft, p. 250; Brown *v.* Howard, 14 Johns. 119, 122; Van Deusen *v.* Van Slyck, 15 Johns. 223. The admission of the witness, in all these cases, seems to rest in the discretion of the judge. Brotherton *v.* Livingston, 3 Watts & Serg 334; [Castle *v.* Bullard, 23 How. 173.]

but by the probabilities whether any such will arise before the whole evidence in the cause closes.[1] The ordinary course, therefore, is to let the cause go on, to the end of the evidence.[2] But if, at the close of the plaintiff's case, there is one defendant against whom no evidence has been given, and none is anticipated with any probability, he instantly will be acquitted.[3] The mere fact of mentioning the party in the *simul cum*, in the declaration, does not render him incompetent as a witness; but if the plaintiff can prove the person so named to be guilty of the trespass, and party to the suit, which must be by producing the original process against him, and proving an ineffectual endeavor to arrest him, or that the process was lost, the defendant shall not have the benefit of his testimony.[4]

§ 359. If the plaintiff, in trespass, has *by mistake* made one of

[1] Sowell *v.* Champion, 6 Ad. & El. 407; White *v.* Hill, 6 Ad. & El. 487, 491, N. S.; Commonwealth *v.* Eastman, 1 Cush. 189; Over *v.* Blackstone, 8 Watts & Serg. 71; Prettyman *v.* Dean, 2 Harringt. 494; Brown *v.* Burnes, 8 Mis. 26.

[2] 6 Ad. & El. 491, N. S., per Ld. Denman.

[3] Child *v.* Chamberlain, 6 C. & P. 213. It is not easy to perceive why the same principle should not be applied to actions upon contract, where one of the defendants pleads a matter in his own personal discharge, such as infancy or bankruptcy, and establishes his plea by a certificate, or other affirmative proof, which the plaintiff does not pretend to gainsay or resist. See Bate *v.* Russell, 1 Mood. & M. 332. Upon Emmett *v.* Butler, 7 Taunt. 599, where it was not allowed, Mr. Phillips very justly observes, that the plea was not the common one of bankruptcy and certificate; but that the plaintiffs *had proved* (under the commission), and thereby made their election; and that where a plea is special, and involves the consideration of many facts, it is obvious that there would be much inconvenience in splitting the case, and taking separate verdicts; but there seems to be no such inconvenience where the whole proof consists of the bankrupt's certificate. Phil. & Am. on Evid. p. 29, note (3); [Beasley *v.* Bradley, 2 Swan, 180; Cochran *v.* Ammon, 16 Ill. 316.]

[4] Bull. N. P. 286; 1 Gilb. Evid. by Lofft, p. 251; Lloyd *v.* Williams, Cas. temp. Hardw. 123; Cotton *v.* Luttrell, 1 Atk. 452. "These cases appear to have proceeded upon the ground, that a co-trespasser, who had originally been made a party to the suit upon sufficient grounds, ought not to come forward as a witness to defeat the plaintiff, after he had prevented the plaintiff from proceeding effectually against him, by his own wrongful act in eluding the process." Phil. & Am. on Ev. p. 60, note (2). But see Stockham *v.* Jones, 10 Johns. 21, *contra*. See also 1 Stark. Evid. 132. In Wakeley *v.* Hart, 6 Binn. 316, all the defendants, in trespass, were arrested, but the plaintiff went to issue with some of them only, and did not rule the others to plead, nor take judgment against them by default; and they were held competent witnesses for the other defendants. The learned chief justice placed the decision partly upon the general ground, that they were not interested in the event of the suit; citing and approving the case of Stockham *v.* Jones, *supra*. But he also laid equal stress upon the fact, that the plaintiff might have conducted his cause so as to have excluded the witnesses, by laying them under a rule to plead, and taking judgment by default. In Purviance *v.* Dryden, 3 S. & R. 402, and Gibbs *v.* Bryant, 1 Pick. 118, both of which were actions upon contract, where the process was not served as to one of the persons named as defendant with the other, it was held, that he was not a party to the record, not being served with process, and so was not incompetent as a witness on that account. Neither of these cases, therefore, except that of Stockham *v.* Jones, touches the ground of public policy for the prevention of fraud in cases of tort, on which the rule in the text seems to have been founded. *Ideo quære*. See also Curtis *v.* Graham, 12 Mart. 289; Heckert *v.* Fegely, 5 Watts & Serg. 333.

his own intended witnesses a defendant, the court will, on motion, give leave to omit him, and have his name stricken from the record, even after issue joined.[1] In criminal informations, the same object is attained by entering a *nolle prosequi*, as to the party intended to be examined; the rule, that a plaintiff can in no case examine a defendant, being enforced in criminal as well as in civil cases.[2]

§ 360. If a material witness for a defendant *in ejectment* be also made a defendant, he may let judgment go by default, and be admitted as a witness for the other defendant. But if he plead, thereby admitting himself tenant in possession, the court will not afterwards, upon motion, strike out his name.[3] But where he is in possession of only a part of the premises, and consents to the return of a verdict against him for as much as he is proved to have in possession, Mr. Justice Buller said, he could see no reason why he should not be a witness for another defendant.[4]

§ 361. In *chancery*, parties to the record are subject to examination as witnesses, much more freely than at law. A plaintiff may obtain an order, as of course, to examine a defendant, and a defendant a co-defendant, as a witness, upon affidavit that he is a material witness, and is not interested on the side of the applicant, in the matter to which it is proposed to examine him; the order being made subject to all just exceptions.[5] And it may be obtained *ex parte*, as well after as before decree.[6] If the answer of the defendant has been replied to, the replication must be withdrawn before the plaintiff can examine him. But a plaintiff cannot be examined by a defendant, except by consent, unless he is

[1] Bull. N. P. 285; Berrington d. Dormer *v.* Fortescue, Cas. temp. Hardw. 162, 163.

[2] Ibid.

[3] Ibid.

[4] Bull. N. P. 286. But where the same jury are also to assess damages against the witness, it seems he is not admissible. See Mash *v.* Smith, 1 C. & P. 577; *supra*, § 356. [Where the court in its discretion orders several actions, depending on the same evidence, to be tried together, the testimony of a witness who is competent in one of the actions is not to be excluded because it is inadmissible in the others, and may possibly have some effect on the decision of them; and the jury should be directed to confine the testimony of the witness to the case in which he is competent. Kimball *v.* Thompson, 4 Cush. 441. See also Reeves *v.* Matthews, 17 Geo. 449.]

[5] 2 Daniel's Chan. Pr. 1035, note (Perkins's edit.); Id. 1043; Ashton *v.* Parker, 14 Sim. 632. But where there are several defendants, one of whom alone has an interest in defeating the plaintiff's claim, the evidence of the defendant so interested, though taken in behalf of a co-defendant, is held inadmissible. Clark *v.* Wyburn, 12 Jur. 613. It has been held in *Massachusetts*, that the answer of one defendant, so far as it is responsive to the bill, may be read by another defendant, as evidence in his own favor. Mills *v.* Gore, 20 Pick. 28.

[6] Steed *v.* Oliver, 11 Jur. 365; Paris *v.* Hughes, 1 Keen, 1; Van *v.* Corpe, 3 My. & K. 269.

merely a trustee, or has no beneficial interest in the matter in question.[1] Nor can a co-plaintiff be examined by a plaintiff, without the consent of the defendant. The course in the latter of such cases is, to strike out his name as plaintiff, and make him a defendant; and, in the former, to file a cross-bill.[2]

§ 362. The principles which govern in the admission or exclusion of parties as witnesses in civil cases are in general applicable, with the like force, to *criminal prosecutions*, except so far as they are affected by particular legislation, or by considerations of public policy. In these cases, the state is the party prosecuting, though the process is usually, and in some cases always, set in motion by a private individual, commonly styled *the prosecutor*. In general, this individual has no direct and certain interest in the event of the prosecution; and therefore he is an admissible witness. Formerly, indeed, it was supposed that he was incompetent, by reason of an indirect interest, arising from the use of the record of conviction as evidence in his favor in a civil suit; and this opinion was retained down to a late period, as applicable to cases of forgery, and especially to indictments for perjury. But it is now well settled, as will hereafter more particularly be shown,[3] that the record in a criminal prosecution cannot be used as evidence in a civil suit, either at law or in equity, except to prove the mere fact of the adjudication, or a judicial confession of guilt by the party indicted.[4] The prosecutor, therefore, is not

[1] The reason of this rule has often been called in question; and the opinion of many of the profession is inclined in favor of making the right of examination of parties in equity reciprocal, without the intervention of a cross-bill. See 1 Smith's Ch. Pr. 459, n. (1); Report on Chancery Practice, App. p. 153, Q. 49. Sir Samuel Romilly was in favor of such change in the practice. Id. p. 54, Q. 266; 1 Hoffman's Ch. Pr. 345. In some of the United States, this has already been done by statute. See *New York* Code of Practice, §§ 390, 395, 396 (Blatchford's edit.); *Ohio*, Rev. St. 1841, ch. 87, § 26; *Missouri*, Rev. St. 1845, ch. 137, art. 2, §§ 14, 15; *New Jersey*, Rev. St. 1846, tit. 23, ch. 1, § 40; *Texas*, Hartley's Dig. arts. 735, 739; *Wisconsin*, Rev. St. 1849, ch. 84, § 30; *California*, Rev. St. 1850, ch. 142, § 296–303.

[2] 1 Smith's Ch. Pr. 343, 344; 1 Hoffman's Ch. Pr. 485–488. See further, Gresley on Evid. 242, 243, 244; 2 Mad. Chan. 415, 416; Neilson *v.* McDonald, 6 Johns. Ch. 201; Souverbye *v.* Arden, 1 Johns. Ch. 240; 2 Daniel's Ch. Pr. 455, 456; Piddock *v.* Brown, 3 P. W. 288; Murray *v.* Shadwell, 2 V. & B. 401; Hoffm. Master in Chanc. 18, 19; Cotton *v.* Luttrell, 1 Atk. 451.

[3] *Infra*, § 537.

[4] Rex *v.* Boston, 4 East, 572; Bartlett *v.* Pickersgill, 1d. 577, n.; Gibson *v.* McCarty, Cas. temp. Hardw. 311; Richardson *v.* Williams, 12 Mod. 319; Reg. *v.* Moreau, 36 Leg. Obs. 69; 11 Ad. & El. 1028; *infra*, § 537. The exception which had grown up in the case of forgery was admitted to be an anomaly in the law, in 4 East, 582, per Lord Ellenborough, and in 4 B. & Ald. 210, per Abbott, C. J.; and was finally removed by the declaratory act, for such in effect it certainly is, of 9 Geo. IV., c. 32, § 2. In this country, with the exception of a few early cases, the party to the forged instrument has been held admissible as a witness, on the general principles of the criminal law. See Commonwealth *v.* Snell, 3 Mass. 82; The People *v.* Dean, 6 Cowen, 27; Furber

incompetent on the ground that he is a party to the record; but whether any interest which he may have in the conviction of the offender, is sufficient to render him incompetent to testify, will be considered more appropriately under the head of incompetency, from interest.[1]

§ 363. In regard to *defendants in criminal cases*, if the state would call one of them, as a witness against others in the same indictment, this can be done only by discharging him from the record; as, by the entry of a *nolle prosequi;*[2] or, by an order for his dismissal and discharge, where he has pleaded in abatement as to his own person, and the plea is not answered;[3] or, by a verdict of acquittal, where no evidence, or not sufficient evidence, has been adduced against him. In the former case, where there is no proof, he is entitled to the verdict; and it may also be rendered at the request of the other defendants, who may then call him as a witness for themselves, as in civil cases. In the latter, where there is some evidence against him, but it is deemed insufficient, a separate verdict of acquittal may be entered, at the instance of the prosecuting officer, who may then call him as a witness against the others.[4] On the same principle, where two were indicted for an assault, and one submitted and was fined, and paid the fine, and the other pleaded "not guilty;" the former was admitted as a competent witness for the latter, because as to the witness the matter was at an end.[5] But the matter is not considered as at an end, so as to render one defendant a competent witness for another, by any thing short of a final judgment, or a plea of guilty.[6] Therefore, where two were jointly indicted for uttering a forged note, and the trial of one of them was postponed, it was held, that he could not be called as a witness for the other.[7] So, where two, being jointly indicted for an assault, pleaded separately "not guilty," and elected to be tried separately,

v. Hilliard, 2 N. Hamp. 480; Respublica *v.* Ross, 2 Dall. 239; The State *v.* Foster, 3 McCord, 442.

[1] *Infra*, § 412–414.

[2] Bull, N. P. 285; Cas. temp. Hardw. 163.

[3] Rex *v.* Sherman, Cas. temp. Hardw. 303.

[4] Rex *v.* Rowland, Ry. & M. 401; Rex *v.* Mutineers of the "Bounty," cited arg. 1 East, 312, 313.

[5] Rex *v.* Fletcher, 1 Stra. 633; Regina *v.* Lyons, 9 C. & P. 555; Regina *v.* Williams, 8 C. & P. 283; *supra*, § 358; Commonwealth *v.* Eastman, 1 Cush. 189.

[6] Regina *v.* Hincks, 1 Denis. C. C. 84. [Where two defendants were jointly indicted for an assault, and one was defaulted on his recognizance, his wife was held to be a competent witness for the other defendant. State *v.* Worthing, 31 Maine, 62.]

[7] Commonwealth *v.* Marsh, 10 Pick. 57.

it was held, that the one tried first could not call the other as a witness for him.[1]

§ 364. Before we dismiss the subject of parties, it may be proper to take notice of the case, where the facts are personally known by the judge before whom the cause is tried. And whatever difference of opinion may once have existed on this point, it seems now to be agreed, that the same person cannot be both *witness and judge*, in a cause which is on trial before him. If he is the sole judge, he cannot be sworn; and if he sits with others, he still can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another.[2] Whether his knowledge of common notoriety is admissible proof of that fact is not so clearly agreed.[3] On grounds of public interest and convenience, a judge cannot be called as a witness to testify to what took place before him in the trial of another cause;[4] though he may testify to foreign and collateral matters, which happened in his presence while the trial was pending, or after it was ended.[5] In regard to *attorneys*, it has in England been held a very objectionable proceeding on the part of an attorney to give evidence, when acting as advocate in the cause; and a sufficient ground for a new trial.[6] But in the United States

[1] The People *v.* Bill, 10 Johns. 95; [McIntyre *v.* People, 5 Selden, 38.] In Rex *v.* Lafone, 5 Esp. 154, where one defendant suffered judgment by default, Lord Ellenborough held him incompetent to testify for the others; apparently on the ground, that there was a community of guilt, and that the offence of one was the offence of all. But no authority was cited in the case, and the decision is at variance with the general doctrine in cases of tort. The reason given, moreover, assumes the very point in dispute, namely, whether there was any guilt at all. The indictment was for a misdemeanor, in obstructing a revenue officer in the execution of his duty. See 1 Phil. Evid. 68. But where two were jointly indicted for an assault and battery, and one of them, on motion, was tried first, the wife of the other was held a competent witness in his favor. Moffit *v.* The State, 2 Humph. 99. And see Jones *v.* The State, 1 Kelly, 610; The Commonwealth *v.* Manson, 2 Ashm. 31; *supra*, § 335, note; The State *v.* Worthing, 1 Redingt. (31 Maine) 62.

[2] Ross *v.* Buhler, 2 Martin, N. S. 313. So is the law of Spain, Partid. 3, tit. 16, l. 19; 1 Moreau & Carlton's Tr. p. 200; and of Scotland, Glassford on Evid. p. 602; Tait on Evid. 432; Stair's Inst. book iv. tit. 45, 4; Erskine's Inst. book iv. tit. 2, 33. If his presence on the bench is necessary to the legal constitution of the court, he cannot be sworn as a witness, even by consent; and if it is not, and his testimony is necessary in the cause on trial, he should leave the bench until the trial is finished. Morss *v.* Morss, 4 Am. Law Rep. 611, N. S. This principle has not been extended to jurors. Though the jury may use their general knowledge on the subject of any question before them; yet, if any juror has a particular knowledge, as to which he can testify, he must be sworn as a witness. Rex *v.* Rosser, 7 C. & P. 648; Stones *v.* Byron, 4 Dowl. & L. 393. See *infra*, § 386, note.

[3] Lord Stair and Mr. Erskine seem to have been of opinion that it was, "unless it be overruled by pregnant contrary evidence." But Mr. Glassford and Mr. Tait are of the contrary opinion. See the places cited in the preceding note.

[4] Regina *v.* Gazard, 8 C. & P. 595, per Patteson, J.

[5] Rex *v.* E. of Thanet, 27 Howell's St. Tr. 847, 848. See *supra*, § 252, as to the admissibility of jurors.

[6] Dunn *v.* Packwood, 11 Jur. 242, a.

no case has been found to proceed to that extent; and the fact is hardly ever known to occur.

§ 365. We proceed now to consider the SECOND CLASS of persons incompetent to testify as witnesses, namely, that of PERSONS DEFICIENT IN UNDERSTANDING. We have already seen[1] that one of the main securities, which the law has provided for the purity and truth of oral evidence, is, that it be delivered under the sanction of an oath; and that this is none other than a solemn invocation of the Supreme Being, as the Omniscient Judge. The purpose of the law being to lay hold on the conscience of the witness by this religious solemnity, it is obvious, that persons incapable of comprehending the nature and obligation of an oath ought not to be admitted as witnesses. The repetition of the words of an oath would, in their case, be but an unmeaning formality. It makes no difference from what cause this defect of understanding may have arisen; nor whether it be temporary and curable, or permanent; whether the party be hopelessly an idiot, or maniac, or only occasionally insane, as a lunatic; or be intoxicated; or whether the defect arises from mere immaturity of intellect, as in the case of children. *While the deficiency of understanding exists*, be the cause of what nature soever, the person is not admissible to be sworn as a witness. But if the cause be temporary, and a lucid interval should occur, or a cure be effected, the competency also is restored.[2]

[1] *Supra*, § 327.

[2] 6 Com. Dig. 351, 352, *Testmoigne*, A. 1; Livingston *v.* Kiersted, 10 Johns. 362; Evans *v.* Hettich, 7 Wheat. 453, 470; White's case, 2 Leach, Cr. Cas. 482; Tait on Evid. pp. 342, 343. The fact of want of understanding is to be proved by the objecting party, by testimony *aliunde*. Robinson *v.* Dana, 16 Vern. 474. See, as to intoxication, Hartford *v.* Palmer, 16 Johns. 143; Gebhart *v.* Skinner, 15 S. & R. 235; Heinec. ad Pandect. Pars. 3, § 14. Whether a *monomaniac* is a competent witness is a point not known to have been directly decided; and upon which text-writers differ in opinion. Mr. Roscoe deems it the safest rule to exclude their testimony. Rosc. Crim. Evid. p. 128. Mr. Best considers this "hard measure." Best, Princ. Evid. p. 168. In a recent case before the Privy Council, where a will was contested on the ground of incapacity in the mind of the testator, it was held, that if the mind is unsound on one subject, and this unsoundness is at all times existing upon that subject, it is erroneous to suppose the mind of such a person really sound on other subjects; and that therefore the will of such a person, though apparently ever so rational and proper, was void. Waring *v.* Waring, 12 Jur. 947, Priv. C. Here, the power of perceiving facts is sound, but the faculty of comparing and of judging is impaired. But where, in a trial for manslaughter, a lunatic patient was admitted as a witness, who had been confined in a lunatic asylum, and who labored under the delusion, both at the time of the transaction and of the trial, that he was possessed by twenty thousand spirits, but whom the medical witness believed to be capable of giving an account of any transaction that happened before his eyes, and who appeared to understand the obligation of an oath, and to believe in future rewards and punishments; — it was held, that his testimony was properly received. And that where a person, under an insane delusion, is offered as a witness, it is for the judge,

§ 366. In regard to persons *deaf and dumb* from their birth, it has been said that, in presumption of law, they are idiots. And though this presumption has not now the same degree of force which was formerly given to it, that unfortunate class of persons being found by the light of modern science, to be much more intelligent in general, and susceptible of far higher culture, than was once supposed; yet still the presumption is so far operative, as to devolve the burden of proof on the party adducing the witness, to show that he is a person of sufficient understanding. This being done, a deaf mute may be sworn and give evidence, by means of an interpreter.[1] If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory, and therefore the better method;[2] but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs.[3]

§ 367. But in respect to *children*, there is no precise age within which they are absolutely excluded, on the presumption that they have not sufficient understanding. At the age of fourteen, every person is presumed to have common discretion and understanding, until the contrary appears; but under that age it is not so presumed; and therefore inquiry is made as to the degree of understanding, which the child offered as a witness may possess; and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify, whatever his age may be.[4] This examination of the child, in order to ascertain his capacity to be sworn, is made by the judge at his discretion; and though, as has been just said, no age has been precisely fixed, within which a child shall be conclusively presumed incapable, yet, in one case a learned judge promptly rejected the dying declarations of a child of four years of age, observing, that it was quite impossible that

at the time, to decide upon his competency as a witness, and for the jury to judge of the credibility of his evidence. Reg. *v.* Hill, 15 Jur. 470; 5 Eng. Law & Eq. Rep. 547; 5 Cox, Cr. Cas. 259; [Holcomb *v.* Holcomb, 28 Conn. 177.]

[1] Rustin's case, 1 Leach, Cr. Cas. 455; Tait on Evid. p. 343; 1 Russ. on Crimes, p. 7; 1 Hale, P. C. 34. Lord Hale refers, for authority as to the ancient presumption, to the Laws of King Alfred, c. 14, which is in these words: — "Si quis mutus vel surdus natus sit, ut peccata sua confiteri nequeat, nec inficiari, emendet pater scelera ipsius." Vid. Leges Barbaror. Antiq. vol. 4, p. 249; Ancient Laws and Statutes of England, vol. 1, p. 71.

[2] Morrison *v.* Lennard, 3 C. & P. 127.

[3] The State *v.* De Wolf, 8 Conn. 93; Commonwealth *v.* Hill, 14 Mass. 207; Snyder *v.* Nations, 4 Blackf. 295.

[4] McNally's Evid. p. 149, ch. 11; Bull. N. P. 293; 1 Hale, P. C. 302; 2 Russ. on Crimes, p. 590; Jackson *v.* Gridley, 18 Johns. 98.

she, however precocious her mind, could have had that idea of a future state, which is necessary to make such declarations admissible.[1] On the other hand, it is not unusual to receive the testimony of children under nine, and sometimes even under seven years of age, if they appear to be of sufficient understanding;[2] and it has been admitted even at the age of five years.[3] If the child, being a principal witness, appears not yet sufficiently instructed in the nature of an oath, the court will, in its discretion, put off the trial, that this may be done.[4] But whether the trial ought to be put off for the purpose of instructing an adult witness has been doubted.[5]

§ 368. The THIRD CLASS of persons incompetent to testify as witnesses consists of those who are INSENSIBLE TO THE OBLIGATIONS OF AN OATH, from defect of religious sentiment and belief. The very nature of an oath, it being a religious and most solemn appeal to God, as the Judge of all men, presupposes that the witness believes in the existence of an omniscient Supreme Being, who is "the rewarder of truth and avenger of falsehood;"[6] and that, by such a formal appeal, the conscience of the witness is affected. Without this belief, the person cannot be subject to that sanction, which the law deems an indispensable test of truth.[7] It is not

[1] Rex *v.* Pike, 3 C. & P. 598; The People *v.* McNair, 21 Wend. 608. Neither can the declarations of such a child, if living, be received in evidence. Rex *v.* Brasier, 1 East, P. C. 443.

[2] 1 East, P. C. 442; Commonwealth *v.* Hutchinson, 10 Mass. 225; McNally's Evid. p. 154; The State *v.* Whittier, 8 Shepl. 341.

[3] Rex *v.* Brasier, 1 Leach, Cr. Cas. 237; Bull. N. P. 293, s. c.; 1 East, P. C. 443, s. c.

[4] McNally's Evid. p. 154; Rex *v.* White, 2 Leach, C. Cas. 482, note (a); Rex *v.* Wade, 1 Mood. Cr. Cas. 86. But in a late case, before Mr. Justice Patteson, the learned judge said, that he must be satisfied that the child felt the binding obligation of an oath, from the general course of her religious education; and that the effect of the oath upon the conscience should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated, for the purpose of the particular trial. And, therefore, the witness having been visited but twice by a clergyman, who had given her some instructions as to the nature of an oath, but still she had but an imperfect understanding on the subject, her evidence was rejected. Rex *v.* Williams, 7 C. & P. 320. In a more recent case, where the principal witness for the prosecution was a female child, of six years old, wholly ignorant of the nature of an oath, a postponement of the trial was moved for, that she might be instructed on that subject; but Pollock, C. B., refused the motion as tending to endanger the safety of public justice; observing that more probably would be lost in memory, than would be gained in point of religious education; adding, however, that in cases where the intellect was sufficiently matured, but the education only had been neglected, a postponement might be very proper. Regina *v.* Nicholas, 2 C. & K. 246.

[5] See Rex *v.* Wade, 1 Mood. Cr. Cas. 86.

[6] Per Ld. Hardwicke, 1 Atk. 48. The opinions of the earlier as well as later jurists, concerning the nature and obligation of an oath, are quoted and discussed much at large, in Omichund *v.* Barker, 1 Atk. 21, and in Tyler on Oaths, *passim*, to which the learned reader is referred.

[7] 1 Stark. Evid. 22. "The law is wise in requiring the highest attainable sanc-

sufficient, that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from fear of the punishment which the law inflicts upon persons guilty of perjury. Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth. Our law, in common with the law of most civilized countries, requires the additional security afforded by the religious sanction implied in an oath; and, as a necessary consequence, rejects all witnesses, who are incapable of giving this security.[1] Atheists, therefore, and all infidels, that is, those who profess no religion that can bind their consciences to speak truth, are rejected as incompetent to testify as witnesses.[2]

§ 369. As to the nature and *degree of religious faith* required in a witness, the rule of law, as at present understood, seems to be this, that the person is competent to testify, if he believes in the being of God, and a future state of rewards and punishments; that is, that Divine punishment will be the certain consequence of perjury. It may be considered as now generally settled, in this country, that it is not material, whether the witness believes that the punishment will be inflicted in this world, or in the next. It is enough, if he has the religious sense of accountability to the Omniscient Being, who is invoked by an oath.[3]

tion for the truth of testimony given; and is consistent in rejecting all witnesses incapable of feeling this sanction, or of receiving this test; whether this incapacity arises from the imbecility of their understanding, or from its perversity. It does not impute guilt or blame to either. If the witness is evidently intoxicated, he is not allowed to be sworn; because, for the time being, he is evidently incapable of feeling the force and obligation of an oath. The non compos, and the infant of tender age, are rejected for the same reason, but without blame. The atheist is also rejected, because he, too, is incapable of realizing the obligation of an oath, in consequence of his unbelief. The law looks only to the fact of incapacity, not to the cause, or the manner of avowal. Whether it be calmly insinuated with the elegance of Gibbon, or roared forth in the disgusting blasphemies of Paine; still it is atheism; and to require the mere formality of an oath, from one who avowedly despises, or is incapable of feeling, its peculiar sanction, would be but a mockery of justice." 1 Law Reporter, pp. 346, 347.

[1] 1 Phil. Evid. 10 (9th edit.).

[2] Bull. N. P. 292; 1 Stark. Evid. 22; 1 Atk. 40, 45; 1 Phil. Evid. 10 (9th edit.). The objection of incompetency, from the want of belief in the existence of God, is abolished, as it seems, in *Michigan*, by force of the statute which enacts that no person shall be deemed incompetent as a witness "on account of his opinions on the subject of religion." Rev. Stat. 1846, ch. 102, § 96. So in *Maine*, Rev. Stat. ch. 82. And in *Wisconsin*, Const. Art. 1, § 18. And in *Missouri*, Rev. Stat. 1845, ch. 186, § 21. And in Mass. Gen. Stat. ch. 131, § 12. In some other states, it is made sufficient, by statute, if the witness believes in the *existence* of a Supreme Being. *Connecticut*, Rev. Stat. 1849, tit. 1, § 140; *New Hampshire*, Rev. Stat. 1842, ch. 188, § 9. In others, it is requisite that the witness should believe in the existence of a Supreme Being, *who will punish false swearing*. *New York*, Rev. Stat. vol. 2, p. 505 (3d edit.); *Missouri*, Rev. Stat. 1835, p. 419.

[3] The proper test of the competency of a witness on the score of a religious be-

§ 370. It should here be observed, that defect of religious faith is *never presumed*. On the contrary, the law presumes that every man brought up in a Christian land, where God is generally acknowledged, does believe in him, and fear him. The charity of its judgment is extended alike to all. The burden of proof is not on the party adducing the witness, to prove that he is a believer; but it is on the objecting party, to prove that he is not. Neither does the law presume that any man is a hypocrite. On the contrary, it presumes him to be what he professes himself to be, whether atheist, or Christian; and the state of a man's opinions, as well as the sanity of his mind, being once proved is, as we have already seen,[1] presumed to continue unchanged, until the contrary is shown. The state of his religious belief, at the time he is offered as a witness, is a fact to be ascertained; and this is presumed to be the common faith of the country, unless the objector can prove that it is not. The ordinary mode of showing this is by evidence of his declarations, previously made to others; the person himself not being interrogated;[2] for the object of

lief was settled, upon great consideration, in the case of Omichund *v.* Barker, Willes, 545; 1 Atk. 21 s. c. to be the belief of a God, and that he will reward and punish us according to our deserts. This rule was recognized in Butts *v.* Swartwood, 2 Cowen, 431; The People *v.* Matteson, 2 Cowen, 433, 573, note; and by Story, J., in Wakefield *v.* Ross, 5 Mason, 18; 9 Dane's Abr. 317, S. P.; and see Brock *v.* Milligan, 1 Wilcox, 125; Arnold *v.* Arnold, 13 Verm. 362. Whether any belief in a future state of existence is necessary, provided accountability to God in this life is acknowledged, is not perfectly clear. In Commonwealth *v.* Bacheler, 4 Am. Jurist, 81, Thacher, J., seemed to think it was. But in Hunscom *v.* Hunscom, 14 Mass., 184, the court held, that mere disbelief in a future existence went only to the credibility. This degree of disbelief is not inconsistent with the faith required in Omichund *v.* Barker. The only case, clearly to the contrary, is Atwood *v.* Welton, 7 Conn. 66. In Curtis *v.* Strong, 4 Day, 51, the witness did not believe in the obligation of an oath; and in Jackson *v.* Gridley, 18 Johns. 98, he was a mere atheist, without any sense of religion whatever. All that was said, in these two cases, beyond the point in judgment, was extrajudicial. In *Maine*, a belief in the existence of the Supreme Being was rendered sufficient, by Stat. 1833, ch. 58, without any reference to rewards or punishments. Smith *v.* Coffin, 6 Shepl. 157; but even this seems to be no longer required. See *supra*, § 368, note. See further, the People *v.* McGarren, 17 Wend. 460; Cubbison *v.* McCreary, 2 Watts & Serg. 262; Brock *v.* Milligan, 10 Ohio, 121; Thurston *v.* Whitney, 2 Law Rep. 18, N. S.; [Blair *v.* Seaver, 26 Penn. St. R. 274; Bennett *v.* State, 1 Swann, 44.]

[1] *Supra*, § 42. The State *v.* Stinson, 7 Law Reporter, 383.

[2] [The question whether a witness is, or is not an atheist, and so an incompetent witness, is a question of fact for the presiding judge alone, and his decision is not open to exception. Commonwealth *v.* Hills, 10 Cush. 530, 532. The want of such religious belief must be established by other means than the examination of the witness upon the stand. He is not to be questioned as to his religious belief, nor required to divulge his opinion upon that subject in answer to questions put to him while under examination. If he is to be set aside for want of such religious belief, the fact is to be shown by other witnesses, and by evidence of his previously expressed opinions voluntarily made known to others. By Shaw, C. J., in Commonwealth *v.* Smith, 2 Gray, 516. In this case the witness had testified in chief, and on cross-examination was asked if he believed in the existence of a God, and replied that he did. Upon this the court interposed and refused to allow

interrogating a witness, in these cases, before he is sworn, is not to obtain the knowledge of other facts, but to ascertain from his answers, the extent of his capacity, and whether he has sufficient understanding to be sworn.[1]

counsel to put further questions in regard to the religious belief of the witness, and the court say: "Aside, therefore, of the propriety of allowing further inquiry, after the witness had answered affirmatively the general question of his belief in the existence of God, in the opinion of the court, the whole inquiry of the witness upon this matter was irregular and unauthorized."]

[1] Swift's Evid. 48; Smith *v.* Coffin, 6 Shepl. 157. It has been questioned, whether the evidence of his declarations ought not to be confined to a period shortly anterior to the time of proving them, so that no change of opinion might be presumed. Brock *v.* Milligan, 1 Wilcox, 126, per Wood, J.

"The witness himself is never questioned in *modern* practice, as to his religious belief, though formerly it was otherwise. (1 Swift's Dig. 739; 5 Mason, 19; American Jurist, vol. 4, p. 79, note.) It is not allowed even after he has been sworn. (The Queen's case, 2 B. & B. 284.) Not because it is a question tending to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience, foreign to the spirit of our institutions. No man is obliged to avow his belief; but if he voluntarily does avow it, there is no reason why the avowal should not be proved, like any other fact. The truth and sincerity of the avowal, and the continuance of the belief thus avowed, are presumed, and very justly too, till they are disproved. If his opinions have been subsequently changed, this change will generally, if not always, be provable in the same mode. (Atwood *v.* Welton, 7 Conn. 66; Curtis *v.* Strong, 4 Day, 51; Swift's Evid. 48–50; Scott *v.* Hooper, 14 Verm. 535; Mr. Christian's note to 3 Bl. Comm. 369; 1 Phil. Evid. 18; Commonwealth *v.* Bachelor, 4 Am. Jur. 79, note.) If the change of opinion is very recent, this furnishes no good ground to admit the witness himself to declare it; because of the greater inconvenience which would result from thus opening a door to fraud, than from adhering to the rule requiring other evidence of this fact. The old cases, in which the witness himself was questioned as to his belief, have on this point been *overruled*. See Christian's note to 3 Bl. Comm. [369] note (30). The law, therefore, is not reduced to any absurdity in this matter. It exercises no inquisitorial power; neither does it resort to secondary or hearsay evidence. If the witness is objected to, it asks third persons to testify, whether he has declared his belief in God, and in a future state of rewards and punishments, &c. Of this fact they are as good witnesses as he could be; and the testimony is primary and direct. It should further be noticed, that the question, whether a person, about to be sworn, is an atheist or not, can never be raised by any one but an adverse party. No stranger or a volunteer has a right to object. There must, in every instance, be a suit between two or more parties, one of whom offers the person in question, as a competent witness. The presumption of law, that every citizen is a believer in the common religion of the country, holds good until it is disproved; and it would be contrary to all rule to allow any one, not party to the suit, to thrust in his objections to the course pursued by the litigants. This rule and uniform course of proceeding shows how much of the morbid sympathy expressed for the atheist is wasted. For there is nothing to prevent him from taking any oath of office; nor from swearing to a complaint before a magistrate; nor from making oath to his answer in chancery. In this last case, indeed, he could not be objected to, for another reason, namely, that the plaintiff, in his bill, requests the court to require him to answer upon his oath. In all these, and many other similar cases, there is no person authorized to raise an objection. Neither is the question permitted to be raised against the atheist, where he himself is the adverse party, and offers his own oath, in the ordinary course of proceeding. If he would make affidavit, in his own cause, to the absence of a witness, or to hold to bail, or to the truth of a plea in abatement, or to the loss of a paper, or to the genuineness of his books of account, or to his fears of bodily harm from one against whom he requests surety of the peace, or would take the poor debtor's oath; in these and the like cases the uniform course is to receive his oath like any other person's. The law, in such cases, does not know that he is an atheist; that is, it never allows the objection of infidelity to be made against any man, seeking his own rights in a court of justice; and it conclusively

§ 371. It may be added, in this place, that all witnesses are to be sworn according to the peculiar ceremonies of their own religion, or in such manner as they may deem binding on their own consciences. If the witness is not of the Christian religion, the court will inquire as to the form in which an oath is administered in his own country, or among those of his own faith, and will impose it in that form. And if, being a Christian, he has conscientious scruples against taking an oath in the usual form, he will be allowed to make a solemn religious asseveration, involving a like appeal to God for the truth of his testimony, in any mode which he shall declare to be binding on his conscience.[1] The court, in ascertaining whether the form in which the oath is administered is binding on the conscience of the witness, may inquire of the witness himself; and the proper time for making this inquiry is before he is sworn.[2] But if the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding on his conscience; but it is unnecessary and irrelevant to ask him, if he considers any other form of oath more binding, and therefore such question cannot be asked.[3] If a witness, without objecting, is sworn in the usual mode, but being of a different faith, the oath was not in a form affecting his conscience, as if, being a Jew, he was sworn on the Gospels, he is still punishable for perjury, if he swears falsely.[4]

and absolutely presumes that, so far as religious belief is concerned, all persons are capable of an oath, of whom it requires one, as the condition of its protection, or its aid; probably deeming it a less evil, that the solemnity of an oath should, in few instances, be mocked by those who feel not its force and meaning, than that a citizen should, in any case, be deprived of the benefit and protection of the law, on the ground of his religious belief. The state of his faith is not inquired into, where his own rights are concerned. He is only prevented from being made the instrument of taking away those of others." 1 Law Reporter, pp. 347, 348.

[1] Omichund *v.* Barker, 1 Atk. 21, 46; Willes, 538, 545–549, s. c.; Ramkissenseat *v.* Barker, 1 Atk. 19; Atcheson *v.* Everitt, Cowp. 389, 390; Bull. N. P. 292; 1 Phil. Evid. 9, 10, 11; 1 Stark. Evid. 22, 23; Rex *v.* Morgan, 1 Leach, Cr. Cas. 64; Vail *v.* Nickerson, 6 Mass. 262; Edmonds *v.* Rowe, Ry. & M. 77; Commonwealth *v.* Buzzell, 16 Pick. 153. "Quumque sit adseveratio religiosa, satis patet jusjurandum attemperandum esse cujusque religioni." Heinec. ad Pand. pars 3, §§ 13, 15. "Quodcunque nomen dederis, id utique constat, omne jusjurandum proficisci ex fide et persuasione jurantis; et inutile esse, nisi quis credat Deum, quem testem advocat, perjurii sui idoneum esse vendicem. Id autem credat, qui jurat per Deum suum, per sacra sua, et ex sua ipsius animi religione," &c. Bynkers. Obs. Jur. Rom. lib. 6, cap. 2.

[2] By Stat. 1 & 2 Vict. c. 105, an oath is binding, in whatever form, if administered in such form and with such ceremonies as the person may declare binding. But the doctrine itself is conceived to be common law.

[3] The Queen's case, 2 B. & B. 284.

[4] Sells *v.* Hoare, 3 B. & B. 232; The State *v.* Whisonhurst, 2 Hawks, 458. But the adverse party cannot, for that cause, have a new trial. Whether he may, if a witness on the other side testified without having been sworn at all, *quære*. If the

§ 372. Under this general head of exclusion because of insensibility to the obligation of an oath, may be ranked the case of *persons infamous;* that is, persons who, whatever may be their professed belief, have been guilty of those heinous crimes which men generally are not found to commit, unless when so depraved as to be unworthy of credit for truth. The basis of the rule seems to be, that such a person is morally too corrupt to be trusted to testify; so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all. Of such a person Chief Baron Gilbert remarks, that the credit of his oath is overbalanced by the stain of his iniquity.[1] The party, however, must have been legally adjudged guilty of the crime. If he is stigmatized by public fame only, and not by the censure of law, it affects the credit of his testimony, but not his admissibility as a witness.[2] The record, therefore, is required as the sole evidence of his guilt; no other proof being admitted of the crime; not only because of the gross injustice of trying the guilt of a third person in a case to which he is not a party, but also, lest, in the multiplication of the issues to be tried, the principal case should be lost sight of, and the administration of justice should be frustrated.[3]

§ 373. It is a point of no small difficulty to determine precisely the crimes which render the perpetrator thus infamous. The rule is justly stated to require, that "the *publicum judicium* must be upon an offence, implying such a dereliction of moral principle, as carries with it a conclusion of a total disregard to the obligation of an oath."[4] But the difficulty lies in the specification of those

omission of the oath was known at the time, it seems he cannot. Lawrence *v.* Houghton, 5 Johns. 129; White *v.* Hawn, Id. 351. But if it was not discovered until after the trial, he may. Hawks *v.* Baker, 6 Grecnl. 72. [As to the mode of administering the oath to deaf and dumb persons, see *supra*, § 366.]

[1] 1 Gilb. Evid. by Lofft, p. 256. It was formerly thought, that an infamous *punishment*, for whatever crime, rendered the person incompetent as a witness, by reason of infamy. But this notion is exploded; and it is now settled that it is the crime and not the punishment that renders the man infamous. Bull. N. P. 292; Pendock *v.* Mackinder, Willes, R. 666. In *Connecticut*, the *infamy* of the witness goes now only to his credibility. Rev. Stat. 1849, tit. 1, § 141. So in *Michigan*. Rev. Stat. 1846, ch. 102, § 99. And in *Massachusetts*. Gen. Stat., ch. 131, § 13. And in *Iowa*. Code of 1851, art. 2388. In *Florida*, a conviction of perjury is a perpetual obstacle to the competency of the party as a witness, notwithstanding he may have been pardoned or punished. But convictions for other crimes go only to the credibility, except the crimes of murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy, or buggery. Convictions for any crime in another state, go to the credibility only. Thompson's Dig. pp. 334, 335.

[2] 2 Dods. R. 186, per Sir Wm. Scott.

[3] Rex *v.* Castel Careinion, 8 East, 77; Lee *v.* Gansell, Cowp. 3, per Lord Mansfield.

[4] 2 Dods. R. 186, per Sir Wm. Scott.

offences. The usual and more general enumeration is, *treason*, *felony*, and the *crimen falsi*.[1] In regard to the two former, as all treasons, and almost all felonies were punishable with death, it was very natural that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a court of justice. But the extent and meaning of the term *crimen falsi*, in our law, is nowhere laid down with precision. In the Roman law, from which we have borrowed the term, it included not only forgery, but every species of fraud and deceit.[2] If the offence did not fall under any other head, it was called *stellionatus*,[3] which included "all kinds of cozenage and knavish practice in bargaining." But it is clear, that the common law has not employed the term in this extensive sense, when applying it to the disqualification of witnesses; because convictions for many offences, clearly belonging to the *crimen falsi* of the civilians, have not this effect. Of this sort are deceits in the quality of provisions, deceits by false weights and measures, conspiracy to defraud by spreading false news,[4] and several others. On the other hand, it has been adjudged that persons are rendered infamous, and therefore incompetent to tes-

[1] Phil. & Am. on Evid. p. 17; 6 Com. Dig. 353, *Testmoigne*, A. 4, 5; Co. Lit. 6, b; 2 Hale, P. C. 277; 1 Stark. Evid. 94, 95. A conviction for petty larceny disqualifies, as well as for grand larceny. Pendock *v.* Mackinder, Willes, R. 665.

[2] Cod. lib. 9, tit. 22, ad legem Corneliam de falsis. Cujac. Opera, tom. ix. in locum. (Ed. Prati, A. D. 1839, 4to, pp. 2191-2200); 1 Brown's Civ. & Adm. Law, p. 525; Dig. lib. 48, tit. 10; Heinec. in Pand. pars vii. § 214-218. The *crimen falsi*, as recognized in the Roman law, might be committed, 1. By words, as in perjury; — 2. By writing, as in forgery; — 3. By act or deed; namely, in counterfeiting or adulterating the public money, — in fraudulently substituting one child for another, or a suppositious birth, — or in fraudulently personating another, — in using false weights or measures, — in selling or mortgaging the same thing to two several persons, in two several contracts, — and in officiously supporting the suit of another, by money, &c., answering to the common-law crime of maintenance. Wood, Instit. Civil Law, pp. 282, 283; Halifax, Analysis Rom. Law, p. 134. The law of Normandy disposed of the whole subject in these words: "Notandum siquidem est, quod nemo in querelâ suâ pro teste recipiendus est; nec ejus hæredes nec participes querelæ. Et hoc intelligendum est tam ex parte actoris, quam ex parte defensoris. Omnes autem illi, qui *perjurio vel lasione fidei* sunt infames, ob hoc etiam sunt repellendi, et omnes illi, qui in bello succubuerunt." Jura Normaniæ, cap. 62; [in Le Grand Coustumier, fol. edit. 1539.] In the ancient Danish law it is thus defined, in the chapter entitled, *Falsi crimen quodnam censetur*. "Falsum est, si terminum, finesve quis moverit, monetam nisi venia vel mandato regio cusserit, argentum adulterinum conflaverit, nummisve reprobis dolo malo emat vendatque, vel argento adulterino." Ancher, Lex Cimbrica, lib. 3, cap. 65, p. 249.

[3] Dig. lib. 47, tit. 20, l. 3, Cujac. (in locum) Opera, tom. ix. (ed. supra), p. 2224. Stellionatus nomine significatur omne crimen, quod nomen proprium non habet, omnis fraus, quæ nomine proprio vacat. Translatum autem esse nomen stellionatus, nemo est qui nesciat, ab animali ad hominem vafrum, et decipiendi peritum. Id. Heinec. ad Pand. pars. vii. §§ 147, 148; 1 Brown's Civ. & Adm. Law, p. 426.

[4] The Ville de Varsovie, 2 Dods. R. 174. But see Crowther *v.* Hopwood, 3 Stark. R. 21.

tify, by having been convicted of forgery,[1] perjury, subornation of perjury,[2] suppression of testimony by bribery, or conspiracy to procure the absence of a witness,[3] or other conspiracy, to accuse one of a crime,[4] and barratry.[5] And from these decisions, it may be deduced, that the *crimen falsi* of the common law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. At least it may be said, in the language of Sir William Scott,[6] "so far the law has gone affirmatively; and it is not for me to say where it should stop, negatively."

§ 374. In regard to the *extent and effect of the disability* thus created, a distinction is to be observed between cases in which the person disqualified is a party, and those in which he is not. In cases between third persons, his testimony is universally excluded.[7] But where he is a party, in order that he may not be wholly remediless, he may make any affidavit necessary to his exculpation or defence, or for relief against an irregular judgment, or the like;[8] but it is said that his affidavit shall not be read to support a criminal charge.[9] If he was one of the subscribing witnesses to a deed, will, or other instrument, before his conviction, his handwriting may be proved, as though he were dead.[10]

§ 375. We have already remarked, that no person is deemed infamous in law, until he has been legally found guilty of an infamous crime. But the mere verdict of the jury is not sufficient for this purpose; for it may be set aside, or the judgment may be arrested, on motion for that purpose. It is *the judgment*, and that only, which is received as the legal and conclusive evidence of the

[1] Rex *v.* Davis, 5 Mod. 74.

[2] Co. Lit. 6, b; 6 Com. Dig. 353, *Testm.* A. 5.

[3] Clancey's case, Fortesc. R. 208; Bushell *v.* Barrett, Ry. & M. 434.

[4] 2 Hale, P. C. 277; Hawk. P. C. b. 2, ch. 46, § 101; Co. Lit. 6, b; Rex *v.* Priddle, 2 Leach, Cr. Cas. 496; Crowther *v.* Hopwood, 3 Stark. R. 21, arg.; 1 Stark. Evid. 95; 2 Dods. R. 191.

[5] Rex *v.* Ford, 2 Salk. 690; Bull. N. P. 292. The receiver of stolen goods is incompetent as a witness. See the Trial of Abner Rogers, pp. 136, 137; [Commonwealth *v.* Rogers, 7 Met. 500. A person convicted of maliciously obstructing the passing of cars on a railroad is not thereby an incompetent witness. Commonwealth *v.* Dame, 8 Cush. 384.] If a statute declare the perpetrator of a crime "infamous," this, it seems, will render him incompetent to testify. 1 Gilb. Evid. by Loft, pp. 256, 257; Co. Lit. 6, b.

[6] 2 Dods. R. 191. See also 2 Russ. on Crimes, 592, 593.

[7] Even where it is merely offered as an affidavit in showing cause against a rule calling upon the party to answer, it will be rejected. *In re* Sawyer, 2 Ad. & El. 721, N. S.

[8] Davis and Carter's case, 2 Salk. 461; Rex *v.* Gardiner, 2 Burr. 1117; Atcheson *v.* Everitt, Cowp. 382; Skinner *v.* Porot, 1 Ashm. 57.

[9] Walker *v.* Kearney, 2 Stra. 1148; Rex *v.* Gardiner, 2 Burr. 1117.

[10] Jones *v.* Mason, 2 Stra. 833.

party's guilt, for the purpose of rendering him incompetent to testify.[1] And it must appear that the judgment was rendered by a court of competent jurisdiction.[2] Judgment of outlawry, for treason or felony, will have the same effect;[3] for the party, in submitting to an outlawry, virtually confesses his guilt; and so the record is equivalent to a judgment upon confession. If the guilt of the party should be shown by oral evidence, and even by his own admission (though in neither of these modes can it be proved, if the evidence be objected to), or, by his plea of "guilty" which has not been followed by a judgment,[4] the proof does not go to the competency of the witness, however it may affect his credibility.[5] And the judgment itself, when offered against his admissibility, can be proved only by the record, or, in proper cases, by an authenticated copy, which the objector must offer and produce at the time when the witness is about to be sworn, or at farthest in the course of the trial.[6]

§ 376. Whether judgment of an infamous crime, passed by a foreign tribunal, ought to be allowed to affect the competency of the party as a witness, in the courts of this country, is a question upon which jurists are not entirely agreed. But the weight of modern opinions seems to be, that personal disqualifications, not arising from the law of nature, but from the positive law of the country, and especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated.[7] Accordingly, it has been held, upon great consideration, that a conviction and sentence for a felony, in one of the United States, did not render the party incompetent as a witness, in the courts of another state; though it might be shown in diminution of the credit due to his testimony.[8]

[1] 6 Com. Dig. 354, *Testm.* A. 5; Rex *v.* Castel Careinion, 8 East, 77; Lee *v.* Gansell, Cowp. 3; Bull. N. P. 292; Fitch *v.* Smalbrook, T. Ray. 32; The People *v.* Whipple, 9 Cowen, 707; The People *v.* Herrick, 13 Johns. 82; Cushman *v.* Luker, 2 Mass. 108; Castellano *v.* Peillon, 2 Martin, N. S. 466.

[2] Cooke *v.* Maxwell, 2 Stark. R. 183.

[3] Co. Lit. 6, b; Hawk. P. C. b. 2, ch. 48, § 22; 3 Inst. 212; 6 Com. Dig. 354, *Testm.* A. 5; 1 Stark. Evid. 95, 96. In Scotland it is otherwise. Tait's Evid. p. 347.

[4] Regina *v.* Hincks, 1 Dennis. Cr. Cas. 84.

[5] Rex *v.* Castel Careinion, 8 East, 77; Wicks *v.* Smalbrook, 1 Sid. 51; T. Ray. 32, s. c.; The People *v.* Herrick, 13 Johns. 82.

[6] Id. Hilts *v.* Colven, 14 Johns. 182; Commonwealth *v.* Green, 17 Mass. 537. In The State *v.* Ridgely, 2 Har. & McHen. 120, and Clark's Lessee *v.* Hall, Id. 378, which have been cited to the contrary, parol evidence was admitted to prove only the fact of the witness's having been transported as a convict; not to prove the judgment of conviction.

[7] Story on Confl. of Laws, §§ 91, 92, 104, 620–625; Martens, Law of Nations, b. 3, ch. 3, §§ 24, 25.

[8] Commonwealth *v.* Green, 17 Mass. 515, 539–549, per totam Curiam; *contra*,

§ 377. The *disability* thus arising from infamy may, in general, be *removed* in two modes: (1.) by reversal of the judgment; and (2.) by a pardon. The reversal of the judgment must be shown in the same manner that the judgment itself must have been proved, namely, by production of the record of reversal, or, in proper cases, by a duly authenticated exemplification of it. The pardon must be proved, by production of the charter of pardon, under the great seal. And though it were granted after the prisoner had suffered the entire punishment awarded against him, yet it has been held sufficient to restore the competency of the witness, though he would, in such case, be entitled to very little credit.[1]

§ 378. The rule, that a pardon restores the competency and completely rehabilitates the party, is *limited* to cases where the disability is a consequence of the judgment, according to the principles of the common law.[2] But where the disability is annexed to the conviction of a crime by the express words of a statute, it is generally agreed that the pardon will not, in such a case, restore the competency of the offender; the prerogative of the sovereign being controlled by the authority of the express law. Thus, if a man be adjudged guilty on an indictment for perjury, at common law, a pardon will restore his competency. But if the indictment be founded on the statute of 5 Eliz. c. 9, which declares, that no person, convicted and attainted of perjury, or subornation of perjury, shall be from thereforth received as

The State *v.* Candler, 3 Hawks, 393, per Taylor, C. J., and Henderson, J.; Hall, J., *dubitante*, but inclining in favor of admitting the witness. In the cases of The State *v.* Ridgely, 2 Har. & McHen. 120; Clark's Lessee *v.* Hall, Id. 378; and Cole's Lessee *v.* Cole, 1 Har. & Johns. 572; which are sometimes cited in the negative, this point was not raised nor considered; they being cases of persons sentenced in England for felony, and transported to Maryland, under the sentence prior to the Revolution.

[1] The United States *v.* Jones, 2 Wheeler's Cr. Cas. 451, per Thompson, J. By Stat. 9 Geo. IV., c. 32, § 3, enduring the punishment to which an offender has been sentenced for any felony not punishable with death has the same effect as a pardon under the great seal, for the same offence; and of course it removes the disqualification to testify. And the same effect is given by § 4, of the same statute, to the endurance of the punishment awarded for any misdemeanor, except perjury and subornation of perjury. See also 1 W. IV., c. 37, to the same effect; Tait on Evid. pp. 346, 347. But whether these enactments have proceeded on the ground, that the incompetency is in the nature of punishment, or, that the offender is reformed by the salutary discipline he has undergone, does not clearly appear.

[2] If the pardon of one sentenced to the penitentiary for life contains a proviso, that nothing therein contained shall be construed, so as to relieve the party from the legal disabilities consequent upon his sentence, other than the imprisonment, the proviso is void, and the party is fully rehabilitated. The People *v.* Pease, 3 Johns. Cas. 333.

a witness in any court of record, he will not be rendered competent by a pardon.[1]

§ 379. The case of *accomplices* is usually mentioned under the head of infamy; but we propose to treat it more appropriately, when we come to speak of persons disqualified by interest, since accomplices generally testify under a promise or expectation of pardon, or some other benefit. But it may here be observed, that

[1] Rex *v.* Ford, 2 Salk. 689; Dover *v.* Maestaer, 5 Esp. 92, 94; 2 Russ. on Crimes, 595, 596; Rex *v.* Greepe, 2 Salk. 513, 514; Bull. N. P. 292; Phil. & Am. on Evid. 21, 22. See also Mr. Hargrave's Juridical Arguments, vol. 2, p. 221 *et seq.*, where this topic is treated with great ability. Whether the disability is, or is not, made a part of the judgment, and entered as such on the record, does not seem to be of any importance. The form in which this distinction is taken in the earlier cases evidently shows that its force was understood to consist in this, that in the former case the disability was declared by the statute, and in the latter, that it stood at common law. "Although the incapacity to testify, especially considered as a mark of infamy, may really operate as a severe punishment upon the party; yet there are other considerations affecting other persons, which may well warrant his exclusion from the halls of justice. It is not consistent with the interests of others, nor with the protection which is due to them from the state, that they should be exposed to the peril of testimony from persons regardless of the obligation of an oath; and hence, on grounds of public policy, the legislature may well require, that while the judgment itself remains unreversed, the party convicted shall not be heard as a witness. It may be more safe to exclude in all cases, than to admit in all, or attempt to distinguish by investigating the grounds on which the pardon may have been granted. And it is without doubt as clearly within the power of the legislature, to modify the law of evidence, by declaring what manner of persons shall be competent to testify, as by enacting, as in the statute of frauds, that no person shall be heard *viva voce* in proof of a certain class of contracts. The statute of Elizabeth itself seems to place the exception on the ground of a rule of evidence, and not on that of a penal fulmination against the offender. The intent of the legislature appears to have been not so much to punish the party, by depriving him of the privilege of being a witness or a juror, as to prohibit the courts from receiving the oath of any person convicted of disregarding its obligation. And whether this consequence of the conviction be entered on the record or not, the effect is the same. The judgment under the statute being properly shown to the judges of a court of justice, their duty is declared in the statute, independent of the insertion of the inhibition as part of the sentence, and unaffected by any subsequent pardon. The legislature, in the exercise of its power to punish crime, awards fine, imprisonment, and the pillory against the offender; in the discharge of its duty to preserve the temple of justice from pollution, it repels from its portal the man who feareth not an oath. Thus it appears, that a man convicted of perjury cannot be sworn in a court of justice, while the judgment remains unreversed, though his offence may have been pardoned after the judgment; but the reason is found in the express direction of the statutes to the courts, and not in the circumstances of the disability being made a part of the judgment. The pardon exerts its full vigor on the offender; but is not allowed to operate beyond this, upon the rule of evidence enacted by the statute. The punishment of the crime belongs to the criminal code; the rule of evidence to the civil." See Amer. Jur. vol. 11, pp. 360, 361, 362. In several of the United States, the disqualification is expressly declared by statutes, and is extended to all the crimes therein enumerated; comprehending not only all the varieties of the *crimen falsi*, as understood in the common law, but divers other offences. In some of the states, it is expressly enacted, that the pardon of one convicted of perjury shall not restore his competency as a witness. See *Virginia*, Rev. Stat. 1849, ch. 199, § 19; *Florida*, Thompson's Dig. p. 334; *Georgia*, Hotchkiss's Dig. p. 730. But in *Ohio*, competency is restored by pardon. Rev. Stat. 1841, chap. 35, § 41. In *Georgia*, convicts in the penitentiary are competent to prove an escape, or a mutiny. Hotchk. Dig. *supra*. And see *New Jersey*, Rev. Stat. 1846, tit. 8, ch. 1, § 23; Id. tit. 34, ch. 9, § 1.

it is a settled rule of evidence, that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not, on that account, an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime. The admission of accomplices, as witnesses for the government, is justified by the necessity of the case, it being often impossible to bring the principal offenders to justice without them. The usual course is, to leave out of the indictment those who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime.[1] He is also a competent witness in their favor; and if he is put on his trial at the same time with them, and there is only very slight evidence, if any at all, against him, the court may, as we have already seen,[2] and generally will forthwith direct a separate verdict as to him, and, upon his acquittal, will admit him as a witness for the others. If he is convicted, and the punishment is by fine only, he will be admitted for the others, if he has paid the fine.[3] But whether an accomplice already charged with the crime, by indictment, shall be admitted as a witness for the government, or not, is determined by the judges, in their discretion, as may best serve the purpose of justice. If he appears to have been the principal offender, he will be rejected.[4] And if an accomplice, having made a private confession, upon a promise of pardon made by the attorney-general, should afterwards refuse to testify, he may be convicted upon the evidence of that confession.[5]

§ 380. The *degree of credit* which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no

[1] See Jones *v.* Georgia, 1 Kelly, 610.

[2] *Supra*, § 362.

[3] 2 Russ. on Crimes, 597, 600; Rex *v.* Westbeer, 1 Leach, Cr. Cas. 14; Charnock's case, 4 St. Tr. 582 (edit. 1730); 12 Howell's St. Tr. 1454, s. c.; Rex *v.* Fletcher, 1 Stra. 633. The rule of the Roman law, *Nemo, allegans turpitudinem suam, est audiendus*, though formerly applied to witnesses, is now to that extent exploded. It can only be applied, at this day, to the case of a party seeking relief. See *infra*, § 383, note. See also 2 Stark. Evid. 9, 10; 2 Hale, P. C. 280; 7 T. R. 611; Musson *v.* Fales, 16 Mass. 335; Churchill *v.* Suter, 2 Mass. 162; Townsend *v.* Bush, 1 Conn. 267, per Trumbull, J.

[4] The People *v.* Whipple, 9 Cowen, 707; *supra*, § 363.

[5] Commonwealth *v.* Knapp, 10 Pick. 477; Rex *v.* Burley, 2 Stark. Evid. 12, note (r).

such rule of law; it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice, without any confirmation of his statement.[1] But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be regarded as an omission of duty on the part of the judge.[2] And, considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner in any case of felony, upon the sole and uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but only advise them not to give credit to the testimony.

§ 381. But though it is thus the settled practice, in cases of felony, to require other evidence in corroboration of that of an accomplice; yet, in regard to the *manner and extent of the corroboration* to be required, learned judges are not perfectly agreed. Some have deemed it sufficient, if the witness is confirmed in any material part of the case;[3] others have required confirmatory evi-

[1] Rex *v.* Hastings, 7 C. & P. 152, per Ld. Denman, C. J.; Rex *v.* Jones, 2 Campb. 132, per Ld. Ellenborough; 31 Howell's St. Tr. 315, s. c.; Rex *v.* Atwood, 2 Leach, Cr. Cas. 521; Rex *v.* Durham, Id. 528; Rex *v.* Dawber, 3 Stark. R. 34; Rex *v.* Barnard, 1 C. & P. 87, 88; The People *v.* Costello, 1 Denio (N. Y.) R. 83.

[2] Roscoe's Crim. Evid. p. 120; 2 Stark. Evid. 12; Rex *v.* Barnard, 1 C. & P. 87. For the limitation of this practice to cases of felony, see Rex *v.* Jones, 31 Howell's St. Tr. 315, per Gibbs, Attor.-Gen., arg. See also Rex *v.* Hargrave, 5 C. & P. 170, where persons present at a fight, which resulted in manslaughter, though principals in the second degree, were held not to be such accomplices as required corroboration, when testifying as witnesses.

[3] This is the rule in Massachusetts, where the law was stated by Morton, J., as follows: "I. It is competent for a jury to convict on the testimony of an accomplice alone. The principle which allows the evidence to go to the jury, necessarily involves in it a power in them to believe it. The defendant has a right to have the jury decide upon the evidence which may be offered against him; and their duty will require of them to return a verdict of guilty or not guilty, according to the conviction which that evidence shall produce in their minds. 2 Hawk. P. C. ch. 46, § 135; 1 Hale, P. C. 304, 305; Roscoe's Crim. Ev. 119; 1 Phil. Ev. 32; 2 Stark. Ev. 18, 20. 2. But the source of this evidence is so corrupt, that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation. Hence the court ever consider it their duty to advise a jury to acquit, where there is no evidence other than the uncorroborated testimony of an accomplice. 1 Phil. Evid. 34; 2 Stark. Evid. 24; Rex *v.* Durham, 2 Leach, 528; Rex *v.* Jones, 2 Campb. 132; 1 Wheeler's Crim. Cas. 418; 2 Rogers's Recorder, 38; 5 Ibid. 95. 3. The mode of corroboration seems to be less certain. It is perfectly clear, that it need not extend to the whole testimony; but it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others. But what amounts to corroboration? We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters, which were known to everybody, would have no tend-

dence as to the *corpus delicti* only; and others have thought it essential, that there should be corroborating proof that the prisoner actually participated in the offence; and that, when several prisoners are to be tried, confirmation is to be required as to all of them, before all can be safely convicted; the confirmation of the witness, as to the commission of the crime, being regarded as no confirmation at all, as it respects the prisoner. For, in describing the circumstances of the offence, he may have no inducement to speak falsely, but may have every motive to declare the truth, if he intends to be believed, when he afterwards fixes the crime upon the prisoner.[1] If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if there were but one.[2]

§ 382. There is one class of persons *apparently accomplices*, to whom the rule, requiring corroborating evidence, does not apply;

eney to confirm his testimony, involving the guilt of the party on trial. If this were the case, every witness, not incompetent for the want of understanding, could always furnish materials for the corroboration of his own testimony. If he could state where he was born, where he had resided, in whose custody he had been, or in what jail, or what room in the jail he had been confined, he might easily get confirmation of all these particulars. But these circumstances having no necessary connection with the guilt of the defendant, the proof of the correctness of the statement in relation to them would not conduce to prove that a statement of the guilt of the defendant was true. Roscoe's Crim. Evid. 120; Rex *v.* Addis. 6 Car. & Payne, 388." See Commonwealth *v.* Bosworth, 22 Pick. 397, 399, 400; The People *v.* Costello, 1 Denio, 83. A similar view of the nature of corroborative evidence, in cases where such evidence is necessary, was taken by Dr. Lushington, who held that it meant evidence, not merely showing that the account given is probable, but proving facts *ejusdem generis*, and tending to produce the same result. Simmons *v.* Simmons, 11 Jur. 830. And see Maddock *v.* Sullivan, 2 Rich. Eq. R. 4.

[1] Rex *v.* Wilkes, 7 C. & P. 272, per Alderson, B.; Rex *v.* Moore, Id. 270; Rex *v.* Addis, 6 C. & P. 388, per Patteson, J.; Rex *v.* Wells, 1 Mood. & M. 326, per Littledale, J.; Rex *v.* Webb, 6 C. & P. 595; Regina *v.* Dyke, 8 C. & P. 261; Regina *v.* Birkett, 8 C. & P. 732; Commonwealth *v.* Bosworth, 22 Pick. 399, per Morton, J. The course of opinions and practice on this subject is stated more at large in 1 Phil. Evid. pp. 30–38; 2 Russ. on Crimes, pp. 956–968, and in 2 Stark. Evid. p. 12, note (x), to which the learned reader is referred. See also Roscoe's Crim. Evid. p. 120. Chief Baron Joy, after an elaborate examination of English authorities, states the true rule to be this, that "the confirmation ought to be in such and so many parts of the accomplice's *narrative*, as may reasonably satisfy the jury that he is telling truth, without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observations of the judge." See Joy on the Evidence of Accomplices, pp. 98, 99. By the Scotch law, the evidence of a single witness is in no case sufficient to warrant a conviction, unless supported by a train of circumstances. Alison's Practice, p. 551. In *Iowa*, it is required by statute, that the corroboration be such as shall tend to connect the defendant with the commission of the offence; and not merely to show the commission of the crime, or its circumstances. Code of 1851, art. 2998.

[2] Rex *v.* Noakes, 3 C. & P. 326, per Littledale, J.; Regina *v.* Bannen, 2 Mood. Cr. Cas. 309. The testimony of the wife of an accomplice is not considered as corroborative of her husband. Rex *v.* Neale, 7 C. & P. 168, per Park, J.

namely, persons who have entered into communication with conspirators, but either afterwards repenting, or having originally determined to frustrate the enterprise, have subsequently disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, until the matter can be so far advanced and matured, so as to insure their conviction and punishment. The early disclosure is considered as binding the party to his duty; and though a great degree of objection or disfavor may attach to him for the part he has acted as an *informer*, or on other accounts, yet his case is not treated as the case of an accomplice.[1]

§ 383. Whether a *party to a negotiable instrument*, who has given it credit and currency by his signature, shall afterwards be admitted as a witness, in a suit between other persons, to prove the instrument *originally void*, is a question upon which judges have been much divided in opinion. The leading case against the admissibility of the witness is that of *Walton* v. *Shelley*,[2] in which the indorser of a promissory note was called to prove it void for usury in its original concoction. The security was in the hands of an innocent holder. Lord Mansfield, and the other learned judges held that upon general grounds of public policy, the witness was inadmissible; it being "of consequence to mankind, that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it." And, in corroboration of this opinion, they referred to the spirit of that maxim of the Roman law, — *Nemo, allegans suam turpitudinem, est audiendus*.[3]

§ 384. The doctrine of this case afterwards came under discussion, in the equally celebrated case of *Jordaine* v. *Lashbrooke*.[4]

[1] Rex *v.* Despard, 12 Howell's St. Tr. 489, per Lord Ellenborough. [One who purchases intoxicating liquor sold contrary to law, for the express purpose of prosecuting the seller for an unlawful sale, is not an accomplice. Commonwealth *v.* Downing, 4 Gray, 29.]

[2] 1 T. R. 296.

[3] This maxim, though it is said not to be expressed, in terms, in the text of the Corpus Juris (see Gilmer's Rep. p. 275, note), is exceedingly familiar among the civilians; and is found in their commentaries on various laws in the Code. See Corpus Juris Glossatum, tom. iv. col. 461, 1799; Corp. Juris Gothofredi (fol. edit.), Cod. lib. 7, tit. 8, l. 5, in margine; Codex Justiniani (4to, Parisiis, 1550), lib. 7, tit. 16, l. 1; Id. tit. 8, l. 5, in margine; 1 Mascard. De Prob. Concl. 78, n. 42. And see 4 Inst. 279. It seems formerly to have been deemed sufficient to exclude witnesses, testifying to their own turpitude; but the objection is now held to go only to the credibility of the testimony. 2 Stark. Evid. 9, 10; 2 Hale, P. C. 280; 7 T. R. 609, per Grose, J.; Id. 611, per Lawrence, J. Thus, a witness is competent to testify that his former oath was corruptly false. Rex *v.* Teal, 11 East, 309; Rands *v.* Thomas, 5 M. & S. 244.

[4] 7 T. R. 599.

This was an action by the indorsee of a bill of exchange against the acceptor. The bill bore date at Hamburg; and the defence was, that it was drawn in London, and so was void at its creation, for want of a stamp; the statute[1] having declared, that unstamped bills should neither be pleaded, given in evidence, or allowed to be available, in law or equity. The indorser was offered by the defendant as a witness, to prove this fact, and the court held that he was admissible. This case might, perhaps, have formed an exception to the general rule adopted in *Walton* v. *Shelley*, on the ground, that the general policy of the law of commerce ought to yield to the public necessity in matters of revenue; and this necessity was relied upon by two of the three learned judges who concurred in the decision. But they also concurred, with Lord Kenyon, in reviewing and overruling the doctrine of that case. The rule, therefore, now received in England is, that the party to any instrument, whether negotiable or not, is a competent witness to prove any fact, to which any other witness would be competent to testify; provided he is not shown to be legally infamous, and is not directly interested in the event of the suit. The objection, that thereby he asserts that to be false which he has solemnly attested or held out to the world as true, goes only to his credibility with the jury.[2]

§ 385. The courts of some of the *American states* have adopted the later English rule, and admitted the indorser, or other party to an instrument, as a competent witness to impeach it, in all cases where he is not on other grounds disqualified. In other states decisions are found, which go to the exclusion of the party to an instrument in every case, when offered as a witness to defeat it, in the hands of a third person; thus importing into the Law of Evidence the maxim of the Roman law in its broadest extent. In other states, the courts, referring the rule of exclusion to the ground of public convenience, have restricted its application to

[1] 31 Geo. III., c. 25, §§ 2, 16. This act was passed subsequent to the decision of Walton *v.* Shelley, 1 T. R. 296.

[2] 1 Phil. Evid. 39, 40. On this ground, parties to other instruments, as well as subscribing witnesses, if not under some other disability, are, both in England and in the United States, held admissible witnesses to impeach the original validity of such instruments. 7 T. R. 611, per Lawrence, J.; Heward *v.* Shipley, 4 East, 180; Lowe *v.* Joliffe, 1 W. Bl. 365; Austin *v.* Willes, Bull. N. P. 264; Howard *v.* Braithwaite, 1 Ves. & B. 202, 208; Title *v.* Grevett, 2 Ld. Raym. 1008; Dickinson *v.* Dickinson, 9 Met. 471; Twambly *v.* Henley, 4 Mass. 441. It has, however, been held in *Louisiana*, that a notary cannot be examined as a witness, to contradict a statement made by him in a protest; and that the principle extends to every public officer, in regard to a certificate given by him in his official character. Peet *v.* Dougherty, 7 Rob. 85.

the case of a negotiable security, actually negotiated and put into circulation before its maturity, and still in the hands of an innocent indorsee, without notice of the alleged original infirmity, or any other defect in the contract. And in this case, the weight of American authority may now be considered as against the admissibility of the witness to impeach the original validity of the security; although the contrary is still holden in some courts, whose decisions, in general, are received with the highest respect.[1]

[1] The rule, that the indorser of a negotiable security, negotiated before it was due, is not admissible as a witness to prove it originally void, when in the hands of an innocent indorsee, is sustained by the Supreme Court of the United States, in The Bank of the United States *v.* Dunn, 6 Peters, 51, 57, explained and confirmed in The Bank of the Metropolis *v.* Jones, 8 Peters, 12, and in the United States *v.* Leffler, 11 Peters, 86, 94, 95; Scott *v.* Lloyd, 12 Peters, 149; Henderson *v.* Anderson, 3 Howard, s. c. Rep. 73; [Saltmarsh *v.* Tuthill, 13 How. U. S. 229;] Taylor *v.* Luther, 2 Sumner, 235, per Story, J. It was also adopted in *Massachusetts;* Churchill *v.* Suter, 4 Mass. 156; Fox *v.* Whitney, 16 Mass. 118; Packard *v.* Richardson, 17 Mass. 122. See also the case of Thayer *v.* Crossman, 1 Metcalf, R. 416, in which the decisions are reviewed, and the rule clearly stated and vindicated, by Shaw, C. J. And in *New Hampshire;* Bryant *v.* Rittersbush, 2 N. Hamp. 212; Haddock *v.* Wilmarth, 5 N. Hamp. 187. And in *Maine;* Deering *v.* Sawtel, 4 Greenl. 191; Chandler *v.* Morton, 4 Greenl. 374. And in *Pennsylvania;* O'Brien *v.* Davis, 6 Watts, 498; Harrisburg Bank *v.* Forster, 8 Watts, 304, 309; Davenport *v.* Freeman, 3 Watts & Serg. 557; [Harding *v.* Mott, 20 Penn. 469; Pennypacker *v.* Umberger, 22 Ib. 492.] In *Louisiana,* the rule was stated and conceded by Porter, J., in Shamburg *v.* Commagere, 10 Martin, 18; and was again stated, but an opinion withheld, by Martin J., in Cox *v.* Williams, 5 Martin, 139, N. S. In *Vermont,* the case of Jordaine *v.* Lashbrooke was followed, in Nichols *v.* Holgate, 2 Aik. 138; but the decision is said to have been subsequently disapproved by all the judges, in Chandler *v.* Mason, 2 Verm. 198, and the rule in Walton *v.* Shelley approved. [In a later case, the question came directly before the court, and the decision in Nichols *v.* Holgate was confirmed. Pecker *v.* Sawyer, 24 Verm. 459.] In *Ohio,* the indorser was admitted to prove facts *subsequent* to the indorsement; the court expressing no opinion upon the general rule, though it was relied upon by the opposing counsel. Stone *v.* Vance, 6 Ohio Rep. 246. But subsequently the rule seems to have been admitted. Rohrer *v.* Morningstar, 18 Ohio, 579. In *Mississippi,* the witness was admitted for the same purpose; and the rule in Walton *v.* Shelley was approved. Drake *v.* Henley, Walker, R. 541. In *Illinois,* the indorser has been admitted, where, in taking the note, he acted as the agent of the indorsee, to whom he immediately transferred it, without any notice of the rule. Webster *v.* Vickers, 2 Scam. 295. But the rule of exclusion has been rejected, and the general doctrine of Jordaine *v.* Lashbrooke followed in *New York;* Stafford *v.* Rice, 5 Cowen, 23; Bank of Utica *v.* Hilliard, Id. 153; Williams *v.* Walbridge, 3 Wend. 415. And in *Virginia;* Taylor *v.* Beck, 3 Randolph, R. 316. And in *Connecticut;* Townsend *v.* Bush, 1 Conn. 260. And in *South Carolina;* Knight *v.* Packard, 3 McCord, 71. [And in *Texas;* Parsons *v.* Phipps, 4 Tex. 341.] And in *Tennessee;* Stump *v.* Napier, 2 Yerger, 35. In *Maryland,* it was rejected by three judges against two, in Ringgold *v.* Tyson, 3 H. & J. 172. It was also rejected in *New Jersey,* in Freeman *v.* Brittin, 2 Harrison, 192. And in *North Carolina;* Guy *v.* Hall, 3 Murphy, 151. And in *Georgia;* Slack *v.* Moss, Dudley, 161. And in *Alabama;* Todd *v.* Stafford, 1 Stew. 199; Griffing *v.* Harris, 9 Porter, 226. In *Kentucky,* in the case of Gorham *v.* Carroll, 3 Littell, 221, where the indorser was admitted as a witness, it is to be observed, that the note was indorsed without recourse to him, and thereby marked with suspicion; and that the general rule was not considered. More recently in *New Hampshire,* the doctrine of Walton *v.* Shelley has been denied, and the rule of the Roman law has been admitted only as a rule of estoppel upon the parties to the transaction and in regard to their rights, and not as a rule of evidence, affecting the competency of witnesses; and therefore the maker of a note, being released by his surety, was held competent in an action by an indorsee against

§ 386. Another class of persons incompetent to testify in a cause consists of those who are *interested in its result*.[1] The principle on which these are rejected is the same with that which excludes the parties themselves, and which has already been considered;[2] namely, the danger of perjury, and the little credit generally found to be due to such testimony, in judicial investigations. This disqualifying interest, however, must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself, or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action.[3] It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced; for these go only to the credibility. Thus, a servant is a competent witness

the surety, to testify to an alteration of the note, made by himself and the payee, which rendered it void as to the surety. Haines *v.* Dennett, 11 N. Hamp. 180. See further, 2 Stark. Evid. 179, note (A); Bayley on Bills, p. 586, note (b) (Phillips and Sewall's edit.); [Chitty on Bills (12th Am. edit. by Perkins), p. 747 *et seq.* (* p. 669 *et seq.*).] But all these decisions against the rule in Walton *v.* Shelley, except that in *New Jersey* and the last cited case in *New Hampshire*, were made long before that rule was recognized and adopted by the Supreme Court of the United States. The rule itself is restricted to cases where the witness is called to prove that the security was actually void at the time when he gave it currency as good; and this in the ordinary course of business, and without any mark or intimation to put the receiver of it on his guard. Hence the indorser is a competent witness, if he indorsed the note "without recourse" to himself; Abbott *v.* Mitchell, 6 Shepl. 355; or, is called to prove a fact not going to the original infirmity of the security; Buck *v.* Appleton, 2 Shepl. 284; Wendell *v.* George, R. M. Charlton's Rep. 51; or, if the instrument was negotiated out of the usual course of business; Parke *v.* Smith, 4 Watts & Serg. 287. So, the indorser of an accommodation note, made for his benefit, being released by the maker, is admissible as a witness for the latter, to prove that it has subsequently been paid. Greenough *v.* West, 8 N. Hamp. 400. And see Kinsley *v.* Robinson, 21 Pick. 327.

[1] In *Connecticut*, persons interested in the cause are now, by statute, made competent witnesses; the objection of interest going only to their credibility. Rev. Stat. 1849, tit. 1, § 141. In *New York*, persons interested are admissible, except those for whose immediate benefit the suit is prosecuted or defended, and the assignor of a thing in action, assigned for the purpose of making him a witness. Rev. Stat. vol. 3, p. 769, 3d edit. In *Ohio*, the law is substantially the same. Stat. March 23, 1850, § 3. In *Michigan*, all such persons are admissible, except parties to the record, and persons for whose immediate benefit the suit is prosecuted or defended; and their husbands and wives. Rev. Stat. 1846, ch. 102, § 99. In *Virginia*, persons interested are admissible in *criminal* cases, when not jointly tried with the defendant. Rev. Stat. 1849, ch. 199, § 21. In *Massachusetts*, the objection of interest no longer goes to the competency of any witnesses, except witnesses to wills. Gen. Stat. ch. 131, § 14. See *supra*, §§ 327, 329, notes. [The admission by statute, of parties as witnesses, of course removes the objection of interest. In some states, where parties are not permitted to testify, the objection of interest is removed by statute. *Supra*, §§ 327, 329, notes.]

[2] *Supra*, §§ 326, 327, 329. And see the observations of Best, C. J., in Hovill *v.* Stephenson, 5 Bing. 493.

[3] 1 Stark. Evid. 102; Bent *v.* Baker, 3 T. R. 27; Doe *v.* Tyler, 6 Bing. 390, per Tindal, C. J.; Smith *v.* Prager, 7 T. R. 62; Wilcox *v.* Farrell, 1 H. Lords Cas. 93; Bailey *v.* Lumpkin, 1 Kelly, 392.

for his master, a child for his parent, a poor dependent for his patron, an accomplice for the government, and the like. Even a wife has been held admissible against a prisoner, though she believed that his conviction would save her husband's life.[1] The rule of the Roman law, — *Idonei non videntur esse testes, quibus imperari potest ut testes fient*,[2] — has never been recognized in the common law, as affecting the competency; but it prevails in those countries in whose jurisprudence the authority of the Roman law is recognized. Neither does the common law regard as of binding force the rule that excludes an advocate from testifying in the cause for his client; — *Mandatis cavetur, ut Præsides attendant, ne patroni, in causa cui patrocinium præstiterunt, testimonium dicant.*[3] But on grounds of public policy, and for the purer administration of justice, the relation of lawyer and client is so far regarded by the rules of practice in some courts, as that the lawyer is not permitted to be both advocate and witness for his client in the same cause.[4]

§ 387. The *interest*, too, must be *real, and not merely apprehended* by the party. For it would be exceedingly dangerous to violate a general rule, because in a particular case, an individual does not understand the nature or extent of his rights and liabilities. If he believes and states that he has no interest, the very statement of the objection to his competency may inform him that he has; and on the other hand, if he erroneously thinks and declares that he is interested, he may learn, by the decision of the court, that he is not. Indeed, there would be danger in resting the rule on the judgment of a witness, and not on the fact itself; for the apprehended existence of the interest might lead his judgment to a wrong conclusion. And moreover, the inquiry which would be necessary into the grounds and degree of the witness's belief, would always be complicated, vague, and indefinite, and

[1] Rex *v.* Rudd, 1 Leach, Cr. Cas. 135, 151. In weighing the testimony of witnesses naturally biased, the rule is to give credit to their statements of facts, and to view their deductions from facts with suspicion. Dillon *v.* Dillon, 3 Curt. 96.

[2] Dig. lib. 22, tit. 5, l. 6; Poth. Obl. [793.] In *Lower Canada*, the incompetency of the relations and connections of the parties, in civil cases, beyond the degree of cousins-german, is removed by Stat. 41 Geo. III. c. 8. See Rev. Code, 1845, p. 144.

[3] Dig. lib. 22, tit. 5, l. 25; Poth. Obl. [793.]

[4] Stones *v.* Byron, 4 Dowl. & Lowndes, 393; Dunn *v.* Packwood, 11 Jur. 242; Reg. Gen. Sup. Court, N. Hamp. Reg. 23, 6 N. Hamp. R. 580; Mishler *v.* Baumgardner, 1 Amer. Law Jour. 304, n. s. But see *contra*, Little *v.* Keon, 1 N. Y. Code Rep. 4; 1 Sandf. 607; Potter *v.* Ware, 1 Cush. 518, 524, and cases cited by Metcalf, J.

productive of much inconvenience. For these reasons, the more simple and practicable rule has been adopted of determining the admissibility of the witness by the actual existence, or not, of any disqualifying interest in the matter.[1]

§ 388. If the witness believes himself to be under an *honorary obligation*, respecting the matter in controversy, in favor of the party calling him, he is nevertheless a competent witness, for the reasons already given; and his credibility is left with the jury.[2]

§ 389. The disqualifying interest of the witness must be in the event of the cause itself, and not in the *question* to be decided. His liability to a like action, or his standing in the same predicament with the party, if the verdict cannot be given in evidence for or against him, is an interest in the question only, and does not exclude him.[3] Thus, one underwriter may be a witness for another underwriter upon the same policy;[4] or, one seaman for another, whose claim for wages is resisted, on grounds equally affecting all the crew;[5] or, one freeholder for another, claiming land under the same title, or by the same lines and corners;[6] or, one devisee for another, claiming under the same will;[7] or, one trespasser for his co-trespasser;[8] or, a creditor for his debtor;[9] or a tenant by the courtesy, or tenant in dower, for the heir at law, in a suit concerning the title.[10] And the purchaser of a license to

[1] 1 Phil. Evid. 127, 128; 1 Stark. Evid. 102; Gresley on Evid. p. 253; Tait on Evid. p. 351. In America and in England, there are some early but very respectable authorities to the point, that a witness believing himself interested is to be rejected as incompetent. See Fotheringham *v.* Greenwood, 1 Stra. 129; Trelawny *v.* Thomas, 1 H. Bl. 307, per Ld. Loughborough, C. J., and Gould, J.; L'Amitie, 6 Rob. Adm. 269, note (a); Plumb *v.* Whiting, 4 Mass. 518; Richardson *v.* Hunt, 2 Munf. 148; Freeman *v.* Lucket, 2 J. J. Marsh. 390. But the weight of modern authority is clearly the other way. See Commercial Bank of Albany *v.* Hughes, 17 Wend. 94, 101, 102; Stall *v.* The Catskill Bank, 18 Wend. 466, 475, 476; Smith *v.* Downs, 6 Conn. 371; Long *v.* Bailie, 4 S. & R. 222; Dellone *v.* Rechmer, 4 Watts, 9; Stimmel *v.* Underwood, 3 G. & J. 282; Havis *v.* Barkley, 1 Harper's Law Rep. 63. And see *infra*, § 423, n.

[2] Peterson *v.* Stoffles, 1 Campb. 144; Solorete *v.* Melville, 1 Man. & Ryl. 198; Gilpin *v.* Vincent, 9 Johns. 219; Moore *v.* Hitchcock, 4 Wend. 292; Union Bank *v.* Knapp, 3 Pick. 96, 108; Smith *v.* Downs, 6 Conn. 365; Stimmel *v.* Underwood, 3 Gill & Johns. 282; Howe *v.* Howe, 10 N. Hamp. 88.

[3] Evans *v.* Eaton, 7 Wheat. 356, 424, per Story, J.; Van Nuys *v.* Terhune, 3 Johns. Cas. 82; Stewart *v.* Kip, 5 Johns. 256; Evans *v.* Hettich, 7 Wheat. 453; Clapp *v.* Mandeville, 5 How. Mis. R. 197.

[4] Bent *v.* Baker, 3 T. R. 27.

[5] Spurr *v.* Pearson, 1 Mason, 104; Hoyt *v.* Wildfire, 3 Johns. 518.

[6] Richardson *v.* Carey, 2 Rand, 87; Owings *v.* Speed, 5 Wheat. 423.

[7] Jackson *v.* Hogarth, 6 Cowen, 248.

[8] Per Ashurst, J., in Walton *v.* Shelley, 1 T. R. 301. See also Blackett *v.* Weir, 5 B. & C. 387, per Abbott, C. J.; Duncan *v.* Meiklehan, 3 C. & P. 192; Curtis *v.* Graham, 12 Martin, 289.

[9] Paull *v.* Brown, 6 Esp. 34; Nowell *v.* Davies, 5 B. & Ad. 368.

[10] Jackson *v.* Brooks, 8 Wend. 426; Doe *v.* Maisey, 1 B. & Ad. 439.

use a patent may be a witness for the patentee, in an action for infringing the patent.[1]

§ 390. The *true test of the interest* of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action.[2] It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent. Thus the heir apparent to an estate is a competent witness in support of the claim of his ancestor; though one, who has a vested interest in remainder, is not competent.[3] And if the interest is of a *doubtful nature*, the objection goes to the credit of the witness, and not to his competency. For, being always presumed to be competent, the burden of proof is on the objecting party, to sustain his exception to the competency; and if he fails satisfactorily to establish it, the witness is to be sworn.[4]

§ 391. The *magnitude or degree of the interest* is not regarded in estimating its effect on the mind of the witness; for it is impossible to measure the influence which any given interest may exert. It is enough, that the interest which he has in the subject is direct, certain, and vested, however small may be its amount;[5] for, interest being admitted as a disqualifying circumstance in any case, it must of necessity be so in every case, whatever be the character, rank, or fortune of the party interested. Nor is it necessary, that the witness should be interested in that which is the subject of the suit; for, if he is liable for the costs, as in the case of a *prochein amy*, or a guardian, or the like, we have already seen,[6] that he is incompetent. And though, where the witness is equally interested on both sides, he is not incompetent; yet if there is a certain excess of interest on one side, it seems that he will be incompetent to testify on that side; for he is interested, to the amount of the excess, in procuring a verdict for the party, in whose favor his interest preponderates.[7]

[1] De Rosnie *v.* Fairlie, 1 M. & Rob. 457.

[2] 1 Gilb. Evid. by Lofft, p. 225; Bull. N. P. 284; Bent *v.* Baker, 3 T. R. 27; 6 Bing. 394, per Tindal, C. J.; *supra*, § 386; Rex *v.* Boston, 4 East, 581, per Lord Ellenborough.

[3] Smith *v.* Blackham, 1 Salk. 283; Doe *v.* Tyler, 6 Bing. 390. But in an action for waste, brought by a landlord, who is tenant for life, the remainder-man is a competent witness for the plaintiff; for the damages would not belong to the witness, but to the plaintiff's executor. Leach *v.* Thomas, 7 C. & P. 327.

[4] Bent *v.* Baker, 3 T. R. 27, 32; Jackson *v.* Benson, 2 Y. & J. 45; Rex *v.* Cole, 1 Esp. 169; Duel *v.* Fisher, 4 Denio, 515; Comstock *v.* Rayford, 12 S. & M. 369; Story *v.* Saunders, 8 Humph. 663.

[5] Burton *v.* Hinde, 5 T. R. 173; Butler *v.* Warren, 11 Johns. 57; Doe *v.* Tooth, 3 Y. & J. 19.

[6] *Supra*, § 347. See also, *infra*, 401, 402.

[7] Larbalestier *v.* Clark, 1 B. & Ad. 899.

§ 392. The *nature of the direct interest* in the event of the suit which disqualifies the witness may be illustrated by reference to some adjudged cases. Thus, persons having become bail for the defendant have been held incompetent to testify as witnesses on his side; for they are immediately made liable, or discharged, by the judgment against or in favor of the principal. And if the bail have given security for the appearance of the defendant, by depositing a sum of money with the officer, the effect is the same.[1] If an underwriter, who has paid his proportion, is to be repaid in the event of the plaintiff's success in a suit against another underwriter upon the same policy, he cannot be a witness for the plaintiff.[2] A creditor, whether of a bankrupt, or of an estate, or of any other person, is not admissible as a witness to increase or preserve the fund, out of which he is entitled to be paid, or otherwise benefited.[3] Nor is a bankrupt competent in an action by his assignees, to prove any fact tending to increase the fund; though both he and his

Where this preponderance arose from a liability to costs only, the rule formerly was to admit the witness; because of the extreme difficulty which frequently arose, of determining the question of his liability to pay the costs. See Ilderton *v.* Atkinson, 7 T. R. 480; Birt *v.* Kershaw, 2 East, 458. But these cases were broken in upon, by Jones *v.* Brooke, 4 Taunt. 464; and the witness is now held incompetent, wherever there is a preponderancy of interest on the side of the party adducing him, though it is created only by the liability to costs. Townsend *v.* Downing, 14 East, 565; Hubbly *v.* Brown, 16 Johns. 70; Scott *v.* McLellan, 2 Greenl. 199; Bottomley *v.* Wilson, 3 Stark. R. 148; Harman *v.* Lesbrey, 1 Holt's Cas. 390; Edmonds *v.* Lowe, 8 B. & C. 407. And see Mr. Evans's observations, in 2 Poth. Obl. p. 269, App. No. 16. The existence of such a rule, however, was regretted by Mr. Justice Littledale, in 1 B. & Ad. 903; and by some it is still thought the earlier cases, above cited, are supported by the better reason. See further, Barretto *v.* Snowden, 4 Wend. 181; Hall *v.* Hale, 8 Conn. 336.

[1] Lacon *v.* Higgins, 3 Stark. R. 132; 1 T. R. 164, per Buller, J. But in such cases, if the defendant wishes to examine his bail, the court will either allow his name to be stricken out, on the defendant's adding and justifying another person as his bail; or, even at the trial, will permit it to be stricken out of the bail-piece, upon the defendant's depositing a sufficient sum with the proper officer. 1 Tidd's Pr. 259; Baillie *v.* Hole, 1 Mood. & M. 289; 3 C. & P. 560, s. c.; Whartley *v.* Fearnley, 2 Chitty, R. 103. And in like manner the surety in a replevin-bond may be rendered a competent witness for the plaintiff. Bailey *v.* Bailey, 1 Bing. 92. And so of the indorser of a writ, who thereby becomes surety for payment of the costs. Roberts *v.* Adams, 9 Greenl. 9. So in *Indiana*, of a *prochein amy*. Harvey *v.* Coffin, 5 Blackf. 566. See further, Salmon *v.* Rance, 3 S. & R. 311, 314; Hall *v.* Baylies, 15 Pick. 51, 53; Beckley *v.* Freeman, Id. 468; Allen *v.* Hawks, 13 Pick. 79; McCulloch *v.* Tyson, 2 Hawks, 336; *infra*, § 430; Comstock *v.* Paie, 3 Rob. Louis. R. 440.

[2] Forrester *v.* Pigou, 3 Campb. 380; 1 M. & S. 9, s. c.

[3] Craig *v.* Cundell, 1 Campb. 381; Williams *v.* Stephens, 2 Campb. 301; Shuttleworth *v.* Bravo, 1 Stra. 507; Powel *v.* Gordon, 2 Esp. 735; Stewart *v.* Kip, 5 Johns. 256; Holden *v.* Hearn, 1 Beav. 415. But to disqualify the witness, he must be legally entitled to payment out of the fund. Phenix *v.* Ingraham, 5 Johns. 427; Peyton *v.* Hallett, 1 Caines, 363, 379; Howard *v.* Chadbourne, 3 Greenl. 461; Marland *v.* Jefferson, 2 Pick. 240; Wood *v.* Braynard, 9 Pick. 322. A mere expectation of payment, however strong, if not amounting to a legal right, has been deemed insufficient to render him incompetent. Seaver *v.* Bradley, 6 Greenl. 60.

creditors may be witnesses to diminish it.[1] The same is true of a legatee, without a release, and also of an heir or distributee, in any action affecting the estate.[2] So, where the immediate effect of the judgment for the plaintiff is to confirm the witness in the enjoyment of an interest in possession,[3] or, to place him in the immediate possession of a right,[4] he is not a competent witness for the plaintiff. Neither can a lessor be admitted as a witness, to prove a right of possession in his lessee to a portion of land claimed as part of the premises leased.[5]

§ 393. So where the event of the suit, if it is adverse to the party adducing the witness, will render the latter *liable* either to a third person, or to the party himself, whether the liability arise from an express or implied legal obligation to indemnify, or from an express or implied contract to pay money upon that contingency, the witness is in like manner incompetent. The cases under this branch of the rule are apparently somewhat conflicting; and therefore it may deserve a more distinct consideration. And here it will be convenient to distinguish between those cases where the judgment will be evidence of the material facts involved in the

[1] Butler *v.* Cooke, Cowp. 70; Ewens *v.* Gold, Bull. N. P. 43; Green *v.* Jones, 2 Campb. 411; Loyd *v.* Stretton, 1 Stark. R. 40; Rudge *v.* Ferguson, 1 C. & P. 253; Masters *v.* Drayton, 2 T. R. 496; Clark *v.* Kirkland, 4 Martin, 405. In order to render the bankrupt competent, in such cases, he must release his allowance and surplus; and he must also have obtained his certificate, without which he is in no case a competent witness for his assignees. Masters *v.* Drayton, 2 T. R. 496; Goodhay *v.* Hendry, 1 Mood. & M. 319. And though his certificate has been allowed by the competent number of creditors, and no opposition to its final allowance is anticipated, yet until its allowance by the Lord Chancellor, he is still incompetent; nor will the trial for that purpose be postponed. Tenant *v.* Strachan, 1 Mood. & M. 377. So, if his certificate has been finally obtained, yet, if his future effects remain liable (as in the case of a second bankruptcy, where he has not yet paid the amount necessary to exempt his future acquisitions), he is still incompetent as a witness for the assignees, being interested to increase the fund. Kennet *v.* Greenwollers, Peake's Cas. 3. The same rules apply to the case of insolvent debtors. Delafield *v.* Freeman, 6 Bing. 294; 4 C. & P. 67, s. c.; Rudge *v.* Ferguson, 1 C. & P. 253. But upon grounds of public policy and convenience, a bankrupt is held inadmissible to prove any fact which is material to support or to defeat the fiat issued against him. Nor is a creditor competent to support the fiat, whether he has or has not availed himself of the right of proving under the bankruptcy. See 1 Phil. Evid. 94, 95, 96, and cases there cited.

[2] Hilliard *v.* Jennings, 1 Ld. Raym. 505; 1 Burr. 424; 2 Stark. R. 546; Creen *v.* Salmon, 3 N. & P. 388; Bloor *v.* Davies, 7 M. & W. 235. And if he is a residuary legatee, his own release of the debt will not render him competent for the executor, in an action against the debtor; for he is still interested in supporting the action, in order to relieve the estate from the charge of the costs. Baker *v.* Tyrwhitt, 4 Campb. 27; 6 Bing. 394, per Tindal, C. J.; Matthews *v.* Smith, 2 Y. & J. 426; Allington *v.* Bearcroft, Peake's Add. Cas. 212; West *v.* Randall, 2 Mason, 181; Randall *v.* Phillips, 3 Mason, 378; Campbell *v.* Tousey, 7 Cowen, 64; Carlisle *v.* Burley, 3 Greenl. 250. Nor is a legatee competent to testify against the validity of the will, if it is, on the whole, for his interest to defeat it. Roberts *v.* Trawick, 13 Ala. 68.

[3] Doe *v.* Williams, Cowp. 621.

[4] Rex *v.* Williams, 9 B. & C. 549.

[5] Smith *v.* Chambers, 4 Esp. 164.

issue, and those where it will be evidence only of the amount of damages recovered, which the defendant may be compelled to pay. In the former class, which will hereafter be considered, the interest of the party is in the record, to establish his entire claim; in the latter, which belongs to the present head, it is only to prove the amount of the injury he has suffered.

§ 394. Thus, in an action against the principal for damage occasioned by the neglect or *misconduct of his agent or servant*, the latter is not a competent witness for the defendant without a release; for he is, in general, liable over to his master or employer, in a subsequent action, to refund the amount of damages which the latter may have paid. And though the record will not be evidence against the agent, to establish the fact of misconduct, unless he has been duly and seasonably informed of the pendency of the suit, and required to defend it, in which case it will be received as evidence of all the facts found;[1] yet it will always be admissible to show the amount of damages recovered against his employer.[2] The principle of this rule applies to the relation of master and servant, or employer and agent, wherever that relation in its broadest sense may be found to exist; as, for example, to the case of a pilot, in an action against the captain and owner of a vessel for mismanagement, while the pilot was in charge;[3] or, of the guard of a coach, implicated in the like mismanagement, in an action against the proprietor;[4] or, of a broker, in an action against the principal for misconduct in the purchase of goods, which he had done through the broker;[5] or, of a sheriff's officer, who had given security for the due execution of his duty, in an action against the sheriff for misconduct in the service of process by the same officer;[6] or, of a ship-master, in an action by his owner against underwriters, where the question was, whether there had

[1] Hamilton *v.* Cutts, 4 Mass. 349; Tyler *v.* Ulmer, 12 Mass. 163. See *infra*, §§ 523, 527, 538, 539.

[2] Green *v.* New River Co. 4 T. R. 589.

[3] Hawkins *v.* Finlayson, 3 C. & P. 305. But the pilot has been held admissible in an action by the owners against the underwriters, for the loss of the vessel while in his charge, on the ground that his interest was balanced. Varin *v.* Canal Ins. Co. 1 Wilcox, 223.

[4] Whitamore *v.* Waterhouse, 4 C. & P. 383.

[5] Field *v.* Mitchell, 6 Esp. 71; Gevers *v.* Mainwaring, 1 Holt's Cas. 139; Boorman *v.* Browne, 1 P. & D. 364; Moorish *v.* Foote, 8 Taunt. 454.

[6] Powel *v.* Hord, 1 Stra. 650; 2 Ld. Raym. 1411, s. c.; Whitehouse *v.* Atkinson, 3 C. & P. 344; Broom *v.* Bradley, 8 C. & P. 500. So, the creditor is incompetent to testify for the officer, where he is liable over to the latter, if the plaintiff succeeds. Keightley *v.* Birch, 3 Campb. 521. See also Jewett *v.* Adams, 8 Greenl. 30; Turner *v.* Austin, 16 Mass. 181; Rice *v.* Wilkins, 8 Shepl. 558; [Howland *v.* Willetts, 5 Selden, 170.]

been a deviation;[1] neither of whom are competent to give testimony, the direct legal effect of which will be, to place themselves in a situation of entire security against a subsequent action. But the liability must be direct and immediate to the party; for if the witness is liable to a third person, who is liable to the party, such circuity of interest is no legal ground of exclusion.[2] The liability also must be legal; for if the contract be against law, as, for example, if it be a promise to indemnify an officer for a violation of his duty in the service of process, it is void; and the promisor is a competent witness, the objection going only to his credibility.[3]

§ 395. The same principle applies to *other cases*, where the direct effect of the judgment will be to create *any other legal claim* against the witness. Thus, if he is to repay a sum of money to the plaintiff, if he fails in the suit he is incompetent to be sworn for the plaintiff.[4] So, in an action on a policy of insurance, where there has been a consolidation rule, an underwriter, who is a party to such rule, is not a competent witness for others.[5] The case is the same, wherever a rule is entered into, that one action shall abide the event of another; for in both these cases all the parties have a direct interest in the result. And it makes *no difference* in any of these cases, whether the witness is called by *the plaintiff* or by *the defendant;* for, in either case *the test of interest* is the same; the question being, whether a judgment, in favor of the party calling the witness, will procure a direct benefit to the witness. Thus, in *assumpsit*, if the non-joinder of a co-contractor is pleaded in abatement, such person is not a competent witness for the defendant to support the plea, unless he is released; for though if the defence succeeds, the witness will still be liable to another action, yet he has a direct interest to defeat the present action, both to avoid the payment of costs, and also to recover the costs of the defence.[6] The case is the same, where, in a defence upon the merits, a witness is called by the defendant, who is confessedly, or by his own testimony, a co-contractor, or partner with him in the subject of the action.[7] So, in a suit against one on a joint obliga-

[1] De Symonds *v.* De la Cour, 2 New Rep. 374.

[2] Clark *v.* Lucas, Ry. & M. 32.

[3] Hodsdon *v.* Wilkins, 7 Greenl. 113.

[4] Fotheringham *v.* Greenwood, 1 Stra. 129; Rogers *v.* Turner, 5 West. Law Journ. 406.

[5] The same principle also applies where the underwriter, offered as a witness for the defendant, has paid the loss, upon an agreement with the assured that the money should be repaid, if he failed to recover against the other underwriters. Forrester *v.* Pigou, 1 M. & S. 9; 3 Campb. 380, *n.* c.

[6] Young *v.* Bairnor, 1 Esp. 103; Lefferts *v.* De Mott, 21 Wend. 136.

[7] Birt *v.* Wood, 1 Esp. 20; Goodacre

tion, a co-obligor, not sued, is not a competent witness for the plaintiff, to prove the execution of the instrument by the defendant; for he is interested to relieve himself of part of the debt, by charging it on the defendant.[1] And upon a similar principle, where an action was brought upon a policy of insurance, averred in the declaration to have been effected by the plaintiffs, as agents, for the use and benefit and on the account of a third person, it was held that this third person was not a competent witness for the plaintiffs; and that his release to the plaintiffs, prior to the action, of all actions, claims, &c., which he might have against them by reason of the policy, or for any moneys to be recovered of the underwriters, did not render him competent; neither could his assignment to them, after action brought, of all his interest in the policy, have that effect; for the action being presumed to have been brought by his authority, he was still liable to the attorney for the costs.[2] So, in an action on a joint and several bond against the surety, he cannot call the principal obligor to prove the payment of money by the latter in satisfaction of the debt; for the witness has an interest in favor of his surety to the extent of the costs.[3] So, also, where a legatee sued the executor, for the recovery of a specific legacy, namely, a bond; it was held, that the obligor, having a direct interest in preventing its being enforced, was not a competent witness to prove that the circumstances, under which the bond was given, were such as to show that it was irrecoverable.[4]

§ 396. It may seem, at the first view, that where the *plaintiff calls his own servant* or agent to prove an injury to his property, while in the care and custody of the servant, there could be no objection to the competency of the witness to prove misconduct in the defendant; because, whatever might be the result of the action, the record would be no evidence against him in a sub-

v. Breame, Peake's Cas. 174; Cheyne *v.* Koops, 4 Esp. 112; Evans *v.* Yeatherd, 2 Bing. 133; Hall *v.* Cecil, 6 Bing. 181; Russell *v.* Blake, 2 M. & G. 373, 381, 382; Vanzant *v.* Kay, 2 Humph. 106, 112. But this point has in some cases been otherwise decided. See Cossham *v.* Goldney, 2 Stark. R. 413; Blackett *v.* Weir, 5 B. & C. 385. See also Poole *v.* Palmer, 9 M. & W. 71.

[1] Marshall *v.* Thraikill, 12 Ohio R. 275; Ripley *v.* Thompson, 12 Moore, 55; Brown *v.* Brown, 4 Taunt. 752; Marquand *v.* Webb, 16 Johns. 89; Purviance *v.* Dryden, 3 S. & R. 402, 407. And see Latham *v.* Kenniston, 13 N. Hamp. R. 203.

[2] Bell *v.* Smith, 5 B. & C. 188.

[3] Townsend *v.* Downing, 5 East, 565, 567, per Lord Ellenborough. In an action against the sheriff, for a negligent escape, the debtor is not a competent witness for the defendant, he being liable over to the defendant for the damages and costs. Griffin *v.* Brown, 2 Pick. 304.

[4] Davies *v.* Morgan, 1 Beav. 405.

sequent action by the plaintiff. But still the witness, in such case, is held inadmissible; upon the general principle already mentioned,[1] in cases where the master or principal is defendant, namely, that a verdict for the master would place the servant or agent in a state of security against any action, which, otherwise, the master might bring against him; to prevent which he is directly interested to fix the liability on the defendant. Thus, in an action for an injury to the plaintiff's cart, or coach, or horses, by negligently driving against them, the plaintiff's own driver or coachman is not a competent witness for him without a release.[2] So, in an action by the shipper of goods, on a policy of insurance, the owner of the ship is not a competent witness for the plaintiff to prove the seaworthiness of the ship, he having a direct interest to exonerate himself from liability to an action for the want of seaworthiness, if the plaintiff should fail to recover of the underwriter.[3] The only difference between the case where the master is plaintiff and where he is defendant, is this, that in the latter case he might claim of the servant both the damages and costs which he had been compelled to pay; but in the former, he could claim only such damages as directly resulted from the servant's misconduct, of which the costs of an unfounded suit of his own would not constitute a part.[4]

§ 397. Where the interest of the witness arises from liability over, it is sufficient that he is *bound to indemnify* the party calling him, against the consequence of some fact essential to the judgment. It is not necessary, that there should be an engagement to indemnify him generally against the judgment itself, though this is substantially involved in the other; for a covenant of indemnity against a particular fact, essential to the judgment, is in effect a covenant of indemnity against such a judgment. Thus, the warrantor of title to the property which is in controversy is

[1] *Supra*, § 393. This principle is applied to all cases where the testimony of the witness, adduced by the plaintiff, would discharge him from the plaintiff's demand, by establishing it against the defendant. Thus, in an action by A against B for the board of C, the latter is not a competent witness for the plaintiff to prove the claim. Emerton *v.* Andrews, 4 Mass. 653; Hodson *v.* Marshall, 7 C. & P. 16; [*infra*, § 416.]

[2] Miller *v.* Falconer, 1 Campb. 251; Moorish *v.* Foote, 8 Taunt. 454; Kerrison *v.* Coatsworth, 1 C. & P. 645; Wake *v.* Lock, 5 C. & P. 454. In Sherman *v.* Barnes, 1 M. & Rob. 69, the same point was so ruled by Tindal, C. J., upon the authority of Moorish *v.* Foote, though he seems to have thought otherwise upon principle, and perhaps with better reason.

[3] Rotheroe *v.* Elton, Peak's case, 84, cited and approved, per Gibbs, C. J., in 8 Taunt. 457.

[4] Per Tindal, C. J., in Faucourt *v.* Bull, 1 Bing. N. C. 681, 688.

generally incompetent as a witness for his vendee, in an action concerning the title. And it makes no difference in what manner the liability arises, nor whether the property is real or personal estate. If the title is in controversy, the person who is bound to make it good to one of the litigating parties against the claim of the other is identified in interest with that party, and therefore cannot testify in his favor.[1] And if the quality or soundness is the subject of dispute, and the vendee with warranty has resold the article with similar warranty, the principle is still the same. If the effect of the judgment is certainly to render him liable, though it be only for costs, he is incompetent;[2] but if it is only to render it more or less probable that he will be prosecuted, the objection goes only to his credibility. But whatever the case may be, his liability must be direct and immediate to the party calling him, and not circuitous and to some other person, as, if a remote vendor with warranty is called by the defendant as a witness, where the article has been successively sold by several persons with the same warranty, before it came to the defendant.[3]

§ 398. In order to render the witness liable, and therefore incompetent, as warrantor of the title, it is not necessary to show an express contract to that effect; for an *implied warranty* is equally binding. Thus, the vendor of goods, having possession

[1] Serle *v.* Serle, 2 Roll. Abr. 685; 21 Vin. Abr. 362, tit. *Trial*, G. f. pl. 1; Steers *v.* Cawardine, 8 C. & P. 570. But if the vendor sold without any covenant of title, or with a covenant restricted to claims set up under the vendor himself alone, the vendor is a competent witness for his vendee. Busby *v.* Greenslate, 1 Stra. 445; Twambly *v.* Henley, 4 Mass. 441; Beidelman *v.* Foulk, 5 Watts, 308; Adams *v.* Cuddy, 13 Pick. 460; Bridge *v.* Eggleston, 14 Mass. 245; Davis *v.* Spooner, 3 Pick. 284; Lathrop *v.* Muzzy, 5 Greenl. 450.

[2] Lewis *v.* Peake, 7 Taunt. 153. In this case the buyer of a horse with warranty resold him with a similar warranty, and, being sued thereon, he gave notice of the action to his vendor, offering him the option of defending it; to which having received no answer, he defended it himself, and failed; it was holden, that he was entitled to recover of his vendor the costs of defending that action, as part of the damages he had sustained by the false warranty. In the later case of Baldwin *v.* Dixon, 1 M. & Rob. 59, where the defendant, in an action on a warranty of a horse, called his vendor, who had given a similar warranty, Lord Tenterden, after examining authorities, admitted the witness. A vendor was admitted, under similar circumstances, by Lord Alvanley, in Briggs *v.* Crick, 5 Esp. 99. But in neither of these cases does it appear that the witness had been called upon to defend the suit. In the still more recent case of Bliss *v.* Mountain, 1 M. & Rob. 302, after an examination of various authorities, Alderson, J., held the vendor incompetent, on the ground that the effect of the judgment for the defendant would be to relieve the witness from an action at his suit.

[3] Clark *v.* Lucas, Ry. & M. 32; 1 C. & P. 156; Briggs *v.* Crick, 5 Esp. 99; Martin *v.* Kelly, 1 Stew. Ala. R. 198. Where the plaintiff's goods were on the wagon of a carrier, which was driven by the carrier's servant; and the goods were alleged to be injured by reason of a defect in the highway; it was held, in an action against the town for this defect, that the carrier's servant was a competent witness for the owner of the goods. Littlefield *v.* Portland, 13 Shepl. 37.

and selling them as his own, is held bound in law, to warrant the title to the vendee;[1] and therefore he is generally not competent as a witness for the vendee in support of the title.[2] This implied warranty of title, however, in the case of sales by sheriffs, executors, administrators, and other trustees, is understood to extend no farther than this, that they do not know of any infirmity in their title to sell in such capacity, and therefore they are in general competent witnesses.[3]

§ 399. In regard to *parties to bills of exchange* and negotiable promissory notes, we have already seen that the persons who have put them into circulation by indorsement are sometimes held incompetent witnesses, to prove them originally void.[4] But, subject to this exception, which is maintained on grounds of public policy, and of the interest of trade, and the necessity of confidence in commercial transactions, and which, moreover, is not everywhere conceded, parties to these instruments are admitted or rejected, in suits between other parties, like any other witnesses, according as they are interested or not in the event of the suit. In general, their interest will be found to be equal on both sides; and in all cases of *balanced interest*, the witness, as we shall hereafter see, is admissible.[5] Thus, in an action against one of several

[1] 2 Bl. Comm. 451. See also 2 Kent, Comm. 478, and cases there cited. See also Emerson *v.* Brigham, 10 Mass. 203 (Rand's edit.), note.

[2] Heermance *v.* Vernoy, 6 Johns. 5; Hale *v.* Smith, 6 Greenl. 416; Baxter *v.* Graham, 5 Watts, 418. In the general doctrine, stated in the text, that where the vendor is liable over, though it be only for costs, he is not a competent witness for the vendee, the English and American decisions agree. And it is believed that the weight of English authority is on the side of the American doctrine, as stated in the text, namely, that the vendor in possession stipulates that his title is good. But where the witness claims to have derived from the plaintiff the same title which he conveyed to the defendant, and so is accountable for the value to the one party or the other, in either event of the suit, unless he can discharge himself by other proof, he is a competent witness for the defendant; unless he has so conducted as to render himself accountable to the latter for the costs of the suit, as part of the damages to be recovered against him. Thus, where in trover for a horse, the defendant called his vendor to prove that the horse was pledged to him for a debt due from the plaintiff, with authority to sell him after a certain day, and that he sold him accordingly to the defendant; he was held a competent witness. Nix *v.* Cutting, 4 Taunt. 18. So, in *assumpsit*, for the price of wine sold to the defendant, where the defence was, that he bought it of one Faircloth, and not of the plaintiff, Faircloth was held a competent witness for the defendant to prove that he himself purchased the wine of the plaintiff, and sold it to the defendant, who had paid him the price. Labalastier *v.* Clark, 1 B. & Ad. 899. So, the defendant's vendor has been held competent, in trover, to prove that the goods were his own, and had been fraudulently taken from him by the plaintiff. Ward *v.* Wilkinson, 4 B. & Ald. 410, where Nix *v.* Cutting is explained by Holroyd, J. See also Baldwin *v.* Dixon, 1 M. & Rob. 59; Briggs *v.* Crick, 5 Esp. 99, and Mr. Starkie's observations on some of these cases; 1 Stark. Evid. 109, note (n); 2 Stark. Evid. 894, note (d).

[3] Peto *v.* Blades, 5 Taunt. 657; Mockbee *v.* Gardiner, 2 Har. & Gill, 176; Petermans *v.* Laws, 6 Leigh's R. 523, 529.

[4] *Supra*, §§ 384, 385.

[5] *Infra*, § 420.

makers of a note, another maker is a competent witness for the plaintiff, as he stands indifferent; for if the plaintiff should recover in that action, the witness will be liable to pay his contributory share; and if the plaintiff should fail in that action, and force the witness to pay the whole, in another suit, he will still be entitled to contribution.[1] So, in an action against the acceptor of a bill, the drawer is in general a competent witness for either party; for if the plaintiff recovers, the witness pays the bill by the hands of the acceptor; if not, he is liable to pay it himself.[2] And in an action by the indorsee of a note against the indorser, the maker is a competent witness for the plaintiff; for if the plaintiff prevails, the witness will be liable to pay the note to the defendant; and if the defendant prevails, the witness will be liable, to the same extent, to the plaintiff.[3]

§ 400. And though the testimony of the witness, by defeating the present action on the bill or note, *may probably deter* the holder from proceeding in another action against the witness, yet this only affords matter of observation to the jury, as to the *credit* to be given to his testimony. Thus, in an action by the indorsee of a note against the indorser, the maker is a competent witness for the defendant, to prove that the date has been altered.[4] And in an action by the indorsee of a bill against the drawer or acceptor, an indorser is, in general, a competent witness for either party; for the plaintiff, because, though his success *may* prevent him from calling on the indorser, it is not certain that it will; and whatever part of the bill or note he may be compelled to pay, he may recover again of the drawer or acceptor; and he is competent for the defendant, because if the plaintiff fails against the drawer or acceptor, he is driven either to sue the indorser or abandon his claim.[5]

§ 401. But if the verdict would necessarily benefit or affect the witness, as if he would be *liable*, in one event, *to the costs of the*

[1] York *v.* Blott, 5 M. & S. 71. He has also been held admissible for the defendant. Thompson *v.* Armstrong, 5 Ala. 383. But see the cases cited *supra*, § 395, notes, and 12 Ohio R. 279.

[2] Dickinson *v.* Prentice, 4 Esp. 32; Lowber *v.* Shaw, 5 Mason, 241, per Story, J.; Rich *v.* Topping, Peake's Cas. 224. But if he is liable in one event for the costs, he has an interest on that side, and is inadmissible. Scott *v.* McLellan, 2 Greenl. 199; *supra*, § 391, and note (3).

[3] Venning *v.* Shuttleworth, Bayley on Bills, p. 593; Hubbly *v.* Brown, 16 Johns. 70. But the maker of an accommodation note, made for his own benefit, is incompetent. Pierce *v.* Butler, 14 Mass. 303, 312; *infra*, § 401.

[4] Levi *v.* Essex, MSS., 2 Esp. Dig. 708, per Lord Mansfield; Chitty on Bills, p. 654, note (b), (8th edit.)

[5] Bayley on Bills, 594, 595 (2d Am. edit. by Phillips & Sewall). And see Bay *v.* Gunn, 1 Denio, R. 108.

action, then, without a release, which will annul his interest in the event, he will not be admissible as a witness on the side of the party in whose favor he is so interested. Thus, the party for whose use an accommodation note or bill has been drawn or accepted, is incompetent as a witness, when adduced by him who has lent his own name and liability for the accommodation of the witness.[1] So, in an action against the drawer of a bill of exchange, it has been held, that the acceptor is not a competent witness for the defendant, to prove a set-off; because he is interested in lessening the balance, being answerable to the defendant only for the amount which the plaintiff may recover against him.[2]

§ 402. Where a *liability to costs* in the suit arises in any other manner, it is still an interest sufficient to render the witness incompetent.[3] Thus, where the witness called by the plaintiff had himself employed the attorney, to whom he had made himself liable for the costs, he was held incompetent, without a release from the attorney.[4] So, where he had given the plaintiff a bond of indemnity against the costs of the suit, he was held incompetent as a witness for the plaintiff, as to any point arising in the action; even such as the service of a notice on the defendant, to produce certain papers at the trial.[5] Thus, also, where an attorney,[6] or, an executor,[7] or the tenant, on whose premises the goods of the plaintiff in replevin had been distrained for rent,[8] or the principal in an administration-bond, the action being only against the surety,[9] have been found personably liable for the costs of the suit, they have been held incompetent as witnesses on the side of the party in whose favor they were thus interested. But if the contract of indemnity is illegal, as, for example, if it be a contract to bear

[1] Jones *v.* Brooke, 4 Taunt. 463; *supra*, § 391, and note. See also Bottomley *v.* Wilson, 3 Stark. R. 148; Harman *v.* Lasbrey, Holt's Cas. 390; Edmonds *v.* Lowe, 8 B. & C. 407; Hall *v.* Cecil, 6 Bing. 181; Scott *v.* McLellan, 2 Greenl. 199; Pierce *v.* Butler, 14 Mass. 303, 312; Southard *v.* Wilson, 8 Shepl. 494.

[2] Mainwaring *v.* Mytton, 1 Stark. R. 83. It is deemed unnecessary any further to pursue this subject in this place, or particularly to mention any of the numerous cases, in which a party to a bill or note has been held competent, or otherwise, on the ground of being free from interest, or interested, under the particular circumstances of the case. It will suffice to refer the reader to the cases collected in Bayley on Bills, p. 586–599 (2d Am. edit. by Phillips & Sewall), with the notes of the learned editors; Chitty on Bills, 654–659 (8th edit.); 2 Stark. Evid. 179, 182 (6th Am. edit. with Metcalf's, Ingraham's, and Gerhard's notes); Thayer *v.* Crossman, 1 Metcalf, R. 416.

[3] See *supra*, § 395.

[4] York *v.* Gribble, 1 Esp. 319; Marland *v.* Jefferson, 2 Pick. 240; Handley *v.* Edwards, 1 Curt. 722.

[5] Butler *v.* Warren, 11 Johns. 57.

[6] Chadwick *v.* Upton, 3 Pick. 442.

[7] Parker *v.* Vincent, 3 C. & P. 38.

[8] Rush *v.* Flickwire, 17 S. & R. 82.

[9] Owens *v.* Collinson, 3 Gill & Johns. 26. See also Cannon *v.* Jones, 4 Hawks, 368; Riddle *v.* Moss, 7 Cranch, 206.

each other harmless in doing wrong, it creates no legal liability to affect the witness.[1]

§ 403. This doctrine is applied in the same manner in *criminal cases*, where the witness has a direct, certain, and immediate interest in the result of the prosecution. Thus, in cases of summary convictions, where a penalty is imposed by statute, and the whole or a part is given to the informer or prosecutor, who becomes entitled to it forthwith upon the conviction, he is not, at the common law, a competent witness for the prosecution.[2] So, in a prosecution under the statutes for forcible entry, where the party injured is entitled to an award of immediate restitution of the lands, he is not a competent witness.[3] This rule, however, is subject to many exceptions, which will hereafter be stated.[4] But it may be proper here to remark, that, in general, where the penalty or provision for restitution is evidently introduced for the sake of the party injured, rather than to insure the detection and punishment of the offender, the party is held incompetent.[5]

§ 404. Having thus briefly considered the subject of disqualification, resulting from a direct, certain, and immediate interest in the event of the suit, we come now to the *second branch of the general rule*, namely, that of *interest in the record*, as an instrument of evidence in some other suit, to prove a fact therein alleged. The record of a judgment, as hereafter will be seen, is always admissible, even in an action between strangers, to prove the fact that such a judgment was rendered, and for such a sum; but it is not always and in all cases admissible to prove the truth of any fact, on which the judgment was founded. Thus the record of a judgment against the master, for the negligence of his servant, would be admissible in a subsequent action by the master against the servant, to prove the fact, that such a judgment had been recovered against the master for such an amount, and upon such and such allegations; but not to prove that either of those allegations was true; unless in certain cases, where the servant or agent has undertaken the defence, or, being bound to indemnify, has

[1] Humphreys *v.* Miller, 4 C. & P. 7, per Lord Tenterden; Hodson *v.* Wilkins, 7 Greenl. 113.

[2] Rex *v.* Williams, 9 B. & C. 549; Commonwealth *v.* Paull, 4 Pick. 251; Rex *v.* Tilley, 1 Stra. 316; 2 Russ. on Crimes, 601, 602. But where the penalty is to be recovered by the witness in a subsequent civil action, he is not an incompetent witness upon the indictment. Rex *v.* Luckup, Willes, 425, n.; 9 B. & C. 557, 558.

[3] Rex *v.* Bevan, Ry. & M. 242.

[4] See *infra*, § 412.

[5] Rex *v.* Williams, 9 B. & C. 549, per Bayley, J.

been duly required to assume it. But under the present head are usually classed only those cases in which the record is admissible in evidence for or against the witness, to establish the facts therein alleged or involved, in order to acquire a benefit or repel a loss;[1] and it is in this view alone that the subject will now be considered.

§ 405. The usual and clearest illustration of this branch of the rule is the case of an action brought by or against one of several persons, who claim a *customary right* of common, or some other species of customary right. In general, in all cases depending on the existence of a particular custom, a judgment establishing that custom is evidence, though the parties are different. Therefore, no person is a competent witness in support of such custom, who would derive a benefit from its establishment; because the record would be evidence for him in another suit, in which his own right may be controverted. Thus, where the plaintiff prescribed for common of pasture upon Hampton Common, as appurtenant to his ancient messuage, and charged the defendant with neglect to repair the fence; it was held, that another commoner, who claimed a similar prescription in right of another tenement, was not a competent witness to prove the charge;[2] and *à fortiori* he is not, where the prescription is, that all the inhabitants of the place have common there.[3] Thus, also, an inhabitant of a town is not a competent witness to prove a prescription for all the inhabitants to dig clams in a certain place;[4] nor to prove a prescriptive right of way for all the inhabitants.[5] So, where the right to a seat in the common council of a borough was in controversy, and it was insisted that by prescription no person was entitled, unless he was an inhabitant and also had a burgage tenure; it was held, that, though a person having but one of these qualifications was a competent witness to prove the prescription, one who had them both was not; for he would thereby establish an exclusive right in favor of himself.[6] So, where a corporation was lord of a manor,

[1] 1 Stark. Evid. 114, 115; Hunter *v.* King, 4 B. & Ald. 210.

[2] Anscomb *v.* Shore, 1 Taunt. 261. See also Parker *v.* Mitchell, 11 Ad. & El. 788.

[3] Hockley *v.* Lamb, 1 Ld. Raym. 731.

[4] Lufkin *v.* Haskell, 3 Pick. 356; Moore *v.* Griffin, 9 Shepl. 350. [But see Look *v.* Bradley, 13 Met. 369, 372.]

[5] Odiorne *v.* Wade, 8 Pick. 518. The statutes which render the inhabitants of towns competent witnesses, where the corporation is a party, or is interested, apply only to cases of corporate rights or interest, and not to cases of individual and private interest, though these may extend to every inhabitant. See *supra*, § 331.

[6] Stevenson *v.* Nevinson, Mayor, &c., 2 Ld. Raym. 1353.

and had approved and leased a part of the common, a freeman was held incompetent to prove that a sufficiency of common was left for the commoners.[1] So, one who has acted in breach of an alleged custom by the exercise of a particular trade, is not a competent witness to disprove the existence of such custom.[2] Nor is the owner of property within a chapelry a competent witness to disprove an immemorial usage, that the land-owners there ought to repair the chapel.[3] And it is proper here to add, that in order to exclude a witness, where the verdict depends on a custom, which he is interested to support, it seems to be necessary that the custom should be stated on the record;[4] for it is said, that the effect of the verdict to support the custom may be aided by evidence.[5]

§ 406. There are some cases, in which the interest of the witness falls under *both branches* of this rule, and in which he has been rejected, sometimes on the ground of immediate interest in the event of the suit, and sometimes on the ground of interest in the record, as an instrument of evidence. Such is the case of the tenant in possession in an action of ejectment; who is held incompetent either to support his landlord's title,[6] or, to prove that himself, and not the defendant, was the tenant in possession of the land.[7] And where a declaration was served on two tenants, in possession of different parts of the premises, and a third person entered into a rule to defend alone, as landlord, it was held, that neither of the tenants was a competent witness for the landlord, to prove an adverse possession by the other of the part held by him; for as they were identified with the landlord in interest, the judgment for the plaintiff would be evidence of his title, in a future action against them for the mesne profits.[8]

[1] Burton *v.* Hinde, 5 T. R. 174.

[2] The Carpenters, &c., of Shrewsbury *v.* Haward, 1 Doug. 374.

[3] Rhodes *v.* Ainsworth, 1 B. & Ald. 87. See also Ld. Falmouth *v.* George, 5 Bing. 286.

[4] Ld. Falmouth *v.* George, 5 Bing. 286; Stevenson *v.* Nevinson *et al.*, 2 Ld. Raym. 1353.

[5] 1 Stark. Evid. 115, note (e).

[6] Doe *v.* Williams, Cowp. 621; Bourne *v.* Turner, 1 Stra. 682.

[7] Doe *v.* Wilde, 5 Taunt. 183; Doe *v.* Bingham, 4 B. & Ald. 672.

[8] Doe *v.* Preece, 1 Tyrwh. 410. Formerly, it was not material in England, as it still is not in the United States, to determine with precision in which of these modes the witness was interested. But by Stat. 3 & 4 W. IV. c. 42, §§ 26, 27, the objection arising from interest in the record, as a future instrument of evidence, is done away; the court being directed, whenever this objection is taken, to indorse the name of the witness on the record or document on which the trial shall be had, and of the party on whose behalf he was called to testify; after which the verdict or judgment in that action shall never be evidence for or against the witness, or any one claiming under him. The practice under this statute seems to

§ 407. So, in *criminal cases*, a person interested in the record is not a competent witness. Thus an *accessory*, whether before or after the fact, is not competent to testify for the principal.[1] And where several were indicted for a *conspiracy*, the wife of one was held not admissible as a witness for the others; a joint offence being charged, and an acquittal of all the others being a ground of discharge for her husband.[2] Nor is the wife of one joint trespasser a competent witness for another, even after the case is already clearly proved against her husband.[3]

§ 408. The extent and meaning of the rule, by which an interested witness is rejected as incompetent, may be further illustrated by reference to some cases, in which the witness has been *deemed not disqualified*. We have already seen that mere wishes or bias on the mind of the witness in favor of the party producing him, or strong hopes or expectations of benefit, or similarity of situation, or any other motive, short of an actual and legal interest in the suit, will not disqualify the witness.[4] Such circumstances may influence his mind, and affect his opinions, and perhaps may tempt him at least to give a false color to his statements; and therefore they should be carefully considered by the jury, in determining the weight or credibility to be given to his testimony; but they are not deemed sufficient to justify its utter exclusion from the jury. It may now be further observed, that a *remote*, *contingent*, *and uncertain interest*, does not disqualify the witness. Thus, a paid legatee of a specific sum, or of a chattel, is a competent witness for the executor; for though the money paid to a legatee may sometimes be recovered back, when necessary for the payment of paramount claims, yet it is not certain that it will be needed for such purpose; nor is it certain, if the legacy has not been paid, that there are not other funds sufficient to pay it.[5] So, also, a creditor of an estate, not in a course of liquidation as an insolvent estate, is a competent witness for the administrator; for he stands in the same relation to the estate now, as he

be not yet completely settled; but the cases which have arisen, and which it is deemed unnecessary here to examine, are stated and discussed in Phil. & Am. on Evid. pp. 108–113; 1 Phil. Evid. 114–117. See also Poole *v.* Palmer, 9 M. & W. 71.

[1] 1 Stark. Evid. 130. But the principal is a competent witness against the accessory. The People *v.* Lohman, 2 Barb. S. C. R. 216.

[2] Rex *v.* Locker, 5 Esp. 107; 2 Russ. on Crimes, 602; *supra*, 403; [Commonwealth *v.* Robinson, 1 Gray, 555.]

[3] Hawkesworth *v.* Showler, 12 M. & W. 45.

[4] *Supra*, §§ 387, 389.

[5] Clarke *v.* Gannon, Ry. & M. 31.

did to the debtor in his lifetime; and the probability that his testimony may be beneficial to himself, by increasing the fund out of which he is to be paid, is equally remote and contingent in both cases.[1] It is only where his testimony will certainly have that effect, as in the case of a creditor to an insolvent estate, or a residuary legatee, or a distributee, that the witness is rendered incompetent.[2] Yet in these cases, and in the case of a creditor to a bankrupt estate, if the legatee, distributee, or creditor has assigned his interest to another person, even equitably, his competency is restored.[3] In an action of covenant against a lessee, for not laying the stipulated quantity of manure upon the land; upon a plea of performance, a sub-lessee of the defendant is a competent witness for him, to support the plea;[4] for it does not appear that he is under the like duty to the defendant, or that a recovery by the latter would place the witness in a state of security against a similar action.[5] Upon the same principle, a defendant against whom a civil action is pending is a competent witness for the government on the trial of an indictment for perjury, against one who has been summoned as a witness for the plaintiff in the civil action.[6]

§ 409. Thus, also, the tenant in possession is a competent witness to support an action on the case, brought by the reversioner, for an injury done to the inheritance.[7] So, in an action against an administrator for a debt due by the intestate, a surety in the administrator's bond in the Ecclesiastical court is a competent witness for him, to prove a tender; for it is but a bare possibility that an action may be brought upon the bond.[8] So, in an action against a debtor, who pleads the insolvent debtor's act in discharge, another creditor is a competent witness for the plaintiff, to prove that, in fact, the defendant is not within the operation of the act.[9] An executor or trustee under a will, taking no beneficial interest

[1] Paull *v.* Brown, 6 Esp. 34; Davies *v.* Davies, 1 Mood. & M. 345; Carter *v.* Pierce, 1 T. R. 164. An annuitant under the will is also a competent witness for the executor, in an action against him for the debt of the testator. Nowell *v.* Davies, 5 B. & Ad. 368.

[2] *Supra*, § 392.

[3] Heath *v.* Hall, 4 Taunt. 326; Boynton *v.* Turner, 13 Mass. 391.

[4] Wishaw *v.* Barnes, 1 Campb. 341

[5] *Supra*, § 394.

[6] Hart's case, 2 Rob. Virg. Rep. 819.

[7] Doddington *v.* Hudson, 1 Bing. 257; [Schnable *v.* Koehler, 28 Penn. St. R. 181.] Where the defence rested on several cognizances, it was held, that the person under whom one of the cognizances was made, was competent to prove matters distinct from and independent of that particular cognizance. Walker *v.* Giles, 2 C. & K. 671.

[8] Carter *v.* Pierce, 1 T. R. 163.

[9] Norcott *v.* Orcott, 1 Stra. 650.

under the will, is a good attesting witness.[1] And in an action against an administrator upon a bond of the intestate, and a plea of *plene administravit* by the payment of another bond debt, the obligee in the latter bond is a competent witness to support the plea.[2] A trespasser, not sued, is a competent witness for the plaintiff, against his co-trespasser.[3] In a *qui tam* action, for the penalty for taking excessive usury, the borrower of the money is a competent witness for the plaintiff.[4] A person who has been arrested on mesne process and suffered to escape, is a competent witness for the plaintiff, in an action against the sheriff for the escape;[5] for though the whole debt may be recovered against the sheriff, yet, in an action on the judgment against the original debtor, the latter can neither plead in bar, nor give in evidence, in mitigation of damages, the judgment recovered against the sheriff. And one who has been rescued is a competent witness for the defendant, in an action against him for the rescue.[6] So, a mariner, entitled to a share in a prize, is a competent witness for the captain in an action brought by him for part of the goods taken.[7] In all these cases, it is obvious that whatever interest the witness might have, it was merely contingent and remote; and, on this ground, the objection has been held to go only to his credibility.

§ 410. It is hardly necessary to observe that, where a witness is produced to testify *against his interest*, the rule, that interest disqualifies, does not apply, and the witness is competent.

§ 411. The general rule, that a witness interested in the subject of the suit, or in the record, is not competent to testify on the side of his interest, having been thus stated and explained, it remains for us to consider some of the *exceptions* to the rule,

[1] Phipps *v.* Pitcher, 6 Taunt. 220; Comstock *v.* Hadlyme, 8 Conn. R. 254. In *Massachusetts*, the executor has been held incompetent to prove the will in the court of Probate, he being party to the proceedings, and liable to the cost of the trial. Sears *v.* Dillingham, 12 Mass. 358. But the will may be proved by the testimony of the other witnesses, he having been a competent witness at the time of attestation. Ibid. Generally speaking, any trustee may be a witness, if he has no interest in the matter; but not otherwise. Main *v.* Newson, Anthon, 11; Johnson *v.* Cunningham, 1 Ala. 249; George *v.* Kimball, 24 Pick. 234; Norwood *v.* Morrow, 4 Dev. & Bat. 442.

[2] Bull. N. P. 143; 1 Ld. Raym. 745.

[3] Morris *v.* Daubigny, 5 Moore, 319. In an action against the printer of a newspaper for a libel, a proprietor of the paper is a competent witness, as he is not liable to contribution. Moscati *v.* Lawson, 7 C. & P. 52.

[4] Smith *v.* Prager, 7 T. R. 60.

[5] Cass *v.* Cameron, Peake's Cas. 124; Hunter *v.* King, 4 B. & Ald. 210. If the escape was committed while the debtor was at large, under a bond for the prison liberties, the jailer, who took the bond, is a competent witness for the sheriff. Stewart *v.* Kip, 5 Johns. 256.

[6] Wilson *v.* Gary, 6 Mod. 211.

[7] Anon. Skin. 403.

which, for various reasons, have been allowed. These exceptions chiefly prevail either in criminal cases, or in the affairs of trade and commerce, and are admitted on grounds of public necessity and convenience, and to prevent a failure of justice. They may be conveniently classed thus: (1.) Where the witness, in a criminal case, is entitled to a reward, upon conviction of the offender; — (2.) Where, being otherwise interested, he is made competent by statute; — (3.) The case of agents, carriers, factors, brokers, or servants, when called to prove acts done for their principals, in the course of their employment; and — (4.) The case of a witness, whose interest has been acquired after the party had become entitled to his testimony. To these a few others may be added, not falling under either of these heads.

§ 412. And in the *first place*, it is to be observed, that the circumstance that a witness for the prosecution will be *entitled to a reward from the government* upon conviction of the offender, or to a restoration, as owner of the property stolen, or to a portion of the fine or penalty inflicted, is not admitted as a valid objection to his competency. By the very statute, conferring a benefit upon a person, who, but for that benefit, would have been a witness, his competency is virtually continued, and he is as much a witness after that benefit, as he would have been before. The case is clear upon grounds of public policy, with a view to the public interest, and because of the principle on which rewards are given. The public has an interest in the suppression of crime, and the conviction of criminals; it is with a view to stir up greater vigilance in apprehending, that rewards are given; and it would defeat the object of the legislature, to narrow the means of conviction, by means of those rewards, and to exclude testimony, which otherwise would have been admissible.[1] The distinction between these excepted cases, and those which fall under the general rule, is, that in the latter, the benefit resulting to the witness is created chiefly for his own sake, and not for public purposes. Such is the case of certain summary convictions heretofore mentioned.[2] But where it is plain, that the infliction of a fine or penalty is intended as a punishment, in furtherance of public justice, rather than as an indemnity to the party injured, and that the detection and con-

[1] Rex *v.* Williams, 9 B. & C. 549, 556, per Bayley, J. See also 1 Gilb. Evid. by Lofft, 245–250.

[2] *Supra*, § 403.

viction of the offender are the objects of the legislature, the case will be within the exception, and the person benefited by the conviction will, notwithstanding his interest, be competent.[1] If the reward to which the witness will be entitled has been *offered by a private individual*, the rule is the same, the witness being still competent; but the principle on which it stands is different; namely, this, that the public have an interest upon public grounds, in the testimony of every person who knows any thing as to a crime; and that nothing which private individuals can do will take away the public right.[2] The interest, also, of the witness is contingent; and, after all, he may not become entitled to the reward.

§ 413. The reason of this exception extends to, and accordingly it has been held to include, the cases where, instead of a pecuniary reward, a *pardon or exemption from prosecution* is offered by statute to any person participating in a particular offence, provided another of the parties should be convicted upon his evidence. In such cases, Lord Ellenborough remarked, that the statute gave a parliamentary capacitation to the witness, notwithstanding his interest in the cause; for it was not probable that the legislature would intend to discharge one offender, upon his discovering another, so that the latter might be convicted without intending that the discoverer should be a competent witness.[3]

§ 414. And in like manner, where the witness will directly derive *any other benefit* from the conviction of the offender, he is still a competent witness for the government, in the cases already mentioned. Formerly, indeed, it was held that the *person whose name* was alleged to be *forged*, was not admissible as a witness against the prisoner, on an indictment for the forgery, upon the notion that the prosecution was in the nature of a proceeding *in rem*, and that the conviction warranted a judicial cancellation of the instrument. And the prosecutor in an indictment for perjury has been thought incompetent, where he had a suit pending, in

[1] Rex *v.* Williams, 9 B. & C. 549, 560, per Bayley, J. See also the case of the Rioters, 1 Leach, Cr. Cas. 353, note (a), where the general question of the admissibility of witnesses, to whom a reward was offered by the government, being submitted to the twelve judges, was resolved in the affirmative. McNally's Evid. p. 61, Rule 12; United States *v.* Murphy, 16 Peters, R. 203; United States *v.* Wilson, 1 Baldw. 99; Commonwealth *v.* Moulton, 9 Mass. 30; Rex *v.* Teasdale, 3 Esp. 68, and the cases cited in Mr. Day's note; Salisbury *v.* Connecticut, 6 Conn. 101.

[2] 9 B. & C. 556, per Bayley, J.

[3] Heward *v.* Shipley, 4 East, 180, 183. See also Rex *v.* Rudd, 1 Leach, Cr. Cas. 151, 156–158; Bush *v.* Railing, Sayer, 289; Mead *v.* Robinson, Willes, 422; Sutton *v.* Bishop, 4 Burr. 2283.

which the person prosecuted was a material witness against him, or was defendant against him in a suit in equity, in which his answer might be evidence. But this opinion as to cases of perjury has since been exploded; and the party is, in all such cases, held admissible as a witness, his credibility being left to the jury. For wherever the party offers as evidence, even to a collateral point, a record which has been obtained on his own testimony, it is not admitted; and moreover, the record in a criminal prosecution is generally not evidence of the facts in a civil suit, the parties not being the same.[1] And as to the person whose name has been forged, the unsoundness of the rule, by which he was held incompetent, was tacitly conceded in several of the more recent cases, which were held not to be within the rule; and at length it was repealed in England by an express statute,[2] which renders the party injured a competent witness in all criminal prosecutions for forgery. In America, though in some of the earlier cases, the old English rule of exclusion was followed, yet the weight of authority, including the later decisions, is quite the other way, and the witness is now almost universally held admissible.[3]

§ 415. The *second class* of cases, in which the general rule of incompetency by reason of interest does not apply, consists of exceptions created by *express statutes*, and which otherwise would not fall within the reason of the first exception. Of this sort are cases, where the informer and prosecutor, in divers summary convictions and trials for petty offences, is, by the statutes of different states, expressly made a competent witness, notwithstanding his interest in the fine or forfeiture; but of which the plan of this Treatise does not require a particular enumeration.

[1] Gilb. Evid. by Lofft, pp. 33, 34; Bull. N. P. 232, 245; Rex *v.* Boston, 4 East, 572; Abrahams *v.* Bunn, 4 Burr. 2251. See further, *infra*, § 537.

[2] 9 Geo. IV., c. 32.

[3] Respublica *v.* Keating, 1 Dall. 110; Pennsylvania *v.* Farrel, Addis. 246; The People *v.* Howell, 4 Johns. 296, 302; The People *v.* Dean, 6 Cowen, 27; Commonwealth *v.* Frost, 5 Mass. 53; Commonwealth *v.* Waite, Id. 261; The State *v.* Stanton, 1 Iredell, 424; Simmons *v.* The State, 7 Ham. 116. Lord Denman is reported to have ruled, at *nisi prius*, that where the prosecutor, in an indictment for perjury, expected that the prisoner would be called as a witness against him in a civil action about to be tried, he was incompetent as a witness to support the indictment. Rex *v.* Hulme, 7 C. & P. 8. But *quære*, and see Rex *v.* Boston, 4 East, 572; *supra*, § 362. In several of the United States, the party injured, or intended to be injured, or entitled to satisfaction for the injury, or liable to pay the costs of the prosecution, is by statute made a competent witness upon a criminal prosecution for the offence. See *Missouri* Rev. Stat. 1845, ch. 138, § 22; *Illinois* Rev. Stat. 1833, Crim. Code, §§ 154, 169, pp. 208, 212; *California* Rev. Stat. 1850, ch. 99, § 13. In *New Hampshire*, no person is disqualified as a witness in a criminal prosecution by reason of interest, "except the respondent." Rev. Stat. 1842, ch. 225, § 17. As to the mode of examining the prosecutor, in a trial for forgery, see *post*, vol. 3, § 106, n.

§ 416. The *third class* of cases, excepted out of the general rule, is that of *agents*, *carriers*, *factors*, *brokers*, and other *servants*, when offered to prove the making of contracts, the receipt or payment of money, the receipt or delivery of goods and other acts done within the scope of their employment. This exception has its foundation in public convenience and necessity;[1] for otherwise, affairs of daily and ordinary occurrence could not be proved, and the freedom of trade and commercial intercourse would be inconveniently restrained. And it extends, in principle, to every species of agency or intervention, by which business is transacted; unless the case is overborne by some other rule. Thus, where the acceptor of a bill of exchange was also the agent of the defendant, who was both drawer and indorser, he was held incompetent in an action by the indorsee, to prove the terms on which he negotiated the bill to the indorsee, in order to defeat the action, though the facts occurred in the course of his agency for the defendant, for whose use the bill was negotiated; it being apparent that the witness was interested in the costs of the suit.[2] But in cases not thus controlled by other rules, the constant course is to admit the witness, notwithstanding his apparent interest in the event of the suit.[3] Thus, a porter, a journeyman, or salesman, is admissible to prove the delivery of goods.[4] A broker, who has effected a policy, is a competent witness for the assured, to prove any matters connected with the policy; even though he has an interest in it arising from his lien.[5] A factor, who sells for the plaintiff, and is to have a poundage on the amount, is a competent witness to prove the contract of sale.[6] So, though he is to have for himself all he has bargained for beyond a certain amount, he is still a competent witness for the seller.[7] A clerk, who has received money, is a competent witness for the party who paid it,

[1] Bull. N. P. 289; 10 B. & C. 864, per Parke, J.; Benjamin *v.* Porteus, 2 H. Bl. 591; Mathews *v.* Haydon, 2 Esp. 509. This necessity, says Mr. Evans, is that which arises from the general state and order of society, and not that which is merely founded on the accidental want or failure of evidence in the particular case. Poth. on Obl. by Evans, App. No. 16, pp. 208, 267. In all the cases of this class, there seems also to be enough of contingency in the nature of the interest, to render the witness admissible under the general rule.

[2] Edmonds *v.* Lowe, 8 B. & C. 407.

[3] Theobald *v.* Tregott, 11 Mod. 262, per Holt, C. J.

[4] Bull. N. P. 289; 4 T. R. 590; Adams *v.* Davis, 3 Esp. 48.

[5] Hunter *v.* Leathley, 10 B. & C. 858.

[6] Dixon *v.* Cooper, 3 Wils. 40; Shepard *v.* Palmer, 6 Conn. 95; Dupeau *v.* Hyams, 2 McCord, 146; Scott *v.* Wells, 6 Watts & Serg. 357.

[7] Benjamin *v.* Porteus, 2 H. Bl. 590; Caune *v.* Sagory, 4 Martin, 81.

to prove the payment, though he is himself liable on the receipt of it.[1] A carrier is admissible for the plaintiff, to prove that he paid a sum of money to the defendant by mistake, in an action to recover it back.[2] So of a banker's clerk.[3] A servant is a witness for his master, in an action against the latter for a penalty, such, for example, as for selling coals without measure by the bushel, though the act were done by the servant.[4] A carrier's bookkeeper is a competent witness for his master, in an action for not safely carrying goods.[5] A shipmaster is a competent witness for the defendant in an action against his owner, to prove the advancement of moneys for the purposes of the voyage, even though he gave the plaintiff a bill of exchange on his owner for the amount.[6] The cashier or teller of a bank is a competent witness for the bank, to charge the defendant on a promissory note,[7] or for money lent, or overpaid,[8] or obtained from the officer without the security which he should have received; and even though the officer has given bond to the bank for his official good conduct.[9] And an agent is also a competent witness to prove his own authority, if it be by parol.[10]

§ 417. This exception being thus founded upon considerations of public necessity and convenience, for the sake of trade and the common usage of business, it is manifest, that it *cannot be extended* to cases where the witness is called to testify to facts *out of the usual and ordinary* course of business, or to contradict or deny the effect of those acts which he has done as agent. He is safely admitted, in all cases, to prove that he acted according to the directions of his principal, and within the scope of his duty; both on the ground of necessity, and because the principal can never maintain an action against him for any act done according to his own directions, whatever may be the result of the suit in which he

[1] Mathews *v.* Haydon, 2 Esp. 509. [A clerk who paid out the money of his employer by mistake has been held to be a competent witness for his employer in any action to recover back the money. Burd *v.* Ross, 15 Mis. 254.]

[2] Barker *v.* Macrae, 3 Campb. 144.

[3] Martin *v.* Horrell, 1 Stra. 647.

[4] E. Ind. Co. *v.* Gossing, Bull. N. P. 289, per Lee, C. J.

[5] Spencer *v.* Goulding, Peake's Cas. 129.

[6] Descadillas *v.* Harris, 8 Greenl. 298; Milward *v.* Hallett, 2 Caines, 77. And see Martineau *v.* Woodland, 2 C. & P. 65.

[7] Stafford Bank *v.* Cornell, 1 N. Hamp. 192.

[8] O'Brien *v.* Louisiana State Bank, 5 Martin, 305, N. S.; United States Bank *v.* Johnson, Id. 310.

[9] The Franklin Bank *v.* Freeman, 16 Pick. 535; U. S. Bank *v.* Stearns, 15 Wend. 314.

[10] Lowber *v.* Shaw, 5 Mason, 242, per Story, J.; McGunnagle *v.* Thornton, 10 S. & R. 251; Ilderton *v.* Atkinson, 7 T. R. 480; Birt *v.* Kershaw, 2 East, 458; [Gould *v.* Norfolk Lead Co. 9 Cush. 338.]

is called as a witness. But if the cause depends on the question, whether the agent has been guilty of some tortious act, or some negligence in the course of executing the orders of his principal, and in respect of which he would be liable over to the principal, if the latter should fail in the action pending against him, the agent, as we have seen, is not a competent witness for his principal, without a release.[1]

§ 418. In the *fourth class of exceptions* to the rule of incompetency by reason of interest, regard is paid to the time and manner in which the interest was acquired. It has been laid down in general terms, that where one person becomes entitled to the testimony of another, the latter shall not be rendered incompetent to testify, by reason of any *interest subsequently acquired* in the event of the suit.[2] But though the doctrine is not now universally admitted to that extent, yet it is well settled and agreed, that in all cases where the interest has been subsequently created by the fraudulent act of the adverse party, for the purpose of taking off his testimony, or by any act of mere wantonness, and aside from the ordinary course of business on the part of the witness, he is not thereby rendered incompetent. And where the person was the original witness of the transaction or agreement between the parties, in whose testimony they both had a common interest, it seems also agreed, that it shall not be in the power either of the witness, or of one of the parties, to deprive the other of his testimony, by reason of any interest subsequently acquired, even though it were acquired without any such intention on the part of the witness or of the party.[3] But the question, upon which learned judges have been divided in opinion is, whether, where the witness was not the agent of both parties, or was not called as a witness of the original agreement or transaction, he ought to be rendered incompetent by reason of an interest subsequently acquired in good faith, and in the ordinary course of business. On this point, it was held by Lord Ellenborough, that the pendency

[1] *Supra*, §§ 394, 395, 396; Miller *v.* Falconer, 1 Campb. 251; Theobald *v.* Tregott, 11 Mod. 262; Gevers *v.* Mainwaring, 1 Holt's Cas. 139; McBraine *v.* Fortune, 3 Campb. 317; 1 Stark. Evid. 113; Fuller *v.* Wheelock, 10 Pick. 135, 138; McDowell *v.* Stimpson, 3 Watts, 129, 135, per Kennedy, J.

[2] See Bent *v.* Baker, 3 T. R. 27, per Ld. Kenyon, and Ashhurst, J.; Barlow *v.* Vowell, Skin. 586, per Ld. Holt; Cowp. 736; Jackson *v.* Rumsey, 3 Johns. Cas. 234, 237; *supra*, § 167; [Sabine *v.* Strong, 6 Met. 670.]

[3] Forrester *v.* Pigou, 3 Campb. 381; 1 Stark. Evid. 118; Long *v.* Bailie, 4 S. & R. 222; 14 Pick. 47; Phelps *v.* Riley, 3 Conn. 266, 272; Rex *v.* Fox, 1 Stra. 652; *supra*, § 167.

of a suit could not prevent third persons from transacting business *bonâ fide* with one of the parties; and that, if an interest in the event of the suit is thereby acquired, the common consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage.[1] And therefore it was held, that where the defence to an action on a policy of insurance was, that there had been a fraudulent concealment of material facts, an underwriter, who had paid on a promise of repayment if the policy should be determined invalid, and who was under no obligation to become a witness for either party, was not a competent witness for another underwriter, who disputed the loss.[2] This doctrine has been recognized in the courts of several of the United States, as founded in good reason;[3] but the question being presented to the Supreme Court of the United States, the learned judges were divided in opinion, and no judgment was given upon the point.[4] If the subsequent interest has been created by the agency of the party producing the witness, he is disqualified; the party having no right to complain of his own act.[5]

§ 419. It may here be added, that where an interested witness does all in his power to divest himself of his interest, by *offering to surrender or release* it, which the surrenderee or releasee, even though he be a stranger, refuses to accept, the principle of the rule of exclusion no longer applies, and the witness is held admissible. Thus, in an ejectment, where the lessors of the plaintiff claimed under a will, against the heir at law, and the executor was called by the plaintiff to prove the sanity of the testator, and was objected to by the defendant, because by the same will he was devisee of the reversion of certain copyhold lands; to obviate which objection he had surrendered his estate in the copyhold lands to the use of the heir at law, but the heir had refused to accept the surrender; the court held him a competent witness.[6]

[1] Forrester *v.* Pigou, 3 Campb. 381; 1 M. & S. 9, s. c.; Hovill *v.* Stephenson, 5 Bing. 493; *supra*, § 167.

[2] Forrester *v.* Pigou, 3 Campb. 381; 1 M. & S. 9, s. c.

[3] Phelps *v.* Riley, 3 Conn. 266, 272; Eastman *v.* Winship, 16 Pick. 44, 47; Long *v.* Bailie, 4 Serg. & R. 222; The Manchester Iron Manufacturing Co. *v.* Sweeting, 10 Wend. 162. In *Maine*, the court seems to have held the witness admissible in all cases, where the party objecting to the witness is himself a party to the agreement by which his interest is acquired. Burgess *v.* Lane, 8 Greenl. 165, 170; *supra*, § 167.

[4] Winship *v.* Bank of United States, 5 Peters, 529, 552.

[5] Hovill *v.* Stephenson, 5 Bing. 493; *supra*, § 167.

[6] Goodtitle *v.* Welford, 1 Doug. 139; 5 T. R. 35, per Buller, J. The legatee in a

So, if the interest may be removed by the release of one of the parties in the suit, and such party offers to remove it, but the witness refuses, he cannot thereby deprive the party of his testimony.[1]

§ 420. Where the witness, though interested in the event of the cause, is so situated that the event is to him a matter of indifference, he is still a competent witness. This arises where he is equally *interested on both sides* of the cause, so that his interest on one side is counterbalanced by his interest on the other.[2] But if there is a preponderance in the amount or value of the interest on one side, this seems, as we have already seen, to render him an interested witness to the amount of the excess, and therefore to disqualify him from testifying on that side.[3] Whether the circumstance that the witness has a *remedy over* against another, to indemnify him for what he may lose by a judgment against the party calling him, is sufficient to render him competent by equalizing his interest, is not clearly agreed. Where his liability to costs appears from his own testimony alone, and in the same mode it is shown that he *has funds in his hands* to meet the charge, it is settled that this does not render him incompetent.[4] So, where he stated that he was *indemnified* for the costs, and considered that he had *ample security*.[5] And where, upon this objection being taken to the witness, the party calling him forthwith executed a bond to the adverse party, for the payment of all costs, with sureties, whom the counsel for the obligee admitted to be abundantly responsible, but at the same time he refused to receive the bond, the court held the competency of the witness to be thereby restored; observing, however, that if the solvency of the sureties had been denied, it might have presented a case of more embar-

will, who has been paid, is considered a competent witness to support the will in a suit at law. Wyndham *v.* Chetwynd, 1 Burr. 414.

[1] 1 Phil. Evid. 149.

[2] *Supra*, § 399. See also Cushman *v.* Loker, 2 Mass. 108; Emerson *v.* Providence Hat Manuf. Co. 12 Mass. 237; Roberts *v.* Whiting, 16 Mass. 186; Rice *v.* Austin, 17 Mass. 179; Prince *v.* Shepard, 9 Pick. 176; Lewis *v.* Hodgdon, 5 Shepl. 267; [Adams *v.* Gardiner, 13 B. Mon. 197; Governor *v.* Gee, 19 Ala. 199. Where both parties to a replevin suit claim the property by purchase from the same vendor, his interest is balanced, and he is a competent witness without a release, to impeach one of the sales. Nute *v.* Bryant, 31 Maine, 553.]

[3] *Supra*, §§ 391, 399, and cases there cited. Where the interest of the witness is *primâ facie* balanced between the parties, the possibility of a better defence against one than the other will not prevent his being sworn. Starkweather *v.* Mathews, 2 Hill, 131.

[4] Collins *v.* McCrummen, 3 Martin, N. S. 166; Allen *v.* Hawks, 13 Pick. 79.

[5] Chatlee *v.* Thomas, 7 Cowen, 358; *contra*, Pond *v.* Hartwell, 17 Pick. 272, per Shaw, C. J.

rassment, it being very questionable whether the judge could determine upon the sufficiency of the obligors, so as to absolve the witness from liability to costs.[1] The point upon which the authorities seem to be conflicting is where there is merely a right of action over, irrespective of the solvency of the party liable; the productiveness of the remedy, in actual satisfaction, being wholly contingent and uncertain. But in such cases, the weight of authority is against the admissibility of the witness. Thus, in an action against the sheriff for taking goods, his officer, who made the levy, being called as a witness for the defence, stated upon the *voir dire*, that he gave security to the sheriff, and added, that he was indemnified by the creditor, meaning that he had his bond of indemnity. But Lord Tenterden held him not a competent witness; observing, that if the result of the action were against the sheriff, the witness was liable to a certainty; and he might never get repaid on his indemnity; therefore it was his interest to defeat the action.[2] So, where the money, with which the surety in a replevin-bond was to be indemnified, had been deposited in the hands of a receiver designated by the judge, it was held, that this did not restore the competency of the surety as a witness in the cause for the principal; for the receiver might refuse to pay it over, or become insolvent, or, from some other cause, the remedy over against him might be unproductive.[3] The true distinction lies between the case, where the witness must resort to an action for his indemnity, and that in which the money is either subject to the order of the court, and within its actual control and custody, or is in the witness's own hands. Therefore it has been laid down by a learned judge, that where a certain sum of money can be so placed, either with the witness himself, or with the court, and its officers, under a proper rule directing and controlling its application according to the event, as that the interest creating the disability may be met and extinguished before the witness is or can be damnified, it shall be considered as bal-

[1] Brandigee *v.* Hale, 13 Johns. 125; Lake *v.* Auburn, 17 Wend. 18, S. P.; *supra*, § 392.

[2] Whitehouse *v.* Atkinson, 3 C. & P. 344; Jewett *v.* Adams, 8 Greenl. 30; Paine *v.* Hussey, 5 Shepl. 274.

[3] Wallace *v.* Twyman, 3 J. J. Marsh. 459–461. See also Owen *v.* Mann, 2 Day, R. 399, 404; Brown *v.* Lynch, 1 Paige, 147, 157; Allen *v.* Hawks, 13 Pick. 85, per Shaw, C. J.; Schillenger *v.* McCann, 6 Greenl. 364; Kendall *v.* Field, 2 Shepl. 30; Shelby *v.* Smith, 2 A. K. Marsh. 504. The cases in which a mere remedy over seems to have been thought sufficient to equalize the interest of the witness are Martineau *v.* Woodland, 2 C. & P. 65; Banks *v.* Kain, Id. 597; Gregory *v.* Dodge, 14 Wend. 593.

ancing or extinguishing that interest, so as to restore the competency of the witness.[1]

§ 421. In regard to the *time of taking the objection* to the competency of a witness, on the ground of interest, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the witness is examined in chief. If the party is aware of the existence of the interest, he will not be permitted to examine the witness, and afterwards to object to his competency, if he should dislike his testimony. He has his election, to admit an interested person to testify against him, or not; but in this, as in all other cases, the election must be made as soon as the opportunity to make it is presented; and failing to make it at that time, he is presumed to have waived it for ever.[2] But he is not prevented from taking the objection at any time during the trial, provided it is taken as soon as the interest is discovered.[3] Thus, if discovered during the examination in chief by the plaintiff, it is not too late for the defendant to take the objection.[4] But if it is not discovered until after the trial is concluded, a new trial will not, for that cause alone, be granted;[5] unless the interest was known and concealed by the party producing the witness.[6] The rule on this subject, in criminal and civil cases, is the same.[7] Formerly, it was deemed necessary to take the objection to the competency of a witness on the *voir dire;* and if once sworn in chief, he could not afterwards be objected to, on the ground of interest. But the strictness of this rule is relaxed; and the objection is now usually taken after he is sworn in chief, but previous to his direct examination. It is in the discretion of the judge to permit the adverse party to cross-examine the witness, as to his interest, after he has been examined in chief; but the usual course is not to allow questions to be asked upon the cross-examination, which properly belong only to an examination upon the *voir dire*.[8]

[1] Pond *v.* Hartwell, 17 Pick. 269, 272, per Shaw, C. J.

[2] Donelson *v.* Taylor, 8 Pick. 390, 392; Belcher *v.* Magnay, 1 New Pr. Cas. 110; [Snow *v.* Batchelder, 8 Cush. 513.]

[3] Stone *v.* Blackburn, 1 Esp. 37; 1 Stark. Evid. 124; Shurtleff *v.* Willard, 19 Pick. 202. Where a party has been fully apprised of the grounds of a witness's incompetency by the opening speech of counsel, or the examination in chief of the witness, doubts have been entertained at *nisi prius*, whether an objection to the competency of a witness can be postponed. 1 Phil. Evid. 154, note (3).

[4] Jacobs *v.* Laybourn, 11 M. & W. 685. And see Yardley *v.* Arnold, 10 M. & W. 141; 6 Jur. 718.

[5] Turner *v.* Pearte, 1 T. R. 717; Jackson *v.* Jackson, 5 Cowen, 173.

[6] Niles *v.* Brackett, 15 Mass. 378.

[7] Commonwealth *v.* Green, 17 Mass. 538; Roscoe's Crim. Evid. 124.

[8] Howell *v.* Lock, 2 Campb. 14; Odiorne *v.* Winkley, 2 Gallis. 51; Perigal *v.* Nicholson, 1 Wightw. 64. The objection

But if, notwithstanding every ineffectual endeavor to exclude the witness on the ground of incompetency, it afterwards should appear incidentally, in the course of the trial, that the witness is interested, his testimony will be stricken out, and the jury will be instructed wholly to disregard it.[1] The rule in equity is the same as at law;[2] and the principle applies with equal force to testimony given in a deposition in writing, and to an oral examination in court. In either case, the better opinion seems to be, that if the objection is taken as soon as may be after the interest is discovered, it will be heard; but after the party is *in mora*, it comes too late.[3] One reason for requiring the objection to be made thus early is, that the other party may have opportunity to remove it by a release; which is always allowed to be done, when the objection is taken at any time before the examination is completed.[4] It is also to be noted as a rule, applicable to all objections to the reception of evidence, that the ground of objection must be distinctly stated at the time, or it will be held vague and nugatory.[5]

that the witness is the real plaintiff, ought to be taken on the *voir dire*. Dewdney *v.* Palmer, 4 M. & W. 664; 7 Dowl. 177, s. c.

[1] Davis *v.* Barr, 9 S. & R. 137; Schillenger *v.* McCann, 6 Greenl. 364; Fisher *v.* Willard, 13 Mass. 379; Evans *v.* Eaton, 1 Peters, C. C. R. 338; Butler *v.* Tutts, 1 Shepl. 302; Stout *v.* Wood, 1 Blackf. 71; Mitchell *v.* Mitchell, 11 G. & J. 388. The same rule seems applicable to all the instruments of evidence, whether oral or written. Scribner *v.* McLaughlin, 1 Allen, 379; and see Swift *v.* Dean, 6 Johns. 523, 536; Perigal *v.* Nicholson, Wightw. 63; Howell *v.* Lock, 2 Campb. 64; Needham *v.* Smith, 2 Vern. 464. In one case, however, where the examination of a witness was concluded, and he was dismissed from the box, but was afterwards recalled by the judge, for the purpose of asking him a question, it was ruled by Gibbs, C. J., that it was then too late to object to his competency. Beeching *v.* Gower, 1 Holt's Cas. 313; and see Heely *v.* Barnes, 4 Denio, 73. And in chancery it is held, that where a witness has been cross-examined by a party, with full knowledge of an objection to his competency, the court will not allow the objection to be taken at the hearing. Flagg *v.* Mann, 2 Sumn. 487.

[2] Swift *v.* Dean, 6 Johns. 523, 538; Needham *v.* Smith, 2 Vern. 463; Vaughan *v.* Worrall, 2 Swanst. 400. In this case, Lord Eldon said, that no attention could be given to the evidence, though the interest were not discovered until the last question, after he has been "cross-examined to the bone." See Gresley on Evid. 234–236; Rogers *v.* Dibble, 3 Paige, 238; Town *v.* Needham, Id. 545, 552; Harrison *v.* Courtauld, 1 Russ. & M. 428; Moorhouse *v.* De Passou, G. Cooper, Ch. Cas. 300; 19 Ves. 433, s. c. See also Jacobs *v.* Laybourn, 7 Jur. 562.

[3] Donelson *v.* Taylor, 8 Pick. 390. Where the testimony is by deposition, the objection, if the interest is known, ought regularly to be taken *in limine*: and the cross-examination should be made *de bene esse*, under protest, or with an express reservation of the right of objection at the trial; unless the interest of the witness is developed incidentally, in his testimony to the merits. But the practice on this point admits of considerable latitude, in the discretion of the judge. United States *v.* One Case of Hair Pencils, 1 Paine, 400; Talbot *v.* Clark, 8 Pick. 51; Smith *v.* Sparrow, 11 Jur. 126; The Mohawk Bank *v.* Atwater, 2 Paige, 54; Ogle *v.* Pelaski, 1 Holt's Cas. 485; 2 Tidd's Pr. 812. As to the mode of taking the objection in chancery, see 1 Hoffm. Chan. 489; Gass *v.* Stinson, 3 Sumn. 605.

[4] Tallman *v.* Dutcher, 7 Wend. 180; Doty *v.* Wilson, 14 Johns. 378; Wake *v.* Lock, 5 C. & P. 454.

[5] Camden *v.* Doremus, 3 Howard, S. C.

§ 422. Where the objection to the competency of the witness arises from *his own examination*, he may be further interrogated to facts tending to remove the objection, though the testimony might, on other grounds, be inadmissible. When the whole ground of the objection comes from himself only, what he says must be taken together as he says it.[1] Thus, where his interest appears, from his own testimony, to arise from a written instrument, which is not produced, he may also testify to the contents of it; but if he produces the instrument, it must speak for itself.[2] So, where the witness for a chartered company stated that he had been a member, he was permitted also to testify that he had subsequently been disfranchised.[3] So, where a witness called by an administrator testified that he was one of the heirs at law, he was also permitted to testify that he had released all his interest in the estate.[4] And generally, a witness upon an examination in court as to his interest may testify to the contents of any contracts, records, or documents not produced, affecting the question of his interest.[5] But if the testimony of the witness is taken upon interrogatories in writing, previously filed and served on the adverse party, who objects to his competency on the ground of interest, which the witness confesses, but testifies that it has been released; the release must be produced at the trial, that the court may judge of it.[6]

§ 423. The *mode of proving the interest* of a witness is either by his own examination, or by evidence *aliunde*. But whether the election of one of these modes will preclude the party from afterwards resorting to the other is not clearly settled by the authorities. If the evidence offered *aliunde* to prove the interest is rejected, as inadmissible, the witness may then be examined on the *voir dire*.[7] And if the witness on the *voir dire* states that he

Rep. 515, 530; Elwood *v.* Deifendorf, 5 Barb. S. C. R. 398; Carr *v.* Gale, Daveis, R. 337.

[1] Abrahams *v.* Bunn, 4 Burr. 2256, per Ld. Mansfield; Bank of Utica *v.* Mestereau, 3 Barb. Ch. R 528.

[2] Butler *v.* Carver, 2 Stark. R. 433. See also Rex *v.* Gisburn, 15 East, 57.

[3] Butcher's Company *v.* Jones, 1 Esp. 160. And see Botham *v.* Swingler, Peake's Cas. 218.

[4] Ingraham *v.* Dade, Lond. Sittings after Mich. T. 1817; 1 C. P. 234, n.; Wandless *v.* Cawthorne, B. R. Guildhall, 1829; 1 M. & M. 321, n.

[5] Miller *v.* The Mariners' Church, 7 Greenl. 51; Fifield *v.* Smith, 8 Shepl. 383; Sewell *v.* Stubbs, 1 C. & P. 73; Quarterman *v.* Cox, 8 C. & P. 97; Luniss *v.* Row, 2 P. & D. 538; Hays *v.* Richardson, 1 Gill & J. 366; Stebbins *v.* Sackett, 5 Conn. 258; Baxter *v.* Rodman, 3 Pick. 435. The case of Goodhay *v.* Hendry, 1 Mo. & M. 319, apparently *contra*, is opposed by Carlisle *v.* Eddy, 1 C. & P. 234, and by Wandless *v.* Cawthorne, 1 Mo. & M. 321, n.

[6] Southard *v.* Wilson, 8 Shepl. 494; Hobart *v.* Bartlett, 5 Shepl. 429.

[7] Main *v.* Newson, Anthon's Cas. 13. But a witness cannot be excluded by

does not know, or leaves it doubtful whether he is interested or not, his interest may be shown by other evidence.[1] It has also been held, that a resort to one of these modes to prove the interest of the witness on one ground does not preclude a resort to the other mode, to prove the interest on another ground.[2] And where the objection to the competency of the witness is founded upon the evidence already adduced by the party offering him, this has been adjudged not to be such an election of the mode of proof, as to preclude the objector from the right to examine the witness on the *voir dire*.[3] But, subject to these modifications, the rule recognized and adopted by the general current of authorities is, that where the objecting party has undertaken to prove the interest of the witness, by interrogating him upon the *voir dire*, he shall not, upon failure of that mode, resort to the other to prove facts, the existence of which was known when the witness was interrogated.[4] The party appealing to the conscience of the witness, offers him to the court as a credible witness; and it is contrary to the spirit of the law of evidence, to permit him afterwards to say, that the witness is not worthy to be believed. It would also violate another rule, by its tendency to raise collateral issues. Nor is it deemed reasonable to permit a party to sport with the conscience of a witness, when he has other proof of his interest. But if evi-

proof of his own admission that he was interested in the suit. Bates *v.* Ryland, 6 Alabama R. 668; Pierce *v.* Chase, 8 Mass. 487, 488; Commonwealth *v.* Waite, 5 Mass. 261; George *v.* Stubbs, 13 Shepl. 243.

[1] Shannon *v.* The Commonwealth, 8 S. & R. 444; Galbraith *v.* Galbraith, 6 Watts, 112; Bank of Columbia *v.* Magruder, 6 Har. & J. 172.

[2] Stebbins *v.* Sackett, 5 Conn. 258.

[3] Bridge *v.* Wellington, 1 Mass. 221, 222.

[4] In the old books, including the earlier editions of Mr. Starkie's and Mr. Phillips's Treatises on Evidence, the rule is clearly laid down, that after an examination upon the *voir dire*, no other mode of proof can in any case be resorted to; excepting only the case where the interest was developed in the course of trial of the issue. But in the last editions of those works it is said, that "if the witness discharged himself on the *voir dire*, the party who objects may still support his objection by evidence;" but no authority is cited for the position. 1 Stark. Evid. 124; Phil. & Am. on Evid. 149; 1 Phil. Evid. 154. Mr. Starkie had previously added these words: "as part of his own case" (see 2 Stark. Evid. p. 756, 1st edit.); and with this qualification the remark is supported by authority, and is correct in principle. The question of competency is a collateral question; and the rule is, that when a witness is asked a question upon a collateral point, his answer is final, and cannot be contradicted; that is, no collateral evidence is admissible for that purpose. Harris *v.* Tippett, 2 Campb. 637; Philadelphia & Trenton Co. *v.* Stimpson, 14 Peters, 448, 461; Harris *v.* Wilson, 7 Wend. 57; Odiorne *v.* Winkley, 2 Gallis, 53; Rex *v.* Watson, 2 Stark. R. 149–157. But if the evidence, subsequently given upon the matter in issue, should also prove the witness interested, his testimony may well be stricken out, without violating any rule. Brockbank *v.* Anderson, 7 Man. & Gr. 295, 313. The American courts have followed the old English rule, as stated in the text. Butler *v.* Butler, 3 Day, R. 214; Stebbins *v.* Sackett, 5 Conn. 258, 261; Chance *v.* Hine, 6 Conn. 231; Welden *v.* Buck, Anthon's Cas. 9; Chatfield *v.* Lathrop, 6

dence of his interest has been given *aliunde*, it is not proper to examine the witness, in order to explain it away.[1]

§ 424. A witness is said to be examined upon the *voir dire*, when he is sworn and examined as to the fact whether he is not a party interested in the cause.[2] And though this term was formerly and more strictly applied only to the case where the witness was sworn to make true answers to such questions as the court might put to him, and before he was sworn in chief, yet it is now extended to the preliminary examination to his interest, whatever may have been the form of the oath under which the inquiry is made.

§ 425. The question of interest, though involving facts, is still a preliminary question, preceding, in its nature, the admission of the testimony to the jury. It is therefore to be *determined by the court* alone, it being the province of the judge and not of the jury, in the first instance, to pass upon its efficiency.[3] If, however, the question of fact in any preliminary inquiry, such, for instance, as the proof of an instrument by subscribing witnesses, is decided by the judge, and the same question of fact afterwards recurs in the course of the trial upon the merits, the jury are not precluded by the decision of the judge, but may, if they are satisfied upon the evidence, find the fact the other way.[4] In determining the question of interest, where the evidence is derived *aliunde*, and it depends upon the decision of intricate questions of fact, the judge may, in his discretion, take the opinion of the jury upon them.[5] And if a witness, being examined on the *voir dire*, testifies to facts tending to prove that he is not interested, and is thereupon admitted to testify; after which opposing evidence is introduced, to the same facts, which are thus left in doubt, and the facts are material to the issue; the evidence must be weighed by the jury, and if they thereupon believe the witness to be interested, they must lay his testimony out of the case.[6]

426. The competency of a witness, disqualified by interest, may always be *restored by* a proper *release*.[7] If it consists in an interest

Pick. 418; Evans *v.* Eaton, 1 Peters, C. C. R. 322; Stewart *v.* Locke, 33 Maine, 87.

[1] Mott *v.* Hicks, 1 Cowen, 513; Evans *v.* Gray, 1 Martin, N. S. 709.

[2] Termes de la Ley, Verb. *Voyer dire*. And see Jacobs *v.* Laybourn, 11 M. & W. 685, where the nature and use of an examination upon the *voir dire* are stated and explained by Ld. Abinger, C. B.

[3] Harris *v.* Wilson, 7 Wend. 57; *supra*, § 49.

[4] Ross *v.* Gould, 5 Greenl. 204.

[5] See *supra*, § 49.

[6] Walker *v.* Sawyer, 13 N. Hamp. R. 191.

[7] Where the witness produces the release from his own possession, as part of his testimony, in answer to a question put to him, its execution needs not to be

vested in himself, he may divest himself of it by a release, or other proper conveyance. If it consists in a liability over, whether to the party calling him, or to another person, it may be released by the person to whom he is liable. A general release of all actions and causes of action for any matter or thing, which has happened previous to the date of the release, will discharge the witness from all liability consequent upon the event of a suit then existing. Such a release from the drawer to the acceptor of a bill of exchange was therefore held sufficient to render him a competent witness for the drawer, in an action then pending by the payee against him; for the transaction was already passed, which was to lay the foundation of the future liability; and upon all such transactions and inchoate rights such a release will operate.[1] A release, to qualify a witness, must be given before the testimony is closed, or it comes too late. But if the trial is not over, the court will permit the witness to be re-examined, after he is released; and it will generally be sufficient to ask him if his testimony, already given, is true; the circumstances under which it has been given going only to the credibility.[2]

§ 427. As to the person *by whom the release should be given*, it is obvious that it must be by the party holding the interest to be released, or by some person duly authorized in his behalf. A release of a bond debt by one of several obligees, or to one of several obligors, will operate as to them all.[3] So, where several

proved by the subscribing witnesses; but it is to be taken as part of his testimony. If the question is asked by the party calling the witness, who thereupon produce the release, the party is estopped to deny that it is a valid and true release. But where the release is produced or set up by the party to the suit, to establish his own title, he must prove its execution by the subscribing witness. Citizens' Bank *v.* Nantucket Steamboat Co. 2 Story, R. 16, 42. And see Morris *v.* Thornton, 8 T. R. 303; Jackson *v.* Pratt, 10 Johns. 381; Carlisle *v.* Eady, 1 C. & P. 234; Ingram *v.* Dada, Ibid. note; Goodhay *v.* Hendry, 1 Mood. & Malk. 319. See also Southard *v.* Wilson, 8 Shepl. 494; Hall *v.* Steamboat Co. 13 Conn. 319. [The instrument of release need not be under seal. Dunham *v.* Branch, 5 Cush. 558, 560. A technical release, to make an interested witness competent, must be under seal. Governor *v.* Daily, 14 Ala. 469. A receipt in full of all demands, not under seal, does not render a witness competent. Dennett *v.* Lamson, 30 Maine, 223.]

[1] Scott *v.* Lifford, 1 Campb. 249, 250; Cartwright *v.* Williams, 2 Stark. R. 340.

[2] Wake *v.* Lock, 5 C. & P. 454; Tallman *v.* Dutcher, 7 Wend. 180; Doty *v.* Wilson, 14 Johns. 378. And see Clark *v.* Carter, 4 Moor, 207.

[3] Co. Lit. 232, a.; Cheetham *v.* Ward, 1 B. & P. 630. So, by one of several partners, or joint proprietors, or owners. Whitamore *v.* Waterhouse, 4 C. & P. 383; Hockless *v.* Mitchell, 4 Esp. 86; Bulkley *v.* Dayton, 14 Johns. 387; Haley *v.* Godfrey, 4 Shepl. 305. But where the interest of the parties to the record is several, a release by one of them only is not sufficient. Betts *v.* Jones, 9 C. & P. 199. [Where the process is *in rem* against a vessel, to recover the value of goods lost or damaged, the master is an interested witness; but a release from some of the part-owners renders him competent. The Peytona, 2 Curtis, C. C. 21.]

had agreed to bear the expense of a joint undertaking, in preferring a petition to parliament, and an action was brought against one of them, another of the contractors was held a competent witness for the defendant, after being released by him; for the event of the suit could at most only render him liable to the defendant for his contributory share.[1] But if there is a joint fund or property to be directly affected by the result, the same reason would not decisively apply; and some act of divestment, on the part of the witness himself, would be necessary.[2] Thus, in an action on a charter-party, a joint-owner with the plaintiff, though not a registered owner, is not a competent witness for the plaintiff, unless cross releases are executed between them.[3] A release by an infant is generally sufficient for this purpose; for it may be only voidable, and not void; in which case, a stranger shall not object to it.[4] But a release by a guardian *ad litem*,[5] or by a *prochein amy*, or by an attorney of record,[6] is not good. A surety may always render the principal a competent witness for himself, by a release.[7] And it seems sufficient, if only the costs are released.[8]

§ 428. Though there are no interests of a disqualifying nature but what may, in some manner, be annihilated,[9] yet there are some which *cannot be reached by a release*. Such is the case of

[1] Duke *v.* Pownall, 1 M. & Malk. 430; Ransom *v.* Keyes, 9 Cowen, 128. So, in other cases of liability to contribution. Bayley *v.* Osborn, 2 Wend. 527; Robertson *v.* Smith, 18 Johns. 459; Gibbs *v.* Bryant, 1 Pick. 118; Ames *v.* Withington, 3 N. Hamp. 115; Carleton *v.* Witcher, 5 N. Hamp. 196. One of several copartners, not being sued with them, may be rendered a competent witness for them by their release. Lefferts *v.* De Mott, 21 Wend. 136 (sed vide Cline *v.* Little, 5 Blackf. 486); but *quære*, if he ought not also to release to them his interest in the assets of the firm, so far as they may be affected by the demand in controversy? Ib.

[2] Waite *v.* Merrill, 4 Greenl. 102; Richardson *v.* Freeman, 6 Greenl. 57; 1 Holt's Cas. 430, note; Anderson *v.* Brock, 3 Greenl. 243. The heir is rendered a competent witness for the administrator, by releasing to the latter all his interest in the action; provided it does not appear, that there is any real estate to be affected by the result. Boynton *v.* Turner, 13 Mass. 391.

[3] Jackson *v.* Galloway, 8 C. & P. 480.

[4] Rogers *v.* Berry, 10 Johns. 132; Walker *v.* Ferrin, 4 Verm. 523.

[5] Fraser *v.* Marsh, 2 Stark. R. 41; Walker *v.* Ferrin, *ub. sup.*

[6] Murray *v.* House, 11 Johns. 464; Walker *v.* Ferrin, *ub. sup.*

[7] Reed *v.* Boardman, 20 Pick. 441; Harmon *v.* Arthur, 1 Bail. 83; Willard *v.* Wickman, 7 Watts, 292.

[8] Perryman *v.* Steggal, 5 C. & P. 197. See also Van Shaack *v.* Stafford, 12 Pick. 565.

[9] In a writ of entry by a mortgagee, the tenant claimed under a deed from the mortgagor, subsequent in date, but prior in registration, and denied notice of the mortgage. To prove that he purchased with notice, the mortgagor was admitted a competent witness for the mortgagee, the latter having released him from so much of the debt as should not be satisfied by the land mortgaged, and covenanted to resort to the land as the sole fund for payment of the debt. Howard *v.* Chadbourne, 5 Greenl. 15.

one, having a common right, as an inhabitant of a town; for a release by him, to the other inhabitants, will not render him a competent witness for one of them, to maintain the common right.[1] So, where in trover, the plaintiff claimed the chattel by purchase from B., and the defendant claimed it under a purchase from W., who had previously bought it from B., it was held that a release to B. from the defendant would not render him a competent witness for the latter; for the defendant's remedy was not against B., but against W. alone.[2] And in the case of a covenant real, running with the land, a release by the covenantee, after he has parted with the estate, is of no avail; no person but the present owner being competent to release it.[3] Where the action is against the surety of one who has since become bankrupt, the bankrupt is not rendered a competent witness for the surety, by a release from him alone: because a judgment against the surety would still give him a right to prove under the commission. The surety ought also to release the assignees from all claim on the bankrupt's estate, it being vested in them; and the bankrupt should release his claim to the surplus.[4] So, a residuary legatee is not rendered a competent witness for the executor, who sues to recover a debt due to the testator, merely by releasing to the executor his claim to that debt; for, if the action fails, the estate will still be liable for the costs to the plaintiff's attorney, or to the executor. The witness must also release the residue of the estate; or, the estate must be released from all claim for the costs.[5]

§ 429. It is *not necessary* that the release be *actually delivered* by the releasor into the hands of the releasee. It may be deposited in court, for the use of the absent party.[6] Or, it may be delivered to the wife, for the use of the husband.[7] But in such cases it has been held necessary that the delivery of the release to a third person should be known to the witness at the time of giving his

[1] Jacobson *v.* Fountain, 2 Johns. 170; Abby *v.* Goodrich, 3 Day, 433; *supra*, § 405.

[2] Radburn *v.* Morris, 4 Bing. 649.

[3] Leighton *v.* Perkins, 2 N. Hamp. 427; Pile *v.* Benham, 3 Hayw. 176; [Field *v.* Snell, 4 Cush. 504, 506; Clark *v.* Johnson, 5 Day, 373; Cunningham, 1 Barb. 399, 405.]

[4] Perryman *v.* Steggal, 8 Bing. 369. [An insolvent debtor, who has obtained his discharge, is a competent witness for the assignee, on his giving a release to the assignee of all claims against him as such assignee. Greene *v.* Durfee, 6 Cush. 362.]

[5] Baker *v.* Tyrwhitt, 4 Campb. 27.

[6] Perry *v.* Fleming, 2 N. Car. Law Repos. 458; Lilly *v.* Kitzmiller, 1 Yeates, 30; Matthews *v.* Marchant, 3 Dev. & Bat. 40; Brown *v.* Brown, 5 Ala. 508. Or, it may be delivered to the attorney. Stevenson *v.* Mudgett, 10 N. Hamp. 308.

[7] Van Deusen *v.* Frink, 15 Pick. 449; Peaceable *v.* Keep, 1 Yeates, 576.

testimony.[1] The objection of interest, as before remarked, proceeds on the presumption that it may bias the mind of the witness; but this presumption is taken away by proof of his having done all in his power to get rid of the interest.[2] It has even been held, that where the defendant has suffered an interested witness to be examined, on the undertaking of the plaintiff's attorney to execute a release to him after the trial, which, after a verdict for the plaintiff, he refused to execute, this was no sufficient cause for a new trial; for the witness had a remedy on the undertaking.[3] But the witness, in such cases, will not be permitted to proceed with his testimony, even while the attorney is preparing or amending the release, without the consent of the adverse party.[4]

§ 430. There are *other modes*, besides a release, in which the competency of an interested witness may be restored. Some of these modes, to be adopted by the witness himself, have already been adverted to;[5] namely, where he has assigned his own interest, or done all in his power to assign it; or, where he refuses to accept a release tendered to him by another. So, where, being a legatee or distributee, he has been fully paid.[6] An indorser is made a competent witness for the indorsee, by striking off his name from the back of the note or bill; but if the bill is drawn in sets, it must appear that his name is erased from each one of the set, even though one of them is missing and is supposed to be lost; for it may be in the hands of a *bonâ fide* holder.[7] A guarantor, also, is rendered a competent witness for the creditor, by delivering up the letter of guaranty, with permission to destroy it.[8] And this may be done by the attorney of the party, his relation as such and the possession of the paper being sufficient to justify a presumption of authority for that purpose.[9] The bail or surety of another may be rendered a competent witness for him, as we have already seen, by substituting another person in his stead; which, where the stipulation is entered into in any judicial proceeding, as in the case of bail and the like, the court will order

[1] Seymour *v.* Strong, 4 Hill, R. 225. Whether the belief of the witness as to his interest, or the impression under which he testifies, can go farther than to affect the credibility of his testimony, *quære;* and see *supra*, §§ 387, 388, 419.

[2] Goodtitle *v.* Welford, 1 Doug. 139, 141, per Ashhurst, J.

[3] Hemming *v.* English, 1 Cr. M. & R. 568; 5 Tyrwh. 185, s. c.

[4] Doty *v.* Wilson, 14 Johns. 378.

[5] *Supra*, § 419.

[6] Clarke *v.* Gannon, Ry. & M. 31; Gebhardt *v.* Shindle, 15 S. & R. 235.

[7] Steinmetz *v.* Currie, 1 Dall. 269.

[8] Merchants' Bank *v.* Spicer, 6 Wend. 543.

[9] Ibid; Watson *v.* McLaren, 19 Wend. 557.

upon motion. The same may be done by depositing in court a sufficient sum of money; or, in the case of bail, by a surrender of the body of the principal.[1] So, where the liability, which would have rendered the witness incompetent, is discharged by the operation of law; as, for example, by the bankrupt or the insolvent laws, or by the statute of limitations.[2] Where, in trespass, several justifications are set up in bar, one of which is a prescriptive or customary right in all the inhabitants of a certain place, one of those inhabitants may be rendered a competent witness for the defendant, by his waving that branch of the defence.[3] In trover by a bailee, he may render the bailor a competent witness for him, by agreeing to allow him, at all events, a certain sum for the goods lost.[4] The assignee of a chose in action, who, having commenced a suit upon it in the name of the assignor, has afterwards sold and transferred his own interest to a stranger, is thereby rendered a competent witness for the plaintiff.[5] But the interest which an informer has in a statute penalty is held not assignable for that purpose.[6] So, the interest of a legatee being assigned, he is thereby rendered competent to prove the will; though the payment is only secured to him by bond which is not yet due.[7] So, a stockholder in any money-corporation may be rendered a competent witness for the corporation, by a transfer of his stock, either to the company or to a stranger; even though he intends to repossess it, and has assigned it merely to qualify himself to testify; provided there is no agreement between him and the assignee or purchaser for a reconveyance.[8] Where a witness was liable to the plaintiff's attorney for the costs, and the attorney had prepared a release, in order to restore his competency in case it should be questioned, but no objection being made to the witness,

[1] *Supra*, § 392, note (1); Bailey *v.* Hole, 3 C. & P. 560; 1 Mood. & M. 289, s. c.; Leggett *v.* Boyd, 3 Wend. 376; Tompkins *v.* Curtis, 3 Cowen, 251; Grey *v.* Young, 1 Harper, 38; Allen *v.* Hawks, 13 Pick. 79; Beckley *v.* Freeman, 15 Pick. 468; Pearcey *v.* Fleming, 5 C. & P. 503; Lees *v.* Smith, 1 M. & Rob. 329; Comstock *v.* Paie, 3 Rob. Louis. R. 440; Fraser *v.* Harding, 3 Kerr, 94.

[2] Murray *v.* Judah, 6 Cowen, 484; Ludlow *v.* Union Ins. Co. 2 S. & R. 119; United States *v.* Smith, 4 Day, 121; Quimby *v.* Wroth, 3 H. & J. 249; Murray *v.* Marsh, 2 Hayw. 200.

[3] Prewitt *v.* Tilly, 1 C. & P. 140.

[4] Maine Stage Co. *v.* Longley, 2 Shepl. 444.

[5] Soulden *v.* Van Rensselaer, 9 Wend. 293.

[6] Commonwealth *v.* Hargesheimer, 1 Ashm. 413.

[7] McIlroy *v.* McIlroy, 1 Rawle, 423.

[8] Gilbert *v.* Manchester Iron Co. 11 Wend. 627; Utica Ins. Co. *v.* Cadwell, 3 Wend. 296; Stall *v.* The Catskill Bank, 18 Wend. 466; Bank of Utica, *v.* Smalley, 2 Cowen, 770; Bell *v.* Hull, &c., Railway Co. 6 M. & W. 701; Illinois Ins. Co. *v.* Marseilles Co. 1 Gilm. 236; Union Bank *v.* Owen, 4 Humph. 388.

he was examined for the plaintiff without a release, this was considered as a gross imposition upon the court; and in a subsequent action by the attorney against the witness, for his costs, he was nonsuited.[1] These examples are deemed sufficient for the purpose of illustrating this method of restoring the competency of a witness disqualified by interest.

[2] Williams *v.* Goodwin, 11 Moore, 342.

CHAPTER III.

OF THE EXAMINATION OF WITNESSES.

§ 431. Having thus treated of the means of procuring the attendance of witnesses, and of their competency, we come now to consider the manner in which they are to be examined. And here, in the first place, it is to be observed, that the subject lies chiefly in the discretion of the judge, before whom the cause is tried, it being from its very nature susceptible of but few positive and stringent rules. The great object is to elicit the truth from the witness; but the character, intelligence, moral courage, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the manner of interrogation, and the degree of its intensity, to attain that end. This manner and degree, therefore, as well as the other circumstances of the trial, must necessarily be left somewhat at large, subject to the few general rules which we shall proceed to state; remarking only, that wherever any matter is left to the discretion of one judge, his decision is not subject to be reversed or revised by another.

§ 432. If the judge deems it essential to the discovery of truth, that the witnesses should be *examined out of the hearing of each other*, he will so order it. This order, upon the motion or suggestion of either party, is rarely withheld; but, by the weight of authority, the party does not seem entitled to it as a matter of right.[1] The course in such cases is either to require the names of

[1] In Rex *v.* Cooke, 13 Howell, St. Tr. 348, it was declared by Lord C. J. Treby to be grantable of favor only, at the discretion of the court, and this opinion was followed by Ld. C. J. Holt, in Rex *v.* Vaughan, Id. 494, and by Sir Michael Foster, in Rex *v.* Goodere, 17 Howell, St. Tr. 1015. See also 1 Stark. Evid. 163; Beamon *v.* Ellice, 4 C. & P. 585, per Taunton, J.; The State *v.* Sparrow, 3 Murphy,

the witnesses to be stated by the counsel of the respective parties, by whom they were summoned, and to direct the sheriff to keep them in a separate room until they are called for; or, more usually, to cause them to withdraw, by an order from the bench, accompanied with notice, that if they remain they will not be examined. In the latter case, if a witness remains in court in violation of the order even by mistake, it is in the discretion of the judge, whether or not he shall be examined.[1] The course formerly was to exclude him; and this is still the inflexible rule in the exchequer in revenue cases, in order to prevent any imputation of unfairness in proceedings between the crown and the subject. But with this exception, the rule in criminal and civil cases is the same.[2] But an attorney in the cause, whose personal attendance in court is necessary, is usually excepted from the order to withdraw.[3] The right of excluding witnesses for disobedience to such an order, though well established, is rarely exercised in America;[4] but the witness is punishable for the contempt.

R. 487. The rule is stated by Fortescue, in these words: Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitavit eorum alium ad consimiliter testificandum. Fortesc. De Laud. Leg. Angl. c. 26. This, however, does not necessarily exclude the right of the court to determine whether there is any need of a separate examination. Mr. Phillips states it only as the uniform course of practice, that "the court, on the application of counsel, will order the witnesses on both sides to withdraw." 2 Phil. Evid. 395. And see, accordingly, Williams *v.* Hullie, 1 Sid. 131; Swift on Evid. 512. In Taylor *v.* Lawson, 3 C. & P. 543, Best, C. J., regretted that the rule of parliamentary practice, which excludes all witnesses but the one under examination, was not universally adopted. But in Southey *v.* Nash, 7 C. & P. 632, Alderson, B., expressly recognized it as "the right of either party, at any moment, to require that the unexamined witnesses shall leave the court." It is a general rule in the Scotch law, that witnesses should be examined separately; and it is founded on the importance of having the story of each witness fresh from his own recollection, unmingled with the impression received from hearing the testimony of others in the same case. To this rule, an exception is allowed in the case of medical witnesses; but even those, on matters of medical opinion, are examined apart from each other. See Alison's Practice, pp. 542–545; Tait on Evid. 420; [Nelson *v.* State, 2 Swan. 237; Benaway *v.* Conyne, 3 Chand. 214.] [* The rule does not extend to the party, who has a right to remain in court for the purpose of instructing counsel. Selfe *v.* Isaacson, 1 F. & F. 194.]

[1] It has, however, been held, that if the witness remains in court, in disobedience of its order, his testimony cannot, on that ground alone, be excluded; but that it is matter for observation on his evidence. Chandler *v.* Horne, 2 M. & Rob. 423. As to the rule in the text, see The State *v.* Brookshire, 2 Ala. 303, acc.

[2] Attorney-Gen. *v.* Bulpit, 9 Price, 4; Parker *v.* McWilliam, 6 Bing. 683; 4 Moore & Payne, 480, s. c.; Thomas *v.* David, 7 C. & P. 350; Rex *v.* Colley, 1 M. & Malk. 329; Beamon *v.* Ellice, 4 C. & P. 585, and note (b); [McLean *v.* State, 16 Ala. 672.]

[3] Everett *v.* Lowdham, 5 C. & P. 91; Pomeroy *v.* Badderley, Ry. & M. 430. [So it is ordinarily with experts, and witnesses called as to character, &c. And in those states in which parties are made competent witnesses, it would seem that the order of exclusion should not include them; and it is the better practice as a general rule in those states, so far as it is known to be established, when the witnesses in a case are ordered to withdraw, to except parties from the order.]

[4] See Anon. 1 Hill, 254, 256; The

§ 433. When a witness has been duly sworn, and his competency is settled, if objected to,[1] he is first examined by the party producing him; which is called his *direct examination*. He is afterwards examined to the same matters by the adverse party; which is called his *cross-examination*. These examinations are conducted orally in open court, under the regulation and order of the judge and in his presence and that of the jury, and of the parties and their counsel.

§ 434. In the direct examination of a witness, it is not allowed to put to him what are termed *leading questions;* that is, questions which suggest to the witness the answer desired.[2] The rule is to be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, the examinations would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case which have been already established. The rule, therefore, is not applied to that part of the examination, which is merely introductory of that which is material. Questions are also objectionable, as leading, which, embodying a material fact, admit of an answer by a simple negative or affirmative. An argumentative or pregnant course of interrogation is as faulty as the like course in pleading. The interrogatory must not assume facts to have been proved, which have not been proved; nor, that particular answers have been given, which have not been given.[3] The witness, except in certain cases hereafter to be mentioned, is to be examined only to matters of fact within his own knowledge, whether they consist of words or actions; and to these matters he should in general be plainly, directly, and distinctly interrogated. Inferences or conclusions, which may be drawn from facts, are ordinarily to be drawn by the

State *v.* Sparrow, 3 Murph. 487; The State *v.* Brookshire, 2 Ala. 303; Dyer *v.* Morris, 4 Mis. 214; Keath *v.* Wilson, 6 Mis. 435; [Pleasant *v.* State, 15 Ark. 624; Sartorious *v.* State, 24 Miss. 602; Porter *v.* State, 2 Carter, 435.]

[1] The course in the Scotch courts, after a witness is sworn, is, first to examine him *in initialibus*, namely, whether he has been instructed what to say, or has received or has been promised any good deed for what he is to say, or bears any ill-will to the adverse party, or has any interest in the cause, or concern in conducting it; together with his age, and whether he is married or not, and the degree of his relationship to the party adducing him. Tait on Evid. 424.

[2] Snyder *v.* Snyder, 6 Binn. 483; Harrison *v.* Rowan, 3 Washingt. 580; Parkin *v.* Moon, 7 C. & P. 408; Alison's Practice, 545; Tait on Evid. 427.

[3] Hill *v.* Coombe, 1 Stark. Evid. 163, note (qq.); Handley *v.* Ward, Id.; Turney *v.* The State, 8 Sm. & Marsh, 104.

jury alone; except where the conclusion is an inference of skill and judgment; in which case it may be drawn by an expert, and testified by him to the jury.[1]

[* § 434*a*. There is probably no rule of practice more habitually violated by counsel in the examination of witnesses, than that questions should not be leading. It is rather an exception to find questions so framed as to elicit the knowledge of witnesses, without intimating the desire of the examiner. But no one can fail to perceive, that, when that is done skilfully, it adds great weight to the testimony. In New Hampshire, it is said that a question to be leading must instruct the witness how to answer; or put words into his mouth to be echoed back; or in some way suggest the answer desired:[2] and that a question calling for a direct affirmative or negative is not leading unless it suggest one more than the other.[3] The matter is considerably discussed in a modern case in Pennsylvania.[4] And, in another case[5] there, it was said that an inquiry, whether a person by name showed him where the corner of land was, is not leading. It may be in a sense leading, but not within the rule of exclusion, since it was merely inducement, and in itself of no importance. It is best such questions should be put in a leading form to save time. But the main inquiry, "What did he show you as the corner?" should be left entirely to the witness. A person cannot be allowed to discredit his own witness by asking if the account now given is the same as that given by him on a former occasion.[6] Nor can one assume, in framing a question to his witness, the existence of facts not proved.[7] The presiding judge may, of course, interrogate the witnesses in any form and to any extent he may deem important to the ends of justice.[8]]

§ 435. In *some cases* however, *leading questions are permitted*, even in a *direct examination;* namely, where the witness appears to be hostile to the party producing him, or in the interest of the other party, or unwilling to give evidence;[9] or where an omission

[1] 1 Stark. Evid. 152; Goodtitle d. Revett *v.* Braham, 4 T. R. 497.

[2] Page *v.* Parker, 40 N. H. 47.

[3] [* Spear *v.* Richardson, 37 N. H. 23.

[4] Wilson *v.* McCullough, 23 Penn. St. 440.

[5] Kemmerer *v.* Edelman, Id. 143.

[6] Sanchez *v.* People, 22 N. Y. Ct. App. 147.

[7] Carpenter *v.* Ambroson, 20 Ill. 170.

[8] Commonwealth *v.* Galavan, 9 Allen, 271.]

[9] Clarke *v.* Saffery, Ry. & M. 126, per Best, C. J.; Regina *v.* Chapman, 8 C. & P. 558; Regina *v.* Ball, Id. 745; Regina *v.* Murphy, Id. 297; Bank of North. Liberties *v.* Davis, 6 Watts & Serg. 285; Towns *v.* Alford, 2 Ala. 378. Leading questions are not allowed in Scotland, even in cross-examining. Tait on Evid. 427; Alison's Practice, 545.

in his testimony is evidently caused by want of recollection, which a suggestion may assist. Thus, where the witness stated, that he could not recollect the names of the component members of a firm, so as to repeat them without suggestion, but thought he might possibly recollect them if suggested to him, this was permitted to be done.[1] So, where the transaction involves numerous items or dates. So, where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry, without a particular specification of it; as, where he is called to contradict another, as to the contents of a letter which is lost, and cannot, without suggestion, recollect all its contents, the particular passage may be suggested to him.[2] So, where a witness is called to contradict another, who had stated, that such and such expressions were used, or the like, counsel are sometimes permitted to ask, whether those particular expressions were used, or those things said, instead of asking the witness to state what was said.[3] Where the witness stands in a situation, which of necessity makes him adverse to the party calling him, as, for example, on the trial of an issue out of chancery, with power to the plaintiff to examine the defendant himself as a witness, he may be cross-examined, as a matter of right.[4] Indeed, when and under what circumstances a leading question may be put, is a matter resting in the sound discretion of the court, and not a matter which can be assigned for error.[5]

[1] Acerro *et al. v.* Petroni, 1 Stark. R. 100, per Lord Ellenborough. [* So a witness who denies his own certificate, or states that it was collusively made, or in any other mode shows an interest of feeling for the party opposed to the one calling him, may be examined in the usual mode of cross-examination. Martin *v.* Travellers' Ins. Co. 1 F. & F. 505.]

[2] Courteen *v.* Touse, 1 Camph. 43; Edmonds *v.* Walter, 3 Stark. R. 7.

[3] 1 Stark. Evid. 152. Mr. Phillips is of opinion that the regular mode should first be exhausted in such cases, before leading questions are resorted to. Phil. & Am. on Evid. pp. 890, 891; 2 Phil. Evid. 404, 405.

[4] Clarke *v.* Saffery, Ry. & M. 126. The policy of these rules, as well as of almost all other rules of the common law on the subject of evidence, is controverted in the Rationale of Judicial Evidence, by Jeremy Bentham; — "a learned writer, who has devoted too much of his time to the theory of jurisprudence, to know much of the practical consequences of the doctrines he has published to the world." Per Best, C. J., in Hovill *v.* Stephenson, 5 Bing. 493.

[5] Moody *v.* Rowell, 17 Pick. 498. In this case the law on this point was thus stated by the learned chief justice: "The court have no doubt that it is within the discretion of a judge at the trial, under particular circumstances, to permit a leading question to be put to one's own witness; as when he is manifestly reluctant and hostile to the interest of the party calling him, or where he has exhausted his memory, without stating the particular required, where it is a proper name, or other fact which cannot be significantly pointed to by a general interrogatory, or where the witness is a child of tender years, whose attention can be called to the matter required, only by a pointed or leading question. So a judge may, in his discretion, prohibit certain leading questions from being put to an adversary's witness, where the witness shows a strong interest

§ 436. Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and *assist his memory, by the use of a written instrument*, memorandum, or entry in a book, and may be compelled to do so, if the writing is present in court.[1] It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection.[2] So also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the particulars therein mentioned were correctly stated.[3] And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence; for if inadmissible in itself, as, for want of a stamp, it may still be referred to by the witness.[4] But where the witness neither recollects the fact, nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far

or bias in favor of the cross-examining party, and needs only an intimation, to say whatever is most favorable to that party. The witness may have purposely concealed such bias in favor of one party, to induce the other to call him and make him his witness; or the party calling him may be compelled to do so, to prove some single fact necessary to his case. This discretionary power to vary the general rule, is to be exercised only so far as the purposes of justice plainly require it, and is to be regulated by the circumstances of each case." And see Donnell *v.* Jones, 13 Ala. 490. [* Walker *v.* Dunspaugh, 20 N. Y. (6 Smith) 170. But when it is so exercised as to deprive the party of important evidence, the question may be raised on appeal. Gunter *v.* Watson, 4 Jones, Law. 455.]

[1] Reed *v.* Boardman, 20 Pick. 441.

[2] Doe *v.* Perkins, 3 T. R. 749, expounded in Rex *v.* St. Martin's, Leicester, 2 Ad. & El. 215; Burton *v.* Plummer, Id. 341; Burroughs *v.* Martin, 2 Camph. 112; Duchess of Kingston's case, 20 Howell's St. Tr. 619; Henry *v.* Lee, 2 Chitty R. 124; Rambert *v.* Cohen, 4 Esp. 213. In Meagoe *v.* Simmons, 2 C. & P. 75, Lord Tenterden observed, that the usual course was not to permit the witness to refresh his memory from any paper not of his own writing. And so is the Scotch practice. Tait on Evid. 133. But a witness has been allowed to refresh his memory from the notes of his testimony, taken by counsel at a former trial. Laws *v.* Reed, 2 Lewin, Cr. Cas. 152. And from his deposition. Smith *v.* Morgan, 2 M. & Rob. 259. And from a printed copy of his report. Home *v.* Mackenzie, 6 C. & Fin. 628. And from notes of another person's evidence, at a former trial examined by him during that trial. Regina *v.* Philpots, 5 Cox, Cr. C. 329. Or, within two days afterwards. Ibid. per Erle, J. But the counsel for the prisoner, on cross-examining a witness for the prosecution, is not entitled to put the deposition of the witness into his hand, for the purpose of refreshing his memory, without giving it in evidence. Regina *v.* Ford, Id. 184; [s. c. 4 Eng. Law & Eq. 576; State *v.* Lull, 37 Maine, 246. But where a witness, whose deposition had been previously taken, was asked in cross-examination what he had stated in the deposition, he was permitted to refresh his recollection by referring to a copy of the deposition. George *v.* Joy, 10 N. H. 544.]

[3] Burrough *v.* Martin, 2 Camph. 112; Burton *v.* Plummer, 2 Ad. & El. 343, per Lord Denman; Jacob *v.* Lindsay, 1 East, 466; Downer *v.* Rowell, 24 Verm. 343. But see Butler *v.* Benson, 1 Barb. Ch. R. 526; [Scavy *v.* Dearborn, 19 N. H. 351; Webster *v.* Clark, 10 Foster, 245; State *v.* Colwell, 3 R. I. 132.] [* Green *v.* Caulk, 16 Md. 556.]

[4] Maugham *v.* Hubbard, 8 B. & C. 14; Kensington *v.* Inglis, 8 East, 273; *supra*, §§ 90, 228.

as it is founded upon the written paper, is but hearsay; and a witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said.[1]

§ 437. The cases in which writings are permitted to be used for this purpose, may be divided into three classes. (1.) Where the writing is used only for the purpose of assisting the memory of the witness. In this case, it does not seem necessary that the writing should be produced in court,[2] though its absence may afford matter of observation to the jury; for the witness at last testifies from his own recollection. (2.) Where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct. In this case, the writing itself must be produced in court, in order that the other party may cross-examine; not that such writing is thereby made evidence of itself, but that the other party may have the benefit of the witness's refreshing his memory by every part.[3] And for the same reason, a witness is not permitted to refresh his memory by extracts made from other writings.[4] (3.) Where the writing in question neither is recognized by the witness as one which he remembers to have before seen, nor awakens his memory to the recollection of any thing contained in it; but, nevertheless, knowing the writing to be genuine, his mind is so con-

[1] 2 Phil. Evid. 413.

[2] Kensington *v.* Inglis, 8 East, 273; Burton *v.* Plummer, 2 Ad. & El. 341. [But see Harrison *v.* Middleton, 11 Gratt. 527; Howland *v.* Sheriff, &c., 5 Sandf. 219.]

[3] *Supra*, §§ 115, 436; Rex *v.* St. Martin's, Leicester, 2 Ad. & El. 215, per Patteson, J.; Sinclair *v.* Stevenson, 1 C. & P. 582; 2 Bing. 516, s. c.; 10 Moore, 46, s. c.; Loyd *v.* Freshfield, 2 C. & P. 325; 8 D. & R. 19, s. c. If the paper is shown to the witness, directly to prove the handwriting, it has been ruled that the other party has not therefore a right to use it. Sinclair *v.* Stevenson, *supra*. But the contrary has since been held, by Bosanquet, J., in Russell *v.* Ryder, 6 C. & P. 416, and with good reason; for the adverse party has a right to cross-examine the witness as to the handwriting. 2 Phil. Evid. 400. But if the counsel, in cross-examination, puts a paper into a witness's hand, in order to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence; and may also ask the witness when it was written, without being bound to put it into the case. Rex *v.* Ramsden, 2 C. & P. 603. The American courts have sometimes carried the rule farther than it has been carried in England, by admitting the writing itself to go in evidence to the jury, in all cases where it was made by the witness at the time of the fact, for the purpose of preserving the memory of it, if, at the time of testifying, he can recollect nothing further than that he had accurately reduced the whole transaction to writing. Farmers' and Mechanics' Bank *v.* Boraef, 1 Rawle, 152; Smith *v.* Lane, 12 S. & R. 84, per Gibson, J.; The State *v.* Rawls, 2 Nott & McCord, 331; Clark *v.* Vorce, 15 Wend. 193; Merrill *v.* Ithaca & Oswego Railroad Co. 16 Wend. 586, 596, 597, 598; Haven *v.* Wendell, 11 N. Hamp. 112. But see Lightner *v.* Wike, 4 S. & R. 203; [*infra*, § 466.]

[4] Doe *v.* Perkins, 3 T. R. 749; 2 Ad. & El. 215.

vinced, that he is on that ground enabled to swear positively as to the fact. An example of this kind is, where a banker's clerk is shown a bill of exchange, which has his own writing upon it, from which he knows and is able to state positively that it passed through his hands. So, where an agent made a parol lease, and entered a memorandum of the terms in a book which was produced, but the agent stated that he had no memory of the transaction but from the book, without which he should not, of his own knowledge, be able to speak to the fact, but on reading the entry he had no doubt that the fact really happened; it was held sufficient.[1] So, where a witness, called to prove the execution of a deed, sees his own signature to the attestation, and says, that he is therefore sure that he saw the party execute the deed; that is sufficient proof of the execution of a deed, though he adds that he has no recollection of the fact.[2] In these and the like cases, for the reason before given, the writing itself must be produced.[3]

§ 438. As to the *time when the writing*, thus used to restore the recollection of facts, *should have been made*, no precise rule seems to have been established. It is most frequently said, that the writing must have been made at the time of the fact in question, or recently afterwards.[4] At the farthest, it ought to have been made before such a period of time has elapsed, as to render it probable that the memory of the witness might have become deficient.[5] But the practice, in this respect, is governed very much by the circumstances of the particular case. In one case, to prove the date of an act of bankruptcy committed many years

[1] 1 Stark. Evid. 154, 155; Alison's Practice, pp. 540, 541; Tait on Evid. 432.

[2] Rex *v.* St. Martin's, Leicester, 2 Ad. & El. 210. See also Haig *v.* Newton, 1 Const. Rep. 423; Sharpe *v.* Bingley, Id. 373; [Martin *v.* Good, 14 Md. 398; Cole *v.* Jessup, 6 Selden (N. Y.), 96.]

[3] Maugham *v.* Hubbard, 8 B. & C. 16, per Bailey, J.; Russell *v.* Collin, 8 Pick. 143, 150; Den *v.* Downam, 1 Green's R. 135, 142; Jackson *v.* Christman, 4 Wend. 277, 282; Merrill *v.* Ithaca, &c., Railroad Co. 16 Wend. 598; Patterson *v.* Tucker, 4 Halst. 322, 332, 333; Wheeler *v.* Hatch, 3 Fairf. 389; Pigott *v.* Holloway, 1 Binn. 436; Collins *v.* Lemasters, 2 Bail. 141.

[4] Tanner *v.* Taylor, cited by Buller, J., in Doe *v.* Perkins, 3 T. R. 754; Howard *v.* Canfield, 5 Dowl. P. C. 417; Dupuy *v.* Truman, 2 Y. & Col. 341. Where A was proved to have written a certain article in a newspaper, but the manuscript was lost, and A had no recollection of the fact of writing it, it was held that the newspaper might be used to refresh his memory, and that he might then be asked whether he had any doubt that the fact was as therein stated. Topham *v.* McGregor, 1 Car. & Kir. 320. So, where the transaction had faded from the memory of the witness, but he recollected, that while it was recent and fresh in his memory, he had stated the circumstances in his examination before commissioners of bankruptcy, which they had reduced to writing, and he had signed; he was allowed to look at his examination to refresh his memory. Wood *v.* Cooper, Id. 645.

[5] Jones *v.* Stroud, 2 C. & P. 196.

before, a witness was permitted to recur to his own deposition, made some time during the year in which the fact happened.[1] In another case, the witness was not permitted to refresh his memory with a copy of a paper, made by himself six months after he made the original, though the original was proved to have been so written over with figures as to have become unintelligible; the learned judge saying, that he could only look at the original memorandum, made near the time.[2] And in a still later case, where it was proposed to refer to a paper, which the witness had drawn up for the party who called him, after the cause was set down for trial, the learned judge refused it; observing that the rule must be confined to papers written contemporaneously with the transaction.[3] But where the witness had herself noted down the transactions from time to time as they occurred, but had requested the plaintiff's solicitor to digest her notes into the form of a deposition, which she afterwards had revised, corrected, and transcribed, the Lord Chancellor indignantly suppressed the deposition.[4]

§ 439. If a witness has *become blind*, a contemporaneous writing made by himself, though otherwise inadmissible, may yet be read over to him, in order to excite his recollection.[5] So, where a receipt for goods was inadmissible for want of a stamp, it was permitted to be used to refresh the memory of a witness who heard it read over to the defendant, the latter at the same time admitting the receipt of the goods.[6]

[1] Vaughan *v.* Martin, 1 Esp. 440.

[2] Jones *v.* Stroud, 2 C. & P. 196, per Best, C. J. In this case, the words in the copy and as sworn to by the witness, were spoken *to* the plaintiff; but on producing the original, which, on further reflection, was confirmed by the witness, it appeared that they were spoken *of* him. The action was slander; and the words being laid according to the copy, for this variance the plaintiff was nonsuited.

[3] Steinkeller *v.* Newton, 9 C. & P. 313. [So where a witness, five months after the occurrence of certain events, had, at the request of a party interested, made a statement in writing, and swore to it, he was not allowed to testify to his belief in its correctness. Spring Garden Ins. Co. *v.* Riley, 15 Md. 54.]

[4] Anon. cited by Lord Kenyon, in Doe *v.* Perkins, 3 T. R. 752. See also Sayer *v.* Wagstaff, 5 Beav. 462.

[5] Catt *v.* Howard, 3 Stark. R. 3.

[6] Jacob *v.* Lindsay, 1 East, 460. In Scotland, the subject of the use and proper office of writings, in restoring the recollection of witnesses, has been well considered and settled; and the law as practised in the courts of that country, is stated with precision by Mr. Alison, in his elegant and philosophical Treatise on the Practice of the Criminal Law. "It is frequently made a question," he observes, "whether a witness may refer to notes or memorandums made to assist his memory. On this subject, the rule is, that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow witnesses to look to memorandums made at the time, of dates, distances, appearances on

§ 440. In general, though a witness must depose to such *facts* only as are *within his own knowledge*, yet there is no rule that requires him to speak with such expression of certainty as to exclude all doubt in his mind. If the fact is impressed on his memory, but his recollection does not rise to positive assurance, it is still admissible, to be weighed by the jury; but if the impression is not derived from recollection of the fact, and is so slight as to render it probable that it may have been derived from others, or may have been some unwarrantable deduction of the witness's own mind, it will be rejected.[1] And though the opinions of witnesses are in general not evidence, yet on certain subjects some classes of witnesses may deliver their own opinions, and on certain other subjects any competent witness may express his *opinion or belief;* and on any subject, to which a witness may testify, if he has any recollection at all of the fact, he may express it as it lies in his

dead bodies, lists of stolen goods or the like, before emitting his testimony, or even to read such notes to the jury, as his evidence, he having first sworn that they were made at the time, and faithfully done. In regard to lists of stolen goods, in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition, signed by him, and libelled on as a production at the trial, and he is then desired to read them, or they are read to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved, at the trial, and much more correctness and accuracy is obtained, than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance perhaps of months from the time when they were lost. With the exception, however, of such memorandums, notes, or inventories made up at the time, or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parol evidence, and *viva voce* examination, and convert a jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule; in the case of medical or other scientific reports or certificates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath, that it is a true report. The reason of this exception is founded in the consideration, that the medical or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed, that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time, when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subjected to a further examination by the prosecutor, or a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions heard by him from the panel, or the like, *utitur jure communi*, he stands in the situation of an ordinary witness, and must give his evidence verbally in answer to the questions put to him, and can only refer to jottings or memorandums of dates, &c., made up at the time, to refresh his memory, like any other person put into the box." See Alison's Practice, 540–542.

[1] Clark *v.* Bigelow, 4 Shepl. 246; [Nute *v.* Nute, 41 N. H. 60.]

memory, of which the jury will judge.[1] Thus it is the constant practice to receive in evidence any witness's belief of the identity of a person, or that the handwriting in question is or is not the handwriting of a particular individual, provided he has any knowledge of the person or handwriting; and if he testifies falsely as to his belief, he may be convicted of perjury.[2] On questions of science, skill, or trade, or others of the like kind, persons of skill, sometimes called *experts*,[3] may not only testify to facts, but are permitted to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted, as to the cause of disease, or of death, or the consequences of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill.[4] And such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself, as proved by other witnesses on the trial.[5] But where sci-

[1] Miller's case, 3 Wils. 427, per Ld. Ch. Just. DeGrey; McNally's Evid. 262, 263. And see Carmalt *v.* Post, 8 Watts, 411, per Gibson, C. J.

[2] Rex *v.* Pedley, Leach, Cr. Cas. 365, case 152.

[3] *Experts*, in the strict sense of the word, are "persons instructed by experience." 1 Bouvier's Law Dict. *in verb.* But more generally speaking, the term includes all "men of science," as it was used by Ld. Mansfield in Folkes *v.* Chadd, 3 Doug. 157; or, "persons professionally acquainted with the science or practice" in question; Strickland on Evid. p. 408; or "conversant with the subject-matter, on questions of science, skill, trade, and others of the like kind." Best's Principles of Evidence, § 346. The rule on this subject is stated by Mr. Smith in his note to Carter *v.* Boehm, 1 Smith's Lead. Cas. 286. "On the one hand," he observes, "it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science, as to require a course of previous habit, or study, in order to the attainment of a knowledge of it; see, Folkes *v.* Chadd, 3 Doug. 157; R. *v.* Searle, 2 M. & M. 75; Thornton *v.* R. E. Assur. Co., Peake, 25; Chaurand *v.* Angerstein, Peake, 44; while on the other hand, it does not seem to be contended that the opinions of witnesses can be received, when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study, in order to qualify a man to understand it." It has been held unnecessary that the witness should be engaged in the practice of his profession or science; it being sufficient that he has studied it. Thus, the fact that the witness, though he had studied medicine, was not then a practising physician, was held to go merely to his credit. Tullis *v.* Kidd, 12 Ala. 648. [The rule determining the subjects upon which experts may testify, and the rule prescribing the qualifications of experts, are matters of law; but whether a witness offered as an expert, has those qualifications, is a question of fact to be decided by the court at the trial. Jones *v.* Tucker, 41 N. Hamp. 546.]

[4] Stark. Evid. 154; Phil. & Am. on Evid. 899; Tait on Evid. 433; Hathorn *v.* King, 8 Mass. 371; Hoge *v.* Fisher, 1 Pet. C. C. R. 163; Folkes *v.* Chadd, 3 Doug. 157, per Ld. Mansfield; McNally's Evid. 329–335, ch. 30. [A non-professional witness may give his opinion upon the sanity of a party, as the result of his own observations, accompanied with a statement of the facts, which he has observed, but he cannot give an opinion upon the facts stated by other witnesses. Dunham's Appeal, 27 Conn. 193.]

[5] Rex *v.* Wright, Russ. & Ry. 156; Rex *v.* Searle, 1 M. & Rob. 75; McNaughten's case, 10 Cl. & Fin. 200, 212; Paige *v.* Hazard, 5 Hill, 603. [But an expert cannot be allowed to give his opinion upon

entific men are called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions upon the facts proved.[1] And if the facts are doubtful, and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence, what is his opinion upon the case on trial; though he may be asked his opinion upon a similar case, hypothetically stated.[2] Nor is the opinion of a medical man admissible, that a particular act, for which a prisoner is tried, was an act of insanity.[3] So, the subscribing witnesses to a will may testify their opinions, in respect to the sanity of the testator at the time of executing the will; though other witnesses can speak only as to facts; for the law has placed the subscribing witnesses about the testator, to ascertain and judge of his capacity.[4] Seal engravers may be called to give their opinion upon an impression whether it was made from an original seal, or from an impression.[5] So, the opinion of an artist in painting is evidence of the genuineness of a picture.[6] And it seems, that the genuineness of a postmark may be proved by the opinion of one who has been in the habit of receiving letters with that mark.[7] In an action for breach of a promise to marry, a person accustomed to observe the mutual deportment of the parties may give in evidence his opinion upon the question, whether they were attached to each other.[8] A shipbuilder may give his opinion as to the seaworthiness of a ship, even on facts stated by others.[9] A nautical person may testify his

a case based upon statements made to him by parties out of court and not under oath. Heald *v.* Thing, 45 Maine, 392.]

[1] Jameson *v.* Drinkald, 12 Moore, 148. But professional books, or books of science (e. g. medical books), are not admissible in evidence; though professional witnesses may be asked the grounds of their judgment and opinion, which might in some degree be founded on these books as a part of their general knowledge. Collier *v.* Simpson, 5 C. & P. 73; [Commonwealth *v.* Wilson, 1 Gray, 338.] But see Bowman *v.* Woods, 1 Iowa, R. 441.

[2] Sills *v.* Brown, 9 C. & P. 601.

[3] Rex *v.* Wright, Russ. & R. 456.

[4] Chase *v.* Lincoln, 3 Mass. 237; Poole *v.* Richardson, Id. 330; Rambler *v.* Tryon, 7 S. & R. 90, 92; Buckminster *v.* Perry, 4 Mass. 593; Grant *v.* Thompson, 4 Conn. 203. And see Sheafe *v.* Rowe, 2 Lee, R. 415; Kinleside *v.* Harrison, 2 Phil. 523; Wogan *v.* Small, 11 S. & R. 141. But where the witness has had opportunities for knowing and observing the conversation, conduct, and manners of the person whose sanity is in question, it has been held, upon grave consideration, that the witness may depose, not only to particular facts, but to his opinion or belief as to the sanity of the party, formed from such actual observation. Clary *v.* Clary, 2 Ired. R. 78. Such evidence is also admitted in the Ecclesiastical courts. See Wheeler *v.* Alderson, 3 Hagg. Eccl. R. 574, 604, 605.

[5] Per Ld. Mansfield, in Folkes *v.* Chadd, 3 Doug. 157.

[6] Ibid.

[7] Abbey *v.* Lill, 5 Bing. 299, per Gaselee, J. [The testimony of experts is receivable, in corroboration of positive evidence to prove that, in their opinion, the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time. Fulton *v.* Hood, 34 Penn. 365.]

[8] McKee *v.* Nelson, 4 Cowen, 355.

[9] Thornton *v.* The Royal Exch. Assur. Co. 1 Peake, R. 25; Chauraud *v.* Angerstein, Id. 43; Beckwith *v.* Sidebotham, 1

opinion whether, upon the facts proved by the plaintiff, the collision of two ships could have been avoided by proper care on the part of the defendant's servants.[1] Where the question was, whether a bank which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbor, the opinions of scientific engineers, as to the effect of such an embankment upon the harbor, were held admissible in evidence.[2] A secretary of a fire insurance company, accustomed to examine buildings with reference to the insurance of them, and who, as a county commissioner, had frequently estimated damages occasioned by the laying-out of railroads and highways, has been held competent to testify his opinion, as to the effect of laying a railroad within a certain distance of a building, upon the value of the rent, and the increase of the rate of insurance against fire.[3] Persons accustomed to observe the habits of certain fish have been permitted to give in evidence their opinions, as to the ability of the fish to overcome certain obstructions in the rivers which they were accustomed to ascend.[4] A person acquainted for many years with a certain stream, its rapidity of rise in times of freshet, and the volume and force of its waters in a certain place, may give his opinion as to the sufficiency of a dam erected in that place, to resist the force of the flood.[5] A practical surveyor may express his opinion, whether the marks on trees, piles of stone, &c., were intended as monuments of boundaries;[6] but he cannot be asked whether, in his opinion, from the objects and appearances which he saw on the ground, the tract he surveyed was identical with the tract marked on a certain diagram.[7]

Campb. 117. So of nautical men, as to navigating a ship. Malton *v.* Nesbit, 1 C. & P. 70. Upon the question, whether certain implements were part of the *necessary tools* of a person's trade, the *opinions* of witnesses are not admissible; but the jury are to determine upon the facts proved. Whitmarsh *v.* Angle, 3 Am. Law Journ. 274, N. S.

[1] Fenwick *v.* Bell, 1 Car. & Kir. 312.

[2] Folkes *v.* Chadd, 3 Doug. 157.

[3] Webber *v.* Eastern Railroad Co. 2 Met. 147. Where a point involving questions of practical science is in dispute in chancery, the court will advise a reference of it to an expert in that science, for his opinion upon the facts; which will be adopted by the court as the ground of its order. Webb *v.* Manchester & Leeds Railw. Co. 4 My. & C. 116, 120; 1 Railw. Cas. 576.

[4] Cottrill *v.* Myrick, 3 Fairf. 222.

[5] Porter *v.* Poquonnoc Man. Co. 17 Conn. 249.

[6] Davis *v.* Mason, 4 Pick. 156.

[7] Farar *v.* Warfield, 8 Mart. N. S. 695, 696. So, the opinion of an experienced seaman has been received, as to the proper stowage of a cargo; — Price *v.* Powell, 3 Const. 322; — and of a mason, as to the time requisite for the walls of a house to become so dry as to be safe for human habitation; Smith *v.* Gugerty, 4 Barb. S. C. R. 614; and of a master, engineer, and builder of steamboats, as to the manner of a collision, in view of the facts proved. The Clipper *v.* Logan, 18 Ohio, 375. [A witness, even if an expert as to hand-

[*§ 440*a*. Some nice, and often difficult, questions will arise, in regard to the particular matters and points with reference to which witnesses may be allowed to give testimony by way of opinion. We have attempted to illustrate the question in various modes, on former occasions.[1] But it is not practicable to make the rule more precise than a mere approximation towards definiteness. Facts which are latent in themselves, and only discoverable by way of appearances more or less symptomatic of the existence of the main fact, may, from their very nature, be shown by the opinion of witnesses as to the existence of such appearances or symptoms: such are the state of health or of the affections, as already stated. Sanity is a question of the same character. So too, upon inquiries as to the state or amount of one's property, when the facts are too numerous and evanescent to be given in detail, those acquainted with the facts are allowed to express an opinion which is the mere grouping of the facts. So too, as to the marketable condition and value of property, and many other questions where it is not practicable to give more definite knowledge, opinions are received. In some cases, these opinions must come from experts, who have acquired special skill in detecting the connection between certain external symptoms and their latent causes; and in other cases, all persons are supposed to have such knowledge and experience as to entitle their opinions to be weighed by the jury. The testimony of experts is necessary upon all such questions as require special study and experience in order to form reliable judgments. The distinction is fairly enough illustrated by the question of sickness or health. All witnesses are competent to form a reliable opinion whether one whom they have opportunity to observe appears to be sick or well at the time; or whether one is seriously disabled by a wound or a blow. But if the inquiry were more definite, as to the

writing, cannot give his opinion as to the indorsement on a note having been made as long previous as six years. Sackett *v.* Spencer, 29 Barb. 180.] But mere opinions as to the amount of damages are not ordinarily to be received. Harger *v.* Edmonds, 4 Barb. s. c. R. 256; Giles *v.* O'Toole, Id. 261. See also Walker *v.* Protection Ins. Co. 16 Shepl. 317. Nor are mere opinions admissible respecting the value of property in common use, such as horses and wagons, or lands, concerning which no particular study is required, or skill possessed. Robertson *v.* Stark, 15 N. Hamp. 109; Rochester *v.* Chester, 3 N. Hamp. 349; Peterborough *v.* Jaffrey, 6 N. Hamp. 462. And see Whipple *v.* Walpole, 10 N. Hamp. 130, where this rule is expounded. [But see Vandine *v.* Burpee, 13 Met. 288; Shaw *v.* Charlestown, 2 Gray, 107. The value of the reversion of land over which a railroad is located is not properly provable by experts. Boston & Worcester R. Co. *v.* Old Colony R. Co. 3 Allen, 142; Mish *v.* Wood, 34 Penn. 451.]

[1] Railways, 133, 134, and notes; Wills, Part 1, §§ 37–39.

particular state of disease under which one is laboring, and its curable or fatal character; or as to the dangerous or fatal character of a wound or blow; or in what particular mode, or with what species of weapon or instrument, such blow or wound was inflicted, special study, observation, and experience might be requisite in order to express an opinion entitled to the dignity of being regarded as evidence.

In a recent case[1] it was said, in order to entitle one to testify as an expert, it must first be shown that he has acquired actual skill and scientific knowledge upon the subject; and that mere opportunity for observation is not sufficient. The term "expert" seems to imply both superior knowledge and practical experience in the art or profession; but, generally, nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular art or profession. The cases are very numerous where the opinions of unprofessional witnesses are received, as for instance, as to the value of property,[2] as to one's pecuniary responsibility;[3] and an expert may state general facts, which are the results of scientific knowledge or professional skill.[4] The testimony of experts is not admissible upon matters of judgment within the knowledge and experience of ordinary jurymen; as, for instance, to what degree of heat it is prudent to expose wet hemlock staves.[5] So, whether one appeared to be intoxicated, may be shown by the opinion of ordinary witnesses.[6]

Matters of general history may be assumed as within the knowledge of court and jury, but particular facts relevant to the cause cannot be proved by reading from a published book, nor can medical books or those upon farming be cited by counsel; but medical witnesses may be asked or cross-examined whether they have read a particular book; and books of standard authority in literature may be referred to by counsel, in order to show the

[1] [* Page *v.* Parker, 40 N. H. R. 47; Pelamourges *v.* Clarke, 9 Iowa, 1.

[2] Nellis *v.* McCarn, 35 Barb. 115; Derby *v.* Gallup, 5 Min. 119; McDonald *v.* Christie, 42 Barb. 36. But in New Hampshire the rule is otherwise. Low *v.* C. & P. R. Railway Co.

[3] Bank of Middlebury *v.* Rutland, 33 Vt. R. 414.

[4] Chapman, J., in Emerson *v.* Lowell Gas Light Co. 6 Allen, 148.

[5] White *v.* Ballou, 8 Allen, 408; New England Glass Co. *v.* Lovell, 7 Cush. 321. But the price to be paid for the use of a horse and wagon may be shown by the opinion of those who have had experience in such matters. Brady *v.* Brady, 8 Allen, 101.

[6] People *v.* Eastwood, 14 N. Y. Ct. App. 562.]

general course of construction, and explain the sense in which words are used.[1]]

§ 440*b*. In weighing the testimony of *biased* witnesses, however, a distinction is observed between *matters of opinion* and *matters of fact*. Such a witness, it is said, is to be distrusted when he speaks to matters of *opinion*; but in matters of *fact*, his testimony is to receive a degree of credit in proportion to the probability of the transaction, the absence or extent of contradictory proof, and the general tone of his evidence.[2]

§ 441. But witnesses are *not receivable to state their views* on matters *of legal or moral obligation*, nor on the manner in which *other persons* would probably be influenced, if the parties acted in one way rather than in another.[3] Therefore the opinions of medical practitioners upon the question, whether a certain physician had honorably and faithfully discharged his duty to his medical brethren, have been rejected.[4] So the opinion of a person conversant with the business of insurance, upon the question, whether certain parts of a letter, which the broker of the insured had received, but which he suppressed when reading the letter to the underwriters, were or were not material to be communicated, has been held inadmissible;[5] for, whether a particular fact was material or not in the particular case is a question for the jury to decide, under the circumstances.[6] Neither can a witness be asked, what would have been his own conduct in the particular case.[7] But in an action against a broker for negligence, in not procuring the needful alterations in a policy of insurance, it has been held, that other brokers might be called to say, looking at the policy,

[1] Darby *v.* Ousley, 1 H. & N. 1.]

[2] Lockwood *v.* Lockwood, 2 Curt. 209; Dillon *v.* Dillon, 3 Curt. 96, 102. [Where a party to a suit is a competent witness he may give his testimony as an expert, if qualified. Dickenson *v.* Fitchburg, 13 Gray, 546.]

[3] Per Ld. Denman, C. J., in Campbell *v.* Rickards, 5 B. & Ad. 840; 2 N. & M. 542, s. c. But where a libel consisted in imputing to the plaintiff that he acted dishonorably, in withdrawing a horse which had been entered for a race; and he proved by a witness that the rules of the jockey club, of which he was a member, permitted owners to withdraw their horses before the race was run; it was held that the witness, on cross-examination, might be asked whether such conduct as he had described as lawful under those rules, would not be regarded by him as dishonorable. Greville *v.* Chapman, 5 Ad. & El. 731, n. s.

[4] Ramadge *v.* Ryan, 9 Bing. 333.

[5] Campbell *v.* Rickards, 5 B. & Ad. 840, in which the case of Rickards *v.* Murdock, 10 B. & C. 527, and certain other decisions to the contrary, are considered and overruled. See, accordingly, Carter *v.* Boehm, 3 Burr, 1905, 1918; Durrel *v.* Bederley, 1 Holt's Cas. 283; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72, 79; [Joyce *v.* Maine Insurance Co. 45 Maine, 168.]

[6] Rawlins *v.* Desborough, 2 M. & Rob. 329; Westbury *v.* Aberdein, 2 M. & W. 267.

[7] Berthon *v.* Loughman, 2 Stark. R. 258.

the invoices, and the letter of instructions, what alterations a skilful broker ought to have made.[1]

§ 442. When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the court, *the law will not permit the party* afterwards *to impeach their general reputation* for truth, or to impugn their credibility by general evidence, tending to show them to be unworthy of belief. For this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him.[2]

§ 443. But to this general rule there are *some exceptions*. For, where the witness is not one of the party's own selection, but is

[1] Chapman *v.* Walton, 10 Bing. 57. Upon the question, whether the opinion of a person, conversant with the business of insurance, is admissible, to show that the rate of the premium would have been affected by the communication of particular facts, there has been much diversity of opinion among judges, and the cases are not easily reconciled. See Phil. & Am. on Evid. 899; 2 Stark. Evid. 886. But the later decisions are against the admissibility of the testimony, as a general rule. See Campbell *v.* Rickards, 5 B. & Ad. 840. Perhaps the following observations of Mr. Starkie, on this subject, will be found to indicate the true principle of discrimination among the cases which call for the application of the rule. "Whenever the fixing the fair price and value upon a contract to insure is matter of skill and judgment, acting according to certain general rules and principles of calculation, applied to the particular circumstances of each individual case, it seems to be matter of evidence to show whether the facts suppressed would have been noticed as a term in the particular calculation. It would not be difficult to propound instances, in which the materiality of the fact withheld would be a question of pure science; in other instances, it is very possible that mere common sense, independent of any peculiar skill or experience, would be sufficient to comprehend that the disclosure was material, and its suppression fraudulent, although not to understand to what extent the risk was increased by that fact. In intermediate cases, it seems to be difficult in principle wholly to exclude the evidence, although its importance may vary exceedingly according to circumstances." See 2 Stark. Evid. 887, 888 (3d Lond. edit.), 649 (6th Am. edit.).

[2] Bull. N. P. 297; Ewer *v.* Ambrose, 3 B. & C. 746; Stockton *v.* Demuth, 7 Watts, 39; Smith *v.* Price, 8 Watts, 447. But where a witness testified to the jury, contrary to her statement in a former deposition given in the same cause, it was held not improper for the *judge to order* the deposition to be read, in order to impeach the credit of the witness. Rex *v.* Oldroyd, Rus. & Ry. 88.. [A witness who has testified in chief that he does not know certain facts cannot, although he shows a disposition to conceal what he knows, be asked by the party calling him whether he did not on a former occasion swear to his knowledge of those facts, as the object of the question could only be "to disparage the witness and show him unworthy of credit with the jury, which was inadmissible." Commonwealth *v.* Welch, 4 Gray, 535, 537.] [* The doctrine of the case just cited is sustained by the general course of decision in America upon the point, as we have already seen, *ante*, § 434 a; Sanchez *v.* The People, 22 N. Y. App. 147. It is very certain that no such course of examination could be allowed for the mere purpose of discrediting the witness. The rule extends even to the case of one party making his adversary a witness. Holbrook *v.* Mix, 1 E. D. Smith, 154. But it has seemed to us that this course of inquiry, as to the witness having given a different account of the matter on another occasion, is fairly susceptible of being viewed as an allowable mode of cross-examination, in order to induce an unwilling witness to

one whom *the law obliges him to call*, such as the subscribing witness to a deed, or a will, or the like: here he can hardly be considered as the witness of the party calling him, and therefore, as it seems, his character for truth may be generally impeached.[1] But, however this may be, it is exceedingly clear that the party, calling a witness, is not precluded from proving the truth of any *particular fact*, by any other competent testimony, in direct *contradiction* to what such witness may have testified; and this not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief.[2]

§ 444. Whether it be competent for a party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, *had previously stated the facts in a different manner*, is a question upon which there exists some diversity of opinion. On the one hand, it is urged, that a party is not to be sacrificed to his witness; that he is not represented by him, nor identified with him; and that he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary.[3] On the other hand, it is said, that to admit such proof would enable the party to get the naked declarations of a witness before the jury, operating, in fact, as independent evidence; and this, too, even where the declarations were made out of court, by collusion, for the purpose of being thus introduced.[4] But the weight of authority seems in favor of admitting the party to show, that the evidence

refresh his memory, and state the matter more favorably to the party. And if we allow the party to cross-examine his own witness because he seems reluctant or partial, it would seem proper that he should have the ordinary range of cross-examination, so far as it has any tendency to elicit a statement of the facts more favorable to the party, and is not exclusively of a tendency to discredit his own witness. *Post*, § 444 a.]

[1] Lowe *v.* Jolliffe, 1 W. Bl. 365; Poth. on Obl. by Evans, vol. 2, p. 232, App. No. 16; Williams *v.* Walker, 2 Rich. Eq. R. 291. And see Goodtitle *v.* Clayton, 4 Burr. 2224; Cowden *v.* Reynolds, 12 S. & R. 281. But see Whitaker *v.* Salisbury, 15 Pick. 544, 545; Dennett *v.* Dow, 5 Shepl. 19; Brown *v.* Bellows, 4 Pick. 191; [Shorey *v.* Hussey, 32 Maine, 579.]

[2] Bull. N. P. 297; Alexander *v.* Gibson, 2 Campb. 555; Richardson *v.* Allan, 2 Stark. R. 334; Ewer *v.* Ambrose, 3 B. & C. 746; 6 D. & R. 127; 4 B. & C. 25, s. c.; Friedlander *v.* London Assur. Co. 4 B. & Ad. 193; Lawrence *v.* Barker, 5 Wend. 305, per Savage, C. J.; Cowden *v.* Reynolds, 12 S. & R. 281; Bradley *v.* Ricardo, 8 Bing. 57; Jackson *v.* Leek, 12 Wend. 105; Stockton *v.* Demuth, 7 Watts, 39; Brown *v.* Bellows, 4 Pick. 179, 194; Perry *v.* Massey, 1 Bail. 32; Spencer *v.* White, 1 Iredell, R. 239; Dennett *v.* Dow, 5 Shepl. 19; McArthur *v.* Hurlburt, 21 Wend. 190; Attor.-Gen. *v.* Hitchcock, 1 Exch. R. 91, 11 Jur. 378; The Lochlibo, 14 Jur. 792, 1 Eng. L. & Eq. Rep. 645; [Hall *v.* Houghton, 37 Maine, 411; Seavy *v.* Dearborn, 19 N. H. 351; Brown *v.* Wood, 19 Miss. 475.]

[3] Phil. & Am. on Evid. 904, 905; 2 Phil. Evid. 447.

[4] Ibid.; Smith *v.* Price, 8 Watts, 447; Wright *v.* Beckett, 1 M. & Rob. 414, 428, per Bolland, B.

has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify; or, that the witness has recently been brought under the influence of the other party, and has deceived the party calling him. For it is said that this course is necessary for his protection against the contrivance of an artful witness; and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases, than it is where the contradictory declarations are proved by the adverse party.[1]

[*§ 444*a*. The author seems in the preceding section to have stated the doctrine of the right of the party to contradict his own witness who unexpectedly testifies against him, somewhat more strongly than it is held by the English courts; and the rule of the American courts is even more restricted than that of the English courts in that respect.[2] The question is extensively discussed in the case of *Melhuish* v. *Collier*[3] both by counsel and by the different members of the court, and the conclusion arrived at is, that you may cross-examine your own witness, if he testify contrary to what you had a right to expect, as to what he had stated in regard to the matter on former occasions, either in court or otherwise, and thus refresh the memory of the witness, and give him full opportunity to set the matter right if he will; and at all events to set yourself right before the jury. But you cannot do this for the

[1] Wright *v.* Beckett, 1 M. & Rob. 414, 416, per Ld. Denman; Rice *v.* New Eng. Marine Ins. Co. 4 Pick. 439; Rex *v.* Oldroyd, Russ. & Ry. 88, 90, per Ld. Ellenborough, and Mansfield, C. J.; Brown *v.* Bellows, 4 Pick. 179; The State *v.* Norris, 1 Hayw. 437, 438; 2 Phil. Evid. 450–463; Dunn *v.* Aslett, 2 M. & Rob. 122; Bank of Northern Liberties *v.* Davis, 6 Watts & Serg. 285; *infra*, § 467, n. But see Holdsworth *v.* Mayor of Dartmouth, 2 M. & Rob. 153; Regina *v.* Ball, 8 C. & P. 745; and Regina *v.* Farr, 8 C. & P. 768, where evidence of this kind was rejected. In a recent case, however, this point has been more fully considered, and it was held, that if a witness unexpectedly gives evidence adverse to the party calling him, the party may ask him if he has not, on a particular occasion, made a contrary statement. And the question and answer may go to the jury, with the rest of the evidence, the judge cautioning them not to infer, from the question alone, that the fact suggested in it is true. In such case, the party who called the witness may still go on to prove his case by other witnesses, notwithstanding their testimony, to relative facts, may contradict, and thus indirectly discredit, the former witness. Thus, in an action for an assault and battery, if the plaintiff's first witness testifies that the plaintiff, in conversation, ascribed the injury to an accident, the plaintiff may prove that, in fact, no such accident occurred. And if the witness denies a material fact, and states that persons connected with the plaintiff offered him money to assert the fact, the plaintiff may not only still go on to prove the fact, but he may also disprove the subornation; for this latter fact has now become relevant, though no part of the main transaction, inasmuch as its truth or falsehood may fairly influence the belief of the jury as to the whole case. Melhuish *v.* Collier, 15 Ad. & El. 378, N. S. [See The Lochlibo, 1 Eng. Law & Eq. 645. Greenough *v.* Eccles, 5 Com. B. Rep. N. S. 786.]

[2] [**Ante*, § 442, and Editor's note.

[3] 15 Q. B. 878.

mere purpose of discrediting the witness; nor can you be allowed to prove the contradictory statements of the witness upon other occasions; but must be restricted to proving the facts otherwise by other evidence. And the same rule prevails in the courts of Admiralty.[1] And this seems to us to be placing the matter upon its true basis.]

§ 445. When a witness has been examined in chief, the other party has a right to *cross-examine* him.[2] But a question often arises, whether the witness has been so examined in chief, as to give the other party this right. If the witness is called merely for the purpose of producing a paper, which is to be proved by another witness, he need not be sworn.[3] Whether the right of cross-examination, that is, of treating the witness as the witness of the adverse party, and of examining him by leading questions, extends to the whole case, or is to be limited to the matters upon which he has already been examined in chief, is a point upon which there is some diversity of opinion. In England, when a competent witness is called and sworn, the other party will, ordinarily, and in strictness, be entitled to cross-examine him, though the party calling him does not choose to examine him in chief;[4] unless he was sworn by mistake;[5] or, unless an immaterial question having been put to him, his further examination in chief has been stopped by the judge.[6] And even where a plaintiff was under the necessity of calling the defendant in interest as a witness, for the sake of formal proof only, he not being party to the record, it has been held, that he was thereby made a witness for all purposes, and might be cross-examined to the whole case.[7] In some of the American

[1] The Lochlibo, 14 Jur. 792; 1 Eng. L. & Eq. 645. Under a late English statute, 17 & 18 Vic. c. 125, the English courts now allow the party to contradict his own witness by showing a statement made by him in direct contradiction to his evidence. Dean *v.* Knight, 1 F. & F. 433. Jackson *v.* Thomason, 10 W. R. 42.]

[2] If the witness dies after he has been examined in chief, and before his cross-examination, it has been held that his testimony is inadmissible. Kissam *v.* Forrest, 25 Wend. 651. But in equity, its admissibility is in the discretion of the court, in view of the circumstances. Gass *v.* Stinson, 3 Sumn. 104–108; *infra*, § 554. [Where the state has summoned a witness, and the witness has been sworn, but not examined, the prisoner has no right to cross-examine him as to the whole case. Austin *v.* State, 14 Ark. 555.] [* If a witness gives no testimony in his examination in chief, he cannot be cross-examined for the purpose of discrediting him. Bracegirdle *v.* Bailey, 1 F. & F. 536.]

[3] Perry *v.* Gibson, 1 Ad. & El. 48; Davis *v.* Dale, 1 Mo. & M. 514; Read *v.* James, 1 Stark. R. 132; Rush *v.* Smith, 1 C. M. & R. 94; Summers *v.* Moseley, 2 C. & M. 477.

[4] Rex *v.* Brooke, 2 Stark. R. 472; Phillips *v.* Eamer, 1 Esp. 357; Dickinson *v.* Shee, 4 Esp. 67; Regina *v.* Murphy, 1 Armst. Macartn. & Ogle, R. 204.

[5] Clifford *v.* Hunter, 3 C. & P. 16; Rush *v.* Smith, 1 C. M. & R. 94; Wood *v.* Mackinson, 2 M. & Rob. 273.

[6] Creevy *v.* Carr, 7 C. & P. 64.

[7] Morgan *v.* Brydges, 2 Stark. R. 314.

courts the same rule has been adopted;[1] but in others, the contrary has been held;[2] and the rule is now considered by the Supreme Court of the United States, to be well established, that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination; and that if he wishes to examine him to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause.[3]

§ 446. The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination, and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. It is not easy for a witness, who is sub-

[1] Moody *v.* Rowell, 17 Pick. 490, 498; Jackson *v.* Varick, 7 Cowen, 238; 2 Wend. 166; Fulton Bank *v.* Stafford, 2 Wend. 483; [Linsley *v.* Lovely, 26 Vt. 123; Beal *v.* Nichols, 2 Gray, 262. This case decides also, that where a witness is called only to prove the execution of an instrument, and is cross-examined generally by the other party, the party calling him has not a right to cross-examine him upon the new matter upon which he was examined by the other party, unless allowed by the court in its discretion to do so; and he cannot except to the ruling of the court that as a matter of law he has no right so to cross-examine him.]

[2] Harrison *v.* Rowan, 3 Wash. 580; Ellmaker *v.* Buckley, 16 S. & R. 77.

[3] The Philadelphia & Trenton Railroad Co. *v.* Stimpson, 14 Peters, 448, 461; Floyd *v.* Bovard, 6 Watts & Serg. 75. It is competent for the party, after having closed his case so far as relates to the evidence, to introduce additional evidence, by the cross-examination of the witnesses on the other side, for the purpose of more fully proving facts not already sufficiently proved; the subject being within the discretion of the judge. Commonwealth *v.* Eastman, 1 Cush. 189, 217. [* In a recent case in New Jersey, Donnelly *v.* State, 2 Dutcher, 463, it was decided, that the defendant in a criminal prosecution could not ask the prosecutor's witness any question not connected with the examination in chief, and which was material only by way of defence. But that is not consistent with the general practice in such cases. All questions put upon cross-examination are supposed to be material only to the adversary's case. The examination in chief is supposed to have drawn out all the testimony of the witness material to the case of the party calling him. And, whether the cross-examination has reference to the same points raised by the direct examination, or to others material to the defence, the witness is to be regarded as the witness of the party calling him. The only proper doubt is whether the adversary shall be allowed to open his case on cross-examination, or shall be allowed to recall the witnesses at the proper time in putting in his own case; and this rests in the discretion of the court. *Post*, § 447.]

jected to this test, to impose on a court or jury; for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended.[1]

[1] 1 Stark. Evid. 160, 161. On the subject of examining and cross-examining witnesses *vivâ voce*, Quintilian gives the following instructions: "Primum est, *nosse testem*. Nam timidus terreri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest; prudens verb et constans, vel tanquam inimicus et pervicax dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamia criminum destruendus. Probos quosdam et verecundos non aspere incessere profuit; nam sæpe, qui adversus insectantem pugnassent, modestia mitigantur. Omnis autem interrogatio, *aut in causa est, aut extra causam. In causa* (sicut accusatori præcepimus), patronus quoque altius, unde nihil suspecti sit repetita percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueat. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec exercitatio traditur; et naturali magis acumine, aut usu contingit hæc virtus. * * * *Extra causam* quoque multa, quæ prosint, rogari solent, de vita testium aliorum, de sua quisque, si turpitudo, si humilitas, si amicitia accusatoris, si inimicitiæ cum reo, in quibus aut dicant aliquid, quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis *interrogatio debet esse circumspecta;* quia multa contra patronos venuste testis sæpe respondet eique præcipue vulgo favetur; tum verbis quam maxime ex medio sumptis; ut qui rogatur (is autem sæpius imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est." Quintil. Inst. Orat. lib. 5, c. 7. Mr. Alison's observations on the same subject are equally interesting both to the student and the practitioner. He observes: "It is often a convenient way of examining, to ask a witness, whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent, a more consistent and intelligent statement will generally be got, than by putting separate questions; for the witnesses generally think over the subjects, on which they are to be examined in criminal cases, so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel. Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony which it is desired to overturn. It frequently happens, that in the course of such a rapid examination, facts most material to the cause are elicited, which are either denied, or but partially admitted before. In such cases, there is no good ground on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt, they come tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens, that in this way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination, in opposition to an obvious desire to conceal." See Alison's Practice, 546, 547. See also the remarks of Mr. Evans on cross-examination, in his Appendix to Poth. on Obl. No. 16, vol. 2, pp. 233, 234.

§ 447. Whether, when a party is once entitled to cross-examine a witness, *this right continues through all the subsequent stages of the cause*, so that if the party should afterwards recall the same witness, to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been held. Upon the general ground, on which this course of examination is permitted at all, namely, that every witness is supposed to be inclined most favorably towards the party calling him, there would seem to be no impropriety in treating him, throughout the trial, as the witness of the party who first caused him to be summoned and sworn. But as the general course of the examination of witnesses is subject to the discretion of the judge, it is not easy to establish a rule, which shall do more than guide, without imperatively controlling the exercise of that discretion.[1] A party, however, who has not opened his own case, will not be allowed to introduce it to the jury by cross-examining the witnesses of the adverse party,[2] though, after opening it, he may recall them for that purpose.

§ 448. We have already stated it as one of the rules, governing the production of testimony, that the evidence offered must correspond with the allegations, and be confined to the point in issue. And we have seen that this rule *excludes all evidence of collateral facts*, or those which afford no reasonable inference as to the principal matter in dispute.[3] Thus, where a broker was examined to prove the market value of certain stocks, it was held that he was not compellable to state the names of the persons to whom he had sold such stocks.[4] As the plaintiff is bound, in the proof of his case, to confine his evidence to the issue, the defendant is in like manner restricted to the same point; and the same rule is applied to the respective parties, through all the subsequent stages of the cause; all questions as to collateral facts, *except in cross-examination*, being strictly excluded. The reasons of this

[1] 1 Stark. Evid. 162; Moody *v.* Rowell, 17 Pick. 498; *supra*, § 435.

[2] Ellmaker *v.* Bulkley, 16 S. & R. 77; 1 Stark. Evid. 164. [The rule in the text is stated to be the strict rule in Burke *v.* Miller, 7 Cush. 547, 550, although a departure from it, being discretionary with the judge, is not open to exception. At the trial of this cause in the court below, the plaintiff called a witness merely to prove the formal execution of a deed, and the defendant began to cross-examine him as to matters of defence, and the court ruled — that this cross-examination should be deferred until the defendant's case was opened, when the witness being recalled, could be cross-examined by the defendant; and this ruling was sustained. See Moody *v.* Rowell, 17 Pick. 499.]

[3] *Supra*, §§ 51, 52.

[4] Jonau *v.* Ferrand, 3 Rob. Louis. R. 366.

rule have been already intimated. If it were not so, the true merits of the controversy might be lost sight of, in the mass of testimony to other points, in which they would be overwhelmed; the attention of the jury would be wearied and distracted; judicial investigations would become interminable; the expenses might be enormous, and the characters of witnesses might be assailed by evidence which they could not be prepared to repel.[1] It may be added, that the evidence not being to a material point, the witness could not be punished for perjury, if it were false.[2]

§ 449. In cross-examinations, however, this rule is not usually applied with the same strictness as in examinations in chief; but on the contrary, great latitude of interrogation is sometimes permitted by the judge, in the exercise of his discretion, where, from the temper and conduct of the witness, or other circumstances, such course seems essential to the discovery of the truth,[3] or, where the cross-examiner will undertake to show the relevancy of the interrogatory afterwards, by other evidence.[4] On this head, it is difficult to lay down any precise rule.[5] But it is a well-settled rule, that a witness *cannot be cross-examined as to any fact, which is collateral and irrelevant to the issue merely* for the purpose of *contradicting him* by other evidence, if he should deny it, thereby to discredit his testimony.[6] And, if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question; but it is conclusive against him.[7] But it is *not irrelevant* to inquire of the

[1] Phil. & Am. on Evid. 909, 910.

[2] But a question, having no bearing on the matter in issue, may be made material by its relation to the witness's credit, and false swearing thereon will be perjury. Reg. *v.* Overton, 2 Mod. Cr. Cas. 263.

[3] [Mayhew *v.* Thayer, 8 Gray, 172.]

[4] Haigh *v.* Belcher, 7 C. & P. 389; *supra*, § 52.

[5] Lawrence *v.* Barker, 5 Wend. 305.

[6] Spenceley *v.* De Willott, 7 East, 108; 1 Stark. Evid. 164; Lee's case, 2 Lewin's Cr. Cas. 154; Harrison *v.* Gordon, Id. 156; [Coombs *v.* Winchester, 39 N. Hamp. 1.] [* Henman *v.* Lester, 12 C. B. N. S. 776; s. c. 9 Jur. N. S. 601.]

[7] Harris *v.* Tippett, 2 Campb. 627; Odiorne *v.* Winkley, 2 Gall. 51, 53; Ware *v.* Ware, 8 Greenl. 52; Rex *v.* Watson, 2 Stark. R. 116, 149; Lawrence *v.* Barker, 5 Wend. 301, 305; Meagoe *v.* Simmons, 3 C. & P. 75; Crowley *v.* Page, 7 C. & P. 789; Commonwealth *v.* Buzzell, 16 Pick. 157, 158; Palmer *v.* Trower, 14 Eng. L. & Eq. R. 470. Thus, if he is asked whether he has not said to A that a bribe had been offered to him by the party by whom he was called; and he denies having so said; evidence is not admissible to prove that he did so state to A. Attorney-Gen. *v.* Hitchcock, 11 Jur. 478; 1 Exch. R. 91, s. c. So where a witness was asked, on cross-examination, and for the sole purpose of affecting his credit, whether he had not made false representations of the adverse party's responsibility, his negative answer was held conclusive against the party cross-examining. Howard *v.* City Fire Ins. Co. 4 Denio, 502. But where a witness, on his cross-examination, denied that he had attempted to suborn another person to testify in favor of the party who had summoned him, it was held, that his answer was not conclusive, and that testimony was admissible to contradict him, as it materially affected his credibility. Mor-

witness, whether he has not on some former occasion *given a different account* of the matter of fact, to which he has already testified, in order to lay a foundation for impeaching his testimony by contradicting him. The inquiry, however, in such cases, must be confined to matters of *fact only;* mere opinions which the witness may have formerly expressed being inadmissible, unless the case is such as to render evidence of opinions admissible and material.[1] Thus, if the witness should give, in evidence in chief, his opinion of the identity of a person, or of his handwriting, or of his sanity, or the like, he may be asked whether he has not formerly expressed a different opinion upon the same subject; but if he has simply testified to a fact, his previous opinion of the merits of the case is inadmissible. Therefore, in an action upon a marine policy, where the broker, who effected the policy for the plaintiff, being called as a witness for the defendant, testified that he omitted to disclose a certain fact, now contended to be material

gan *v.* Frees, s. c. N. York, 1 Am. Law Reg. 92. Where a witness, called by the plaintiff to prove the handwriting in issue, swore it was not that of the defendant, and another paper, not evidence in the cause, being shown to him by the plaintiff, he swore that this also was not the defendant's, the latter answer was conclusive against the plaintiff. Hughs *v.* Rogers, 8 M. & W. 123. See also Griffiths *v.* Ivery, 11 Ad. & El. 322; Philad. & Trenton Railroad Co. *v.* Stimpson, 14 Peters, 461; Harris *v.* Wilson, 7 Wend. 57; Tennant *v.* Hamilton, 7 Clark & Fin. 122; The State *v.* Patterson, 2 Iredell, R. 346. [The rule which excludes all evidence tending to contradict the statements of a witness as to collateral matters does not apply to any facts immediately and properly connected with the main subject of inquiry. Every thing which goes to affect the credit of a witness, as to the particular facts to which he is called to testify, is material and admissible. Thus, where testimony to a fact is founded mainly upon a written memorandum which the witness testifies was made by himself at the time, and which was produced by him at a former trial, and since has been lost, the other party may show, for the purpose of discrediting the witness, that the memorandum then produced was not in his handwriting. Commonwealth *v.* Hunt, 4 Gray, 421. In Harrington *v.* Lincoln, 2 Gray, 133, a witness on cross-examination by the plaintiff answered in the negative the following question: "Did you not say to W. (another witness), after he had left the stand, that if you had been on the stand in his place, when cross-examined by the defendant's counsel, you would have said something, even if it had been untrue?" and it was held, that the plaintiff could not be allowed to contradict this answer by other evidence, because it was collateral, and did not tend to show any partiality or bias on the part of the witness in favor of the defendant, or any attempt to influence or induce W. to give false testimony favorable to the defendant; had it been of that character, it would have been competent to put in the contradictory evidence. See also Commonwealth *v.* Goddard, 2 Allen, 148.]

[1] Elton *v.* Larkins, 5 C. & P. 385; Daniels *v.* Conrad, 4 Leigh's R. 401, 405. But a witness cannot be cross-examined as to what he has sworn in an affidavit, unless the affidavit is produced. Sainthill *v.* Bound, 4 Esp. 74; Rex *v.* Edwards, 8 C. & P. 26; Regina *v.* Taylor, Id. 726. If the witness does not recollect saying that which is imputed to him, evidence may be given that he did say it, provided it is relevant to the matter in issue. Crowley *v.* Page, 7 C. & P. 789. [Nute *v.* Nute, 41 N. H. 60. Nor is it competent to show that the witness has given an opinion out of court relative to the subject-matter of the suit, inconsistent with the conclusion which the facts he testifies to at the trial will warrant. The statement must not only relate to the issue, but be a matter of fact, and not merely a former opinion. Holmes *v.* Anderson, 18 Barb. 420.]

to the risk, and being cross-examined whether he had not expressed his opinion that the underwriter had not a leg to stand upon in the defence, he denied that he had said so; this was deemed conclusive, and evidence to contradict him in this particular was rejected.[1]

§ 450. So, also, it has been held not irrelevant to the guilt or innocence of one charged with a crime, to inquire of the witness for the prosecution, in cross-examination, whether he has not expressed feelings of hostility towards the prisoner.[2] The like inquiry may be made in a civil action; and if the witness denies the fact, he may be contradicted by other witnesses.[3] So, also, in assumpsit upon a promissory note, the execution of which was disputed, it was held material to the issue, to inquire of the subscribing witness, she being a servant of the plaintiff, whether she was not his kept mistress.[4]

§ 451. In regard to the *privilege of witnesses, in not being compellable to answer*, the cases are distinguishable into several classes. (1.) Where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge. Here the authorities are exceedingly clear that the witness is not bound to answer.[5] And he may claim the protection at any stage of the inquiry, whether he has already answered the question in part, or not at all.[6] If the fact to which he is interrogated forms but one link in the chain of testimony, which is to convict him, he is protected. And whether it may tend to criminate or expose the witness is a point upon which the court are bound to instruct him;[7] and which the

[1] Elton *v.* Larkins, 5 C. & P. 385.

[2] Rex *v.* Yewin, cited 2 Campb. 638.

[3] Atwood *v.* Welton, 7 Conn. 66; [Martin *v.* Farnham, 5 Foster, 195; Drew *v.* Wood, 6 Ib. 363; Cooley *v.* Norton, 4 Cush. 93; Long *v.* Lamkin, 9 Ib. 361; Newton *v.* Harris, 2 Selden, 345; Commonwealth *v.* Byron, 14 Gray, 31.]

[4] Thomas *v.* David, 6 C. & P. 350, per Coleridge, J.

[5] Southard *v.* Rexford, 6 Cowen, 254; 1 Burr's Trial, 245; E. India Co. *v.* Campbell, 1 Ves. 227; Paxton *v.* Douglass, 19 Ves. 225; Cates *v.* Hardacre, 3 Taunt. 424; MacBride *v.* MacBride, 4 Esp. 248; Rex *v.* Lewis, Id. 225; Rex *v.* Slaney, 5 C. & P. 213; Rex *v.* Pegler, 5 C. & P. 521; Dodd *v.* Norris, 3 Campb. 519; Malony *v.* Bartly, Id. 210. If he is wrongfully compelled to answer, what he says will be regarded as obtained by compulsion, and cannot be given in evidence against him. Regina *v.* Garbett, 1 Denis. C. C. 236; 2 Car. & K. 474. And see *supra*, § 193; 7 Law Rev. 19–30.

[6] Regina *v.* Garbett, 1 Denis. C. C. 236; 2 Car. & K. 474; *ex parte* Cossens, Buck, Bankr. Cas. 531, 545. [If a witness discloses part of a transaction in which he was criminally concerned, without claiming his privilege, he must then proceed to state the whole, if what he has disclosed is clearly a part of the transaction; otherwise not. Coburn *v.* Odell, 10 Foster, 540; Norfolk *v.* Gaylord, 28 Conn. 309.]

[7] Close *v.* Olney, 1 Denio, R. 319. [See Commonwealth *v.* Shaw, 4 Cush. 594.]

court will determine, under all the circumstances of the case:[1] but without requiring the witness fully to explain how he might be criminated by the answer, which the truth would oblige him to give. For if he were obliged to show how the effect would be produced, the protection which this rule of law is designed to afford him would at once be annihilated.[2] But the court will not

[1] This point, however, is not universally agreed. In Fisher *v.* Ronalds, 17 Jur. 393, Jervis, C. J., and Maule, J., were of opinion that it was for the witness to say, on his oath, whether he believed that the question tended to criminate him; and if he did, that his answer was conclusive. Williams, J., thought the point not necessary then to be decided. [s. c. 16 Eng. Law & Eq. 417, and note. See also Osborne *v.* London Dock Co. 29 lb. 389; Jauvrin *v.* Scammon, 9 Foster, 280.] [* Fernandez, *ex parte*, 10 C. B. N. S. 3.]

[2] The People *v.* Mather, 4 Wend. 229; 1 Burr's Trial, 245; Southard *v.* Rexford, 6 Cowen, 254, 255; Bellinger, in error, *v.* The People, 8 Wend. 595. In the first of these cases, this doctrine was stated by the learned judge, in the following terms: "The principal reliance of the defendant, to sustain the determination of the judge, is placed, I presume, on the rule of law, that protects a witness in refusing to answer a question which will have a tendency to accuse him of a crime or misdemeanor. Where the disclosures he may make can be used against him to procure his conviction for a criminal offence, or to charge him with penalties and forfeitures, he may stop in answering, before he arrives at the question, the answer to which may show directly his moral turpitude. The witness, who knows what the court does not know, and what he cannot communicate without being a self-accuser, is to judge of the effect of his answer, and if it proves a link in the chain of testimony, which is sufficient to convict him, when the others are made known, of a crime, he is protected by law from answering the question. If there be a series of questions, the answer to all of which would establish his criminality, the party cannot pick out a particular one and say, if that be put, the answer will not criminate him. 'If it is one step having a tendency to criminate him, he is not compelled to answer.' (16 Ves. 242.) The same privilege that is allowed to a witness is the right of a defendant in a court of equity, when called on to answer. In Parkhurst *v.* Lowten, 2 Swanst. 215, the chancellor held, that the defendant 'was not only not bound to answer the question, the answer to which would criminate him directly, but not any which, however remotely connected with the fact, would have a tendency to prove him guilty of simony.' The language of Chief Justice Marshall, on Burr's trial, is equally explicit on this point. 'Many links,' he says, 'frequently compose that chain of testimony, which is necessary to convict an individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself, and, to every effectual purpose, accuse himself entirely as he would by stating every circumstance, which would be required for his conviction. That fact of itself would be unavailing, but all other facts without it would be insufficient. While that remains concealed in his own bosom, he is safe, but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed, by compelling a witness to disclose a fact of this description.' (1 Burr's Trial, 241.) My conclusion is, that where a witness claims to be excused from answering a question, because the answer may disgrace him, or render him infamous, the court must see that the answer may, without the intervention of other facts, fix on him moral turpitude. Where he claims to be excused from answering, because his answer will have a tendency to implicate him in a crime or misdemeanor, or will expose him to a penalty of forfeiture, then the court are to determine, whether the answer he may give to the question can criminate him, directly or indirectly, by furnishing direct evidence of his guilt, or by establishing one of many facts, which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think the answer may in any way criminate him, they must allow his privilege, without exacting from him to explain how he would be criminated by the answer, which the truth may oblige him to give.

prevent the witness from answering it, if he chooses; they will only advertise him of his right to decline it.[1] This rule is also administered in chancery, where a defendant will not be compelled to discover that which, if answered, would tend to subject him to a penalty or punishment, or which might lead to a criminal accusation, or to ecclesiastical censures.[2] But in all cases where the witness, after being advertised of his privilege, chooses to answer, he is bound to answer every thing relative to the transaction.[3] But the privilege is his own, and not that of the party; counsel, therefore, will not be allowed to make the objection.[4] If the witness declines answering, no inference of the truth of the fact is permitted to be drawn from that circumstance.[5] And no answer forced from him by the presiding judge, after he has claimed protection, can be afterwards given in evidence against him.[6] If the prosecution, to which he might be exposed, is barred by lapse of time, the privilege ceases, and the witness is bound to answer.[7]

[*§ 451*a*. It seems that in some of the states, where the party gives testimony to part of a transaction without claiming his privilege of not testifying to what may criminate him, he may be compelled to state the whole;[8] and to submit to a full cross-examination, notwithstanding his answers tend to criminate or disgrace him.[9] But, in general, a witness who proceeds inadvertently, and without expecting to be asked to give testimony upon points affecting his character or subjecting him to prosecution for crime,

If the witness was obliged to show how the effect is produced, the protection would at once be annihilated. The means which he would be in that case compelled to use to obtain protection would involve the surrender of the very object, for the security of which the protection was sought." See 4 Wend. 252, 253, 254. See also Short *v.* Mercier, 15 Jur. 93; 1 Eng. Law & Eq. Rep. 208, where the same point is discussed.

[1] 4 Wend. 252, 253, 254.

[2] Story's Eq. Pl. §§ 524, 576, 577, 592–598; McIntyre *v.* Mancius, 16 Johns. 592; Wigram on Discovery, pp. 61, 150, 195 (1st Am. edit.); Id. §§ 130–133, 271 (2d Lond. edit.); Mitford's Eq. Pl. 157–163.

[3] Dixon *v.* Vale, 1 C. & P. 278; The State *v.* K——, 4 N. Hamp. 562; East *v.* Chapman, 1 M. & Malk. 46; 2 C. & P. 570, s. c.; Low *v.* Mitchell, 6 Shepl. 272; [Foster *v.* Pierce, 11 Cush. 437, 439.]

[4] Thomas *v.* Newton, 1 M. & Malk. 48, note; Rex *v.* Adey, 1 M. & Rob. 94; [Commonwealth *v.* Shaw, 4 Cush. 594.]

[5] Rose *v.* Blakemore, Ry. & M. 383; [Phealing *v.* Kenderdine, 20 Penn. St. R. 354; Carne *v.* Litchfield, 2 Mich. 340. See Boyle *v.* Wiseman, 29 Eng. Law & Eq. 473, where the witness who claimed the privilege was one of the parties to the suit.]

[6] Reg. *v.* Garbett, 2 C. & K. 474. In *Connecticut*, by Rev. Stat. 1849, tit. 6, § 161, it is enacted, that evidence given by a witness in a criminal case, shall not "be at any time construed to his prejudice." Such, in substance, is also the law of *Virginia*. See Tate's Dig. p. 340; Virg. Code of 1849, ch. 199, § 22.

[7] Roberts *v.* Allatt, 1 M. & Malk. 192; The People *v.* Mather, 4 Wend. 229, 252–255.

[8] [*Coburn *v.* Odell, 10 Foster, 540.

[9] Norfolk *v.* Gaylord, 28 Conn. 309.]

will be accorded his privilege, when claimed, although the result should be to strike his testimony from the case after it had been partly taken down.[1] The witness must himself judge, in the first instance, whether the answers sought will tend to prove him guilty of a crime. Unless he is able to testify that he believes they will, he is not entitled to claim the privilege. If he informs the court, upon oath, that he cannot testify, without criminating himself, the court cannot compel him to testify, unless fully satisfied such is not the fact, *i.e.*, that the witness is either mistaken, or acts in bad faith; in either of which cases they should compel him to testify.[2] But where the reason for not giving testimony assigned by the witness is evidently insufficient, the court should compel him to testify.[3] It is not important that the witness is really innocent, if his answers will place him in a position where he could not exculpate himself from legal presumptions, although contrary to the fact.[4] But if, for any cause, the testimony cannot be used against the witness, he is not privileged;[5] nor can he claim exemption from testifying merely because his testimony will give a clue to evidence against him. Nor will the fact that the direct examination will not tend to criminate the witness be sufficient, if proper questions on cross-examination will.[6]]

§ 452. (2.) Where the witness, by answering, may *subject himself to a civil action or pecuniary loss*, or charge himself with a debt. This question was very much discussed in England, in Lord Melville's case; and, being finally put to the judges by the House of Lords, eight judges and the chancellor were of opinion that a witness, in such case, was bound to answer, and four thought that he was not. To remove the doubts which were thrown over the question by such a diversity of opinion among eminent judges, a statute was passed,[7] declaring the law to be, that a witness could not legally refuse to answer a question relevant to the matter in issue, merely on the ground that the answer may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit; provided the answer has no tendency to accuse himself, or to expose him to any kind of penalty or for-

[1] [* Dixon *v.* Vale, 1 C. & P. 278, by Best, C. J.

[2] Chamberlain *v.* Willson, 12 Vt. R. 491.

[3] Mexico & S. A. Co. in re; Ashton's case, 4 DeG. & J. 320; s. c. 27 Beav. 474.

[4] Adams *v.* Lloyd, 4 Jur. N. S. 590.

[5] The People *v.* Kelly, 24 N.Y. Ct. App. 74.

[6] Printz *v.* Cheeney, 11 Iowa, 469.]

[7] 46 Geo. III. c. 37; 2 Phil. Evid. 420; 1 Stark. Evid. 165. It is so settled by statute in *New York*. 2 Rev. Stat. 405, § 71.

feiture. In the United States, this act is generally considered as declaratory of the true doctrine of the common law; and, accordingly, by the current of authorities, the witness is held bound to answer.[1] But neither is the statute, nor the rule of the common law, considered as compelling a person interested in the cause as party, though not named on the record, to testify as a witness in the cause, much less to disclose any thing against his own interest.[2]

§ 453. (3.) Where the answer will subject the witness to a *forfeiture of his estate.* In this case, as well as in the case of an exposure to a criminal prosecution or penalty, it is well settled that a witness is not bound to answer.[3] And this is an established rule in equity, as well as at law.[4]

§ 454. (4.) Where the answer, though it will not expose the witness to any criminal prosecution or penalty, or to any forfeiture of estate, yet has a *direct tendency to degrade his character.* On this point there has been a great diversity of opinion, and the law still remains not perfectly settled by authorities.[5] But the conflict

[1] Bull *v.* Loveland, 10 Pick. 9; Baird *v.* Cochran, 4 S. & R. 397; Nass *v.* Van Swearingen, 7 S. & R. 192; Taney *v.* Kemp, 4 H. & J. 348; Naylor *v.* Semmes, 4 G. & J. 273; City Bank *v.* Bateman, 7 H. & J. 104; Stoddart *v.* Manning, 2 H. & G. 147; Copp *v.* Upham, 3 N. Hamp. 159; Cox *v.* Hill, 3 Ohio R. 411, 424; Planters' Bank *v.* George, 6 Martin, 679, N. S.; Jones *v.* Lanier, 2 Dev. Law Rep. 480; Conover *v.* Bell, 6 Monroe, 157; Gorham *v.* Carroll, 3 Littel, 221; Zollicoffer *v.* Turney, 6 Yerger, 297; Ward *v.* Sharp, 15 Verm. 115. The contrary seems to have been held in *Connecticut.* Benjamin *v.* Hathaway, 3 Conn. 528, 532. [An action will not lie against a witness, who, in the due course of judicial proceeding, has uttered false and defamatory statements concerning the plaintiff, even though he did so maliciously and without reasonable and probable cause, and the plaintiff suffered damages in consequence. Revis *v.* Smith, 36 Eng. Law & Eq. 268, 272, 273.]

[2] Rex *v.* Woburn, 10 East, 395; Maurán *v.* Lamb, 7 Cowen, 174; Appleton *v.* Boyd, 7 Mass. 131; Fenn *v.* Granger, 3 Campb. 177; The People *v.* Irving, 1 Wend. 20; White *v.* Everest, 1 Verm. 181.

[3] 6 Cobbett's P. D. 167; 1 Hall's Law J. 223; 2 Phil. Evid. 420.

[4] Mitford's Eq. Pl. 157, 161; Story's Eq. Pl. §§ 607, 846.

[5] The arguments on the respective sides of this question are thus summed up by Mr. Phillips: "The advocates for a compulsory power in cross-examination maintain, that, as parties are frequently surprised by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that, on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary; and that, if a witness may not be questioned as to his character at the moment of trial, the property and even the life of a party must often be endangered. Those on the other side, who maintain that a witness is not compellable to answer such questions, argue to the following effect. They say, the obligation to give evidence arises from the oath, which every witness takes; that by this oath he binds himself only to speak touching the matters in issue; and that such particular facts as these, whether the witness has been in jail for felony, or suffered some infamous punishment, or the like, cannot form any part of the issue, as appears evident from this consideration, that the party against whom the witness is called would not be allowed to prove such particular facts by other witnesses. They argue, further, that it would be an extreme grievance to a witness, to be com-

of opinions may be somewhat reconciled by a distinction, which has been very properly taken between cases, where the testimony is relevant and material to the issue, and cases where the question is not strictly relevant, but is collateral, and is asked only under the latitude allowed in a cross-examination. In the former case, there seems great absurdity in excluding the testimony of a witness, merely because it will tend to degrade himself, when others have a direct interest in that testimony, and it is essential to the establishment of their rights of property, of liberty, or even of life; or to the course of public justice. Upon such a rule, one who had been convicted and punished for an offence, when called as a witness against an accomplice, would be excused from testifying to any of the transactions, in which he had participated with the accused, and thus the guilty might escape. And, accordingly, the better opinion seems to be, that where the transaction, to which the witness is interrogated, forms any part of the issue to be tried, the witness will be obliged to give evidence, however strongly it may reflect on his character.[1]

§ 455. But where the question is not material to the issue, but is *collateral and irrelevant*, being asked under the license allowed in cross-examination, it stands on another ground. In general, as we have already seen, the rule is, that upon cross-examination to try the credit of a witness, only general questions can be put; and he cannot be asked as to any collateral and independent fact, merely with a view to contradict him afterwards by calling another witness. The danger of such a practice, it is said, is obvious; besides the inconvenience of trying as many collateral issues as one of the parties might choose to introduce, and which the other

pelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character afresh to evil report, when, perhaps, by his subsequent conduct, he may have recovered the good opinion of the world; that, if a witness is privileged from answering a question, though relevant to the matters in issue, because it may tend to subject him to a forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question, to the disparagement and forfeiture of his character; that, in the case of accomplices, in which this compulsory power of cross-examination is thought to be more particularly necessary, the power may be properly conceded to a certain extent, because accomplices stand in a peculiar situation, being admitted to give evidence only under the implied condition of making a full and true confession of the whole truth; but even accomplices are not to be questioned, in their cross-examination, as to other offences, in which they have not been concerned with the prisoner; that, with respect to other witnesses, the best course to be adopted, both in point of convenience and justice, is to allow the question to be asked, at the same time allowing the witness to shelter himself under his privilege of refusing to answer." Phil. & Am. on Evid. pp. 917, 918; 2 Phil. Evid. 422.

[1] 2 Phil. Evid. 421; The People *v.* Mather, 4 Wend. 250–254, per Marcy, J.; Peake's Evid. (by Norris) p. 92; Cundell

could not be prepared to meet.[1] Whenever, therefore, the question put to the witness is plainly of this character, it is easy to perceive that it falls under this rule, and should be excluded. But the difficulty lies in determining, with precision, the materiality and relevancy of the question, when it goes to the character of the witness. There is certainly great force in the argument, that where a man's liberty, or his life, depends upon the testimony of another, it is of infinite importance, that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted. They cannot look into his breast, to see what passes there; but must form their opinion on the collateral indications of his good faith and sincerity. Whatever, therefore, may materially assist them in this inquiry, is most essential to the investigation of truth; and it cannot but be material for the jury to understand the character of the witness, whom they are called upon to believe; and to know whether, although he has not been convicted of any crime, he has not in some measure rendered himself less credible by his disgraceful conduct.[2] The weight of this argument seems to have been felt by the judge in several cases in which questions, tending to disgrace the witness, have been permitted in cross-examination.

§ 456. It is, however, generally conceded, that where the answer, which the witness may give, will *not directly and certainly show his infamy*, but will *only tend* to disgrace him, he may be compelled to answer. Such is the rule in equity, as held by Lord Eldon;[3] and its principle applies with equal force at common law; and, accordingly, it has been recognized in the common-law courts.[4] In questions involving a criminal offence, the rule, as we have seen,[5] is different; the witness being permitted to judge for the most part for himself, and to refuse to answer, wherever it would tend to subject him to a criminal punishment or forfeiture. But here the court must see for itself, that the answer will directly

v. Pratt, 1 M. & Malk. 108; Swift's Evid. 80. So in Scotland. Alison's Practice, p. 528.

[1] Spencely *v.* De Willott, 7 East, 108, 110. Ld. Ellenborough remarked, that he had ruled this point again and again at the sittings, until he was quite tired of the agitation of the question, and therefore he wished that a bill of exceptions should be tendered by any party dissatisfied with his judgment, that the question might be finally put at rest. See also Lohman *v.* The People, 1 Comst. 379.

[2] 1 Stark. Evid. 170.

[3] Parkhurst *v.* Lowten, 1 Meriv. 400; 2 Swanst. 194, 216, s. c.; Foss *v.* Haynes, 1 Redingt. 81. And see Story, Eq. Pl. §§ 585, 596.

[4] The People *v.* Mather, 4 Wend. 232, 252, 254; The State *v.* Patterson, 2 Iredell, R. 346.

[5] *Supra*, § 451.

show his infamy, before it will excuse him from testifying to the fact.[1] Nor does there seem to be any good reason why a witness should be privileged from answering a question touching his present situation, employment, and associates, if they are of his own choice; as, for example, in what house or family he resides, what is his ordinary occupation, and whether he is intimately acquainted and conversant with certain persons, and the like; for, however these may disgrace him, his position is one of his own selection.[2]

[* § 456*a*. There is no doubt that the latitude which the law allows for cross-examination is very liable to abuse. There is probably no other mode in which more time is needlessly consumed in court, or by which more unbecoming scenes are liable to be produced there. It is a matter resting solely in the discretion of the judge, and where he would naturally desire to err, if at all, by too great indulgence. A mere impertinent inquiry, calculated and intended to test the witness's power of self-control, and, if possible, to throw him off his guard, should never be resorted to or allowed, unless there has been something very marked in the conduct of the witness to justify it. The witness should be told that he is not obliged to submit to insult, or to answer inquiries merely impertinent. Such questions generally defeat their own purpose, if that is eliciting as favorable a statement of the facts as possible toward the party. The surest course to secure that, even from unwilling and unfair witnesses, is to treat them with kindness and courtesy. It is a great mistake, which some of the profession unfortunately sometimes fall into, that putting impertinent and impudent questions, upon cross-examination, tends either to the exaltation of their own credit, or can possibly subserve the interests of their clients. There can be nothing, as a general rule, more damaging to both.[3]]

§ 457. But, on the other hand, where the question *involves the fact of a previous conviction*, it ought not to be asked; because there is higher and better evidence which ought to be offered. If the inquiry is confined, in terms, to the fact of his having been

[1] Macbride *v.* Macbride, 4 Esp. 242, per Ld. Alvanley; The People *v.* Mather, 4 Wend. 254, per Marcy, J.

[2] Thus, when a witness was asked, whether she was not cohabiting with a particular individual, in a state of incest, Best, C. J., prohibited the question; stating expressly, that he did this only on the ground, that the answer would expose her to punishment. Cundell *v.* Pratt, 1 M. & Malk. 108.

[3] [* Commonwealth *v.* Sacket, 22 Pick. 394; Same *v.* Shaw, 4 Cush. 593; Smith *v.* Cutter, 1 Gray, 108.]

subjected to an ignominious punishment, or to imprisonment alone, it is made, not for the purpose of showing that he was an innocent sufferer, but that he was guilty; and the only competent proof of this guilt is the record of his conviction. Proof of the same nature, namely, documentary evidence, may also be had of the cause of his commitment to prison, whether in execution of a sentence, or on a preliminary charge.[1]

§ 458. There is another class of questions, which do not seem to come within the reasons already stated in favor of permitting this extent of cross-examination; namely, questions, the answers to which, though they may disgrace the witness in other respects, yet *will not affect the credit* due to his testimony. For it is to be remembered, that the object of indulging parties in this latitude of inquiry is, that the jury may understand the character of the witness, whom they are asked to believe, in order that his evidence may not pass for more than it is worth. Inquiries, therefore, having no tendency to this end, are clearly impertinent. Such are the questions frequently attempted to be put to the principal female witness, in trials for seduction *per quod servitium amisit*, and on indictments for rape, &c., whether she had not previously been criminal with other men, or with some particular person, which are generally suppressed.[2] So, on an indictment of a female prisoner,

[1] The People *v.* Herrick, 13 Johns. 84, per Spencer, J.; Clement *v.* Brooks, 13 N. Hamp. R. 92. In Rex *v.* Lewis, 4 Esp. 225, the prosecutor, who was a common informer, was asked whether he had not been in the house of correction in Sussex; but Lord Ellenborough interposed, and suppressed the question; partly on the old rule of rejecting all questions, the object of which was to degrade the witness; but chiefly, because of the injury to the administration of justice, if persons, who came to do their duty to the public, might be subjected to improper investigation. Inquiries of this nature have often been refused on the old ground alone. As in The State *v.* Bailey, Pennington's R. 304 (2d edit.); Millman *v.* Tucker, 2 Peake's Cas. 222; Stout *v.* Russell, 2 Yeates, 334. A witness is also privileged from answering respecting the commission of an offence, though he has received a pardon; "for," said North, C. J., "if he hath his pardon, it doth take away as well all calumny, as liableness to punishment, and sets him right against all objection." Rex *v.* Reading, 7 Howell's St. Tr. 296. It may also be observed, as a further reason for not interrogating a witness respecting his conviction and punishment for a crime, that he may not understand the legal character of the crime for which he was punished, and so may admit himself guilty of an offence which he never committed. In Rex *v.* Edwards, 4 T. R. 440, the question was not asked of a witness, but of one who offered himself as bail for another, indicted of grand larceny. [*The party who calls the witness has the right to insist, that if the adversary would impeach his character by proving him guilty of an infamous crime, he shall do it by proof of the record of such conviction. Newcomb *v.* Griswold, 24 N.Y. App. 298.]

[2] Dodd *v.* Norris, 3 Campb. 519; Rex *v.* Hodgdon, Russ. & Ry. 211; Vaughn *v.* Perrine, Penningt. R. 534. But where the prosecution is under a bastardy act, the issue being upon the paternity of the child, this inquiry to its mother, if restricted to the proper time, is material, and she will be held to answer. Swift's Evid. p. 81. See also Macbride *v.* Macbride, 4 Esp. 242; Bate *v.* Hill, 1 C. & P. 100. In Rex *v.* Teal *et al.* 11 East, 307,

for stealing from the person, in a house, the prosecutor cannot be asked, whether at that house any thing improper passed between him and the prisoner.[1]

§ 459. But where the question *does not fall within either of the classes mentioned* in the three preceding sections, *and goes clearly to the credit* of the witness for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding it may disgrace him. The examination being governed and kept within bounds by the discretion of the judge, all inquiries into transactions of a remote date will of course be suppressed; for the interests of justice do not require that the errors of any man's life, long since repented of and forgiven by the community, should be recalled to remembrance, and their memory be perpetuated in judicial documents, at the pleasure of any future litigant. The state has a deep interest in the inducements to reformation, held out by the protecting veil, which is thus cast over the past offences of the penitent. But where the inquiry relates to transactions comparatively recent, bearing directly upon the present character and moral principles of the witness, and therefore essential to the due estimation of his testimony by the jury, learned judges have of late been disposed to allow it.[2] Thus it has been held, that a witness called by one party may be asked in cross-examination, whether he had not attempted to dissuade a witness for the other party from attending the trial.[3] So where one was indicted for larceny, and the principal witness for the prosecution was his servant boy, the learned judge allowed the prisoner's counsel to ask the boy, whether he not been charged with robbing his master, and whether he had not afterwards said he would be revenged of him, and would soon fix him in jail.[4] Similar inquiries have been permitted in other cases.[5] The great question, however, whether

311, which was an indictment for conspiring falsely to charge one with being the father of a bastard child, similar inquiries were permitted to be made of the mother, who was one of the conspirators, but was admitted a witness for the prosecution. [People *v.* Blakeley, 4 Parker, C. R. 176.] See *post*, vol. 2, § 577.

[1] Rex *v.* Pitcher, 1 C. & P. 85.

[2] This relaxation of the old rule was recognized, some years ago, by Lord Eldon. "It used to be said," he observed, "that a witness could not be called on to discredit himself; but there seems to be something like a departure from that; I mean, that in modern times, the courts have permitted questions to show, from transactions not in issue, that the witness is of impeached character, and therefore not so credible." Parkhurst *v.* Lowten, 2 Swanst. 216.

[3] Harris *v.* Tippett, 2 Campb. 637.

[4] Rex *v.* Yewin, cited 2 Campb. 638.

[5] Rex *v.* Watson, 2 Stark. R. 116, 149; Rex *v.* Teal *et al.* 11 East, 311; Cundell *v.* Pratt, 1 M. & Malk. 108; Rex *v.* Barnard, 1 C. & P. 85, note (a); Rex *v.* Gilroy, Ib.; Frost *v.* Holloway, cited in 2 Phil. Evid. 425.

a witness may not be bound in some cases to answer an interrogatory to his own moral degradation, where, though it is collateral to the main issue, it is relevant to his character for veracity, has not yet been brought into direct and solemn judgment, and must therefore be regarded as an open question, notwithstanding the practice of eminent judges at *nisi prius*, in favor of the inquiry, under the limitations we have above stated.[1]

§ 460. Though there may be cases, in which a witness is not bound to answer a question which goes directly to disgrace him, yet *the question may be asked*, wherever the answer, if the witness should waive his privilege, would be received as evidence.[2] It has been said, that if the witness declines to answer, his refusal may well be urged against his credit with the jury.[3] But in several cases this inference has been repudiated by the court; for it is the duty of the court, as well as the objects of the rule, to protect the witness from disgrace, even in the opinion of the jury and other persons present; and there would be an end of this protection, if a demurrer to the question were to be taken as an admission of the fact inquired into.[4] [* It is probably safe to say, that counsel cannot in any case insist upon asking a question which the witness is not obliged to answer; nor can any just inference be made against a witness on account of his silence, where he is under no obligation to speak.]

§ 461. After a witness has been examined in chief, his *credit may be impeached* in various modes, besides that of exhibiting the improbabilities of a story by a cross-examination. (1.) By *disproving the facts* stated by him, by the testimony of other witnesses. (2.) By general evidence affecting his credit for veracity. But in *impeaching the credit* of a witness, the examination must be confined to his general reputation, and not be permitted as to

[1] See 1 Stark. Evid. 167–172; 2 Phil. Evid. 423–428; Peake's Evid. by Norris, pp. 202–204. In Respublica *v.* Gibbs, 3 Yeates, 429, where the old rule of excluding the inquiry was discussed on general grounds, and approved, the inquiry was clearly inadmissible on another account, as the answer would go to a forfeiture of the witness's right of suffrage and of citizenship.

[2] 2 Phil. Evid. 423–428; 1 Stark. Evid. 172; Southard *v.* Rexford, 6 Cowen, 254. But it should be remembered, that if the question is collateral to the issue, the answer cannot be contradicted. In such cases, the prudent practitioner will seldom put a question, unless it be one which, if answered either way, will benefit his client. Such was the question put by the prisoner's counsel, in Rex *v.* Pitcher, *supra*, § 458. See 1 C. & P. 85, note (a).

[3] 1 Stark. Evid. 172; Rose *v.* Blakemore, Ry. & M. 382, per Brougham, arg.

[4] Rose *v.* Blakemore, Ry. & M. 382, per Abbott, Ld. Ch. J.; Rex *v.* Watson, 2 Stark. R. 258, per Holroyd, J.; Lloyd *v.* Passingham, 16 Ves. 64; *supra*, § 451.

particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other, without notice; and unless his general character and behavior be in issue, he has no notice.[1] This point has been much discussed, but may now be considered at rest.[2] The regular mode of examining into the general reputation is to inquire of the witness whether he knows the general reputation of the person in question among his neighbors; and what that reputation is.[3] In the English courts the course is further to inquire whether, from such knowledge, the witness would believe that person, upon his oath.[4] In the American courts the same course has been pursued;[5] but its propriety has of late been questioned, and perhaps the weight of authority is now against permitting the witness to testify as to his own opinion.[6] In answer to such evidence, the

[1] Bull. N. P. 296, 297. The mischief of raising collateral issues is also adverted to as one of the reasons of this rule. "Look ye," said Holt, Ld. C. J., "you may bring witnesses to give an account of the general tenor of the witness's conversation; but you do not think, sure, that we will try, at this time, whether he be guilty of robbery." Rex *v.* Rookwood, 4 St. Tr. 681; 13 Howell's St. Tr. 211, s. c.; 1 Stark. Evid. 182. It is competent, however, for the party against whom a witness has been called, to show that he has been bribed to give his evidence. Attor.-Gen. *v.* Hitchcock, 11 Jur. 478.

[2] Layer's case, 16 How. St. Tr. 246, 286; Swift's Evid. 143.

[3] [In Bates *v.* Barber, 4 Cush. 107, 108, it was held, that the preliminary question as to the knowledge of the reputation need not, and should not, be put.]

[4] Phil. & Am. on Evid. 925; Mawson *v.* Hartsink, 4 Esp. 104, per Ld. Ellenborough; 1 Stark. Evid. 182; Carlos *v.* Brook, 10 Ves. 50.

[5] The People *v.* Mather, 4 Wend. 257, 258; The State *v.* Boswell, 2 Dev. R. 209, 211; Anon. 1 Hill, S. Car. R. 258; Ford *v.* Ford, 7 Humph. 92.

[6] Gass *v.* Stinson, 2 Sumn. 610, per Story, J.; Wood *v.* Mann, Id. 321; Kimmel *v.* Kimmel, 3 S. & R. 336–338; Wike *v.* Lightner, 11 S. & R. 198; Swift's Evid. 143; Phillips *v.* Kingfield, 1 Appleton's R. 275. In this last case the subject was ably examined by Shepley, J. who observed: "The opinions of a witness are not legal testimony, except in special cases; such, for example, as experts in some profession or art, those of the witnesses to a will, and, in our practice, opinions on the value of property. In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely upon any such opinion instead of exercising their own judgment, taking into consideration the whole testimony. When they have the testimony that the reputation of a witness is good or bad for truth, connecting it with his manner of testifying, and with the other testimony in the case, they have the elements from which to form a correct conclusion, whether any and what credit should be given to his testimony. To permit the opinion of a witness, that another witness should not be believed, to be received and acted upon by a jury, is to allow the prejudices, passions, and feelings of that witness to form, in part, at least, the elements of their judgment. To authorize the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and established rules of law, respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it. It moreover would permit the introduction and indulgence in courts of justice of personal and party hostilities, and of every unworthy motive by which man can be actuated, to form the basis of an opinion to be expressed to a jury to influence their decision." 1 Applet. R. 379. But *quære*, whether a witness to impeach reputation may not be asked, *in cross-examination*, if he would not believe the principal witness on oath.

other party may cross-examine those witnesses as to their means of knowledge, and the grounds of their opinion; or may attack their general character, and by fresh evidence support the character of his own witness.[1] The inquiry must be made as to his general reputation, where he is best known. It is not enough that the impeaching witness professes merely to state what he has heard "others say;" for those others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character.[2] And, ordinarily, the witness ought himself to come from the neighborhood of the person whose character is in question. If he is a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries; but otherwise, the court will not undertake to determine, by a preliminary inquiry, whether the impeaching witness has sufficient knowledge of the fact to enable him to testify; but will leave the value of his testimony to be determined by the jury.[3]

[1] 2 Phil. Evid. 432; Mawson *v.* Hartsink, 4 Esp. 104, per Ld. Ellenborough; 1 Stark. Evid. 182. It is not usual to cross-examine witnesses to character, unless there is some definite charge upon which to cross-examine them. Rex *v.* Hodgkiss, 7 C. & P. 298. Nor can such witnesses be contradicted as to collateral facts. Lee's case, 2 Lewin, Cr. Cas. 154. [The court may exercise its discretion in limiting the number of impeaching witnesses, and likewise that of the supporting witnesses; and the proper exercise of such discretion is no ground of error. Bunnell *v.* Butler, 23 Conn. 65. In the Supreme Judicial Court of Massachusetts, the court at *nisi prius* has in some cases limited the number to *five* or *six* on a side, giving the parties notice beforehand of such intended limitation. In Bunnell *v.* Butler, *ubi supra*, the number was limited to *six* on each side, the court previously notifying the parties of the intended limitation.]

[2] Boynton *v.* Kellogg, 3 Mass. 129, per Parsons, C. J.; Wike *v.* Lightner, 11 S. & R. 198, 199, 200; Kimmel *v.* Kimmel, 3 S. & R. 337, 338; Phillips *v.* Kingfield, 1 Applet. R. 375. The impeaching witness may also be asked to name the persons whom he has heard speak against the character of the witness impeached. Bates *v.* Barber, 4 Cush. 107. [Or if the reputation of the witness impeached relates wholly or in part to his want of punctuality in paying his debts. Pierce *v.* Newton, 13 Gray, 528.] [*But such evidence should commonly be restricted to the character of the witness for truth. Shaw *v.* Emery, 42 Me. R. 59; Craig *v.* State, 5 Ohio, N. S. 605; State *v.* Sater, 8 Clarke, 420. But in some of the states such inquiries take a wider range. Eason *v.* Chapman, 21 Ill. 33; Gilliam *v.* State, 1 Head, 38.]

[3] Douglass *v.* Tousey, 2 Wend. 352; Bates *v.* Barber, 4 Cush. 107; Sleeper *v.* Van Middlesworth, 4 Denio, 431. Whether this inquiry into the general reputation or character of the witness should be restricted to his reputation for truth and veracity, or may be made in general terms, involving his entire moral character and estimation in society, is a point upon which the American practice is not uniform. All are agreed, that the true and primary inquiry is into his general character for truth and veracity, and to this point, in the Northern states, it is still confined. But in several of the other states greater latitude is allowed. In *South Carolina*, the true mode is said to be, first, to ask what is his general character, and if this is said to be bad, then, to inquire whether the witness would believe him on oath; leaving the party who adduced him to inquire whether, notwithstanding his bad character in other respects, he has not preserved his character for truth. Anon. 1

§ 462. (3.) The credit of a witness may also be impeached by proof, that he has made *statements out of court, contrary to what he has testified at the trial.* But it is only in such matters as are relevant to the issue, that the witness can be contradicted. And before this can be done, it is generally held necessary, in the case of verbal statements, first to ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, nor whether he has always told the same story; because it may frequently happen, that, upon the general question, he may not remember whether he has so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said.[1] This course of

Hill, S. Car. R. 251, 258, 259. In *Kentucky*, the same general range of inquiry is permitted; and is thus defended by one of the learned judges: "Every person conversant with human nature must be sensible of the kindred nature of the vices to which it is addicted. So true is this, that, to ascertain the existence of one vice, of a particular character, is frequently to prove the existence of more, at the same time, in the same individual. Add to this, that persons of infamous character may, and do frequently exist, who have formed no character as to their lack of truth; and society may have never had the opportunity of ascertaining that they are false in their words or oaths. At the same time, they may be so notoriously guilty of acting falsehood, in frauds, forgeries, and other crimes, as would leave no doubt of their being capable of speaking and swearing it, especially as they may frequently depose falsehood with greater security against detection, than practice those other vices. In such cases, and with such characters, ought the jury to be precluded from drawing inferences unfavorable to their truth as witnesses, by excluding their general turpitude? By the character of every individual, that is, by the estimation in which he is held in the society or neighborhood where he is conversant, his word and his oath are estimated. If that is free from imputation, his testimony weighs well. If it is sullied, in the same proportion his word will be doubted. We conceive it perfectly safe, and most conducive to the purposes of justice, to trust the jury with a full knowledge of the standing of a witness, into whose character an inquiry is made. It will not thence follow, that from minor vices they will draw the conclusion, in every instance, that his oath must be discredited, but only be put on their guard to scrutinize his statements more strictly; while in cases of vile reputation, in other respects, they would be warranted in disbelieving him, though he had never been called so often to the book as to fix upon him the reputation of a liar, when on oath." Hume *v.* Scott, 3 A. K. Marsh, 261, 262, per Mills, J. This decision has been cited and approved in *North Carolina*, where a similar course prevails. The State *v.* Boswell, 2 Dev. Law Rep. 209, 210. See also The People *v.* Mather, 4 Wend. 257, 258, per Marcy, J. See also 3 Am. Law Jour. 154–162, N. S., where all the cases on this point are collected and reviewed. Whether evidence of common prostitution is admissible to impeach a female witness, *quære*. See Commonwealth *v.* Murphy, 14 Mass. 387; 2 Stark. Evid. 369, note (1), by Metcalf, that it is admissible. Spears *v.* Forrest, 15 Verm. 435, that it is not. [And Commonwealth *v.* Churchill, 11 Met. 538, that it is not, thus overruling Commonwealth *v.* Murphy. Teese *v.* Huntington, 23 How. 2.]

[1] Angus *v.* Smith, 1 M. & Malk. 473, per Tindal, C. J.; Crowley *v.* Page, 7 C. & P. 789, per Parke, B.; Regina *v.* Shellard, 9 C. & P. 277; Regina *v.* Holden, 8 C. & P. 606; Palmer *v.* Haight, 2 Barb. S.C. R. 210. In the Queen's case, this subject was very much discussed, and the unanimous opinion of the learned judges was delivered by Abbott, C. J., in these terms: "The legitimate object of the proposed proof is to discredit the witness. Now, the usual practice of the courts below, and a practice to which we are not aware of any exception, is this: if it be

proceeding is considered indispensable, from a sense of justice to the witness; for, as the direct tendency of the evidence is to im-

intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declarations imputed to him, the adverse party has an opportunity afterwards of contending that the matter of the speech or declaration is such, that he is not to be bound by the answer of the witness, but may contradict and falsify it; and, if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the court is of opinion that he cannot be compelled to answer, the adverse party has, in this instance, also, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to; and it is, in our opinion, of great importance that this opportunity should be thus afforded, not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost; for a witness, who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done; and, in our opinion, not unfrequently, would be done both to the witness and to the party; and this not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant; and one of the great objects of the course of proceeding, established in our courts, is the prevention of surprise, as far as practicable, upon any person who may appear therein." The Queen's case, 2 Brod. & Bing. 313, 314. In the United States, the same course is understood to be generally adopted; [Conrad *v.* Griffey, 16 How. U. S. 38; Sprague *v.* Cadwell, 12 Barb. 516; Unis *v.* Charlton's Adm'r, 12 Gratt. 484; Wright *v.* Hicks, 15 Geo. 160; Carlisle *v.* Hunley, 16 Ala. 622; Powell *v.* State, 19 Ib. 577; Drennen *v.* Lindsey, 15 Ark. 359; Nelson *v.* State, 2 Swan, 237; Smith *v.* People, 2 Mich. 415;] except in *Maine;* Ware *v.* Ware, 8 Greenl. 42; and perhaps in *Massachusetts;* Tucker *v.* Welsh, 17 Mass. 160. But see Brown *v.* Bellows, 4 Pick. 188. [In Massachusetts the rule is now settled, that the witness need not be first asked whether he has ever testified differently. Gould *v.* Norfolk Lead Co. 9 Cush. 338; Commonwealth *v.* Hawkins, 3 Gray, 463, 464. In the latter case, "Bolles, for the defendant, offered the depositions, taken before the coroner, at the inquest on the body of Leet, for the purpose of contradicting the evidence given by the same witnesses at this trial, when called by the commonwealth. The attorney-general objected, on the ground that the witnesses sought to be impeached had not been asked, on their examination, whether they had not previously made different statements, nor had their attention in any way been called to their depositions before the coroner. But the court were of opinion that, for the purpose of impeaching the witnesses, such parts of their depositions were admissible as were contradictory of the evidence given by them at the trial; that the uniform practice in this commonwealth, differing in this respect from that of England, and some of the other states, had been, as stated in Tucker *v.* Welsh, 17 Mass. 160, to allow the introduction of evidence that a witness had previously made different statements, without first calling his attention to such statements; that, after such parts had been read, the commonwealth would have the right to require the whole of the former statement to be read, and might recall the witness afterwards to explain the alleged discrepancy. Bolles then proposed to point out to the jury that these witnesses had omitted, in their testimony before the coroner, material facts to which they had now testified, and which, he argued were so im-

peach his veracity, common justice requires that, by first calling his attention to the subject, he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning, and design of what he is proved elsewhere to have said.[1]

portant that they could not have been omitted then, and remembered now, consistently with the ordinary workings of a good memory and a good conscience. But the court ruled that those parts only of the testimony before the coroner could be read, for the purpose of impeaching the character of the witness, which went to show a discrepancy or contradiction, as by showing that the witness had given different accounts at different times, by alleging a fact at one time which he denied at another, or by stating it in two ways inconsistent with each other; and that the mere omission to state a fact, or stating it less fully before the coroner, was not a subject for comment to the jury, unless the attention of the witness was particularly called to it at the inquest;" and in *New Hampshire*, Titus *v.* Ash, 4 Foster, 319; and in *Connecticut*, Hedge *v.* Clapp, 22 Conn. 622, in which Tucker *v.* Welsh, 17 Mass. 160, is cited and approved. Robinson *v.* Hutchinson, 31 Vt. 443.] [*The rule requiring the witness first to be inquired of as to his having made such contradictory statements seems not to obtain with entire approbation in some of the states. Cook *v.* Brown, 34 N. H. 460; Howland *v.* Conway, 1 Abbott, Adm. 281. But in others it is rigidly enforced. Jarboe *v.* Kepler, 8 Ind. 314; Galena, &c., R. R. Co. *v.* Fay, 16 Ill. 558; State *v.* Davis, 29 Mo. 391; Ketchingman *v.* State, 6 Wis. 426. But in order to lay the foundation for inquiring of the witness as to what he may have said out of court, he must first be examined as to the facts upon that point, in order to make the inquiry material. Combs *v.* Winchester, 39 N.H. 13; Bearss *v.* Copley, 10 N.Y. App. 93.] The utility of this practice, and of confronting the two opposing witnesses, is illustrated by a case mentioned by Mr. Justice Cowen, in his notes to Phillips on Evidence, vol. 2, p. 774 (note 553 to Phil. Evid. 308); "in which a highly respectable witness, sought to be impeached through an out-of-door conversation by another witness, who seemed very willing to bring him into a contradiction, upon both being placed on the stand, furnished such a distinction to the latter as corrected his memory, and led him, in half a minute, to acknowledge that he was wrong. The difference lay in only one word. The first witness had now sworn, that he did not rely on a certain firm as being in good credit; for he was not well informed on the subject. The former words imputed to him were a plain admission that he was fully informed, and did rely on their credit. It turned out that, in his former conversation, he spoke of a partnership, from which one name was soon afterward withdrawn, leaving him now to speak of the latter firm, thus weakened by the withdrawal. In regard to the credit of the first firm, he had, in truth, been fully informed by letters. With respect to the last, he had no information. The sound in the titles of the two firms was so nearly alike, that the ear would easily confound them; and, had it not been for the colloquium thus brought on, an apparent contradiction would doubtless have been kept on foot, for various purposes, through a long trial. It involved an inquiry into a credit which had been given to another, on the fraudulent representations of the defendant." Mr. Starkie, for a different purpose, mentions another case, of similar character, where the judge understood the witness to testify that the prisoner, who was charged with forgery, said, "I *am* the drawer, acceptor, and indorser of the bill;" whereas the words were, "I *know* the drawer, acceptor, and indorser of the bill." 1 Stark. Evid. 484.

[1] Regina *v.* St. George, 9 C. & P. 483, 489; Carpenter *v.* Wahl, 11 Ad. & El. 803. On this subject, the following observations of Lord Langdale deserve great consideration. "I do not think," said he, "that the veracity or even the accuracy of an ignorant and illiterate person is to be conclusively tested by comparing an affidavit which he has made, with his testimony given upon an oral examination in open court. We have too much experience of the great infirmity of affidavit evidence. When the witness is illiterate and ignorant, the language presented to the court is not his; it is, and must be, the language of the person who prepares the affidavit; and it may be, and too often is, the expression of that person's erroneous inference as to the meaning of the language used by the witness himself; and however carefully the affidavit may

And this rule is extended, not only to contradictory statements by the witness, but to other declarations, and to acts done by him, through the medium of verbal communications or correspondence, which are offered with the view either to contradict his testimony in chief, or to prove him a corrupt witness himself, or to have been guilty of attempting to corrupt others.[1]

§ 463. A similar principle prevails in cross-examining a witness as to the *contents of a letter*, or other paper written by him. The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to

be read over to the witness, he may not understand what is said in language so different from that which he is accustomed to use. Having expressed his meaning in his own language, and finding it translated by a person on whom he relies, into language not his own, and which he does not perfectly understand, he is too apt to acquiesce; and testimony not intended by him is brought before the court as his. Again, evidence taken on affidavit, being taken *ex parte*, is almost always incomplete, and often inaccurate, sometimes from partial suggestions, and sometimes from the want of suggestions and inquiries, without the aid of which the witness may be unable to recall the connected collateral circumstances, necessary for the correction of the first suggestions of his memory, and for his accurate recollection of all that belongs to the subject. For these and other reasons, I do not think that discrepancies between the affidavit and the oral testimony of a witness are conclusive against the testimony of the witness. It is further to be observed, that witnesses, and particularly ignorant and illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open court. The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witnesses may be subjected, the want of questions calculated to excite those recollections, which might clear up every difficulty, and the confusion occasioned by cross-examination, as it is too often conducted, may give rise to important errors and omissions; and the truth is to be elicited, not by giving equal weight to every word the witness may have uttered, but by considering all the words with reference to the particular occasion of saying them, and to the personal demeanor and deportment of the witness during the examination. All the discrepancies which occur, and all that the witness says in respect of them, are to be carefully attended to, and the result, according to the special circumstances of each case, may be, either that the testimony must be altogether rejected, on the ground that the witness has said that which is untrue, either wilfully or under self-delusion, so strong as to invalidate all that he has said; or else the result must be, that the testimony must, as to the main purpose, be admitted, notwithstanding discrepancies which may have arisen from innocent mistake, extending to collateral matters, but perhaps not affecting the main question in any important degree." See Johnson *v.* Todd, 5 Beav. 600–602. See McKinney *v.* Neil, 1 McLean, 540; Hazard *v.* N.Y.& Providence R.R. 2 R. I. R. 62.

[1] See 2 Brod. & Bing. 300, 313; 1 Mood. & Malk. 473. If the witness does not recollect the conversation imputed to him, it may be proved by another witness, provided it is relevant to the matter in issue. Crowley *v.* Page, 7 C. & P. 789, per Parke, B. The contrary seems to have been ruled some years before, in Pain *v.* Beeston, 1 M. & Rob. 20, per Tindal, C. J. But if he is asked, upon cross-examination, if he will swear that he has not said so and so, and he answers that he will not swear that he has not, the party cannot be called to contradict him. Long *v.* Hitchcock, 9 C. & P. 619; *supra*, § 449. If he denies having made the contradictory statements inquired of, and a witness is called to prove that he did, the particular words must not be put, but the witness must be required to relate what passed. Hallett *v.* Cousens, 2 M. & Rob. 238. [* This contradiction may be made out by a series of documents. Jackson *v.* Thomason, 8 Jur. N. S. 134.]

the like effect; without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it. For the contents of every written paper, according to the ordinary and well-established rules of evidence, are to be proved by the paper itself, and by that alone, if it is in existence.[1] But it is not required that the whole paper should be shown to the witness. Two or three lines only of a letter may be exhibited to him, and he may be asked, whether he wrote the part exhibited. If he denies, or does not admit that he wrote that part, he cannot be examined as to the contents of such letter, for the reason already given; nor is the opposite counsel entitled, in that case, to look at the paper.[2] And if he admits the letter to be his writing, he cannot be asked whether statements, such as the counsel may suggest, are contained in it, but the whole letter itself must be read, as the only competent evidence of that fact.[3] According to the ordinary rule of proceeding in such cases, the letter is to be read as the evidence of the cross-examining counsel, in his turn, when he shall have opened his case. But if he suggests to the court, that he wishes to have the letter read immediately, in order to found certain questions upon its contents, after they shall have been made known to the court, which otherwise could not well or effectually be done; that becomes an excepted case; and for the convenient administration of justice, the letter is permitted to be read, as part of the evidence of the counsel so proposing it, subject to all the consequences of its being considered.[4]

§ 464. If the *paper* in question *is lost*, it is obvious that the

[1] The Queen's case, 2 Brod. & Bing. 286; *supra*, §§ 87, 88; Bellinger *v.* The People, 8 Wend. 595, 598; Rex *v.* Edwards, 8 C. & P. 26; Regina *v.* Taylor, Id. 726. If the paper is not to be had, a certified copy may be used. Regina *v.* Shellard, 9 C. & P. 277. So, where a certified copy is in the case for other purposes, it may be used for this also. Davies *v.* Davies, 9 C. & P. 253. But the witness, on his own letter being shown to him, cannot be asked whether he wrote it in answer to a letter to him of a certain tenor or import, such letter not being produced. See McDonnell *v.* Evans, 16 Jur. 103, where the rule in question is fully discussed. [Stamper *v.* Griffin, 12 Geo. 450. If a party, for the purpose of discrediting a witness, by showing a bias, offers in evidence a letter from the witness to himself, he may also, for the purpose of explaining it, read a letter from himself to which the letter of the witness is a reply. Trischet *v.* Hamilton Insurance Co. 14 Gray, 456.] [*The English courts hold that it is competent to cross-examine the party, when offered to support his own case, as to the contents of an affidavit or letter not produced. Sladden *v.* Sergeant, 1 F. & F. 322; Farrow *v.* Bloomfield, Id. 653. So, too, as to whether he had read a letter of a certain date, and in certain terms. Ireland *v.* Stiff, Id. 340. So also as to the rules of a society to which the party belonged. Minns *v.* Smith, Id. 318.]

[2] Regina *v.* Duncombe, 8 C. & P. 369.

[3] Ibid.; 2 Brod. & Bing. 288.

[4] The Queen's case, 2 Brod. & Bing. 289, 290.

course of examination, just stated, cannot be adopted. In such case, it would seem, that regularly, the proof of the loss of the paper should first be offered, and that then the witness may be cross-examined as to its contents; after which he may be contradicted by secondary evidence of the contents of the paper. But where this course would be likely to occasion inconvenience, by disturbing the regular progress of the cause, and distracting the attention, it will always be in the power of the judge, in his discretion, to prevent this inconvenience, by postponing the examination, as to this point, to some other stage of the cause.[1]

§ 465. A witness cannot be asked on cross-examination, *whether he has written such a thing*, stating its particular nature or purport; the proper course being to put the writing into his hands, and to ask him whether it is his writing. And if he is asked generally, whether he has made *representations*, of the particular nature stated to him, the counsel will be required to specify, whether the question refers to representations in writing, or in words alone; and if the former is meant, the inquiry, for the reasons before mentioned, will be suppressed, unless the writing is produced.[2] But whether the witness may be asked the general question, whether he has given any account, by letter or otherwise, differing from his present statement; the question being proposed without any reference to the circumstance, whether the writing, if there be any, is or is not in existence, or whether it has or has not been seen by the cross-examining counsel; is a point which is considered still open for discussion. But so broad a question, it is conceived, can be of very little use, except to test the strength of the witness's memory, or his confidence in assertion; and, as such, it may well be suffered to remain with other questions of that class, subject to the discretion of the judge.[3]

§ 466. If the memory of the witness is *refreshed by a paper* put into his hands, the adverse party may cross-examine the witness upon that paper, without making it his evidence in the cause. But if it be a book of entries, he cannot cross-examine as to other

[1] See McDonnell *v.* Evans, 16 Jur. 103; 11 Com. B. 930.

[2] The Queen's case, 2 Brod. & Bing. 292–294.

[3] This question is raised and acutely treated, in Phil. & Am. on Evid. 932–938. See also Regina *v.* Shellard, 9 C. & P. 277; Regina *v.* Holden, 8 C. & P. 606. [* The party may object to improper inquiry, although the witness do not. Newcomb *v.* Griswold, 24 N.Y. App. 298. And if one party cross-examine a witness as to certain passages in a letter, the other may insist upon having the whole letter read. Smith *v.* Prickett, 7 Jur. N. S. 610.]

entries in the book without making them his evidence.[1] But if the paper is shown to the witness merely to prove the handwriting, this alone does not give the opposite party a right to inspect it, or to cross-examine as to its contents.[2] And if the paper is shown to the witness upon his cross-examination, and he is cross-examined upon it, the party will not be bound to have the paper read, until he has entered upon his own case.[3]

§ 467. After a witness has been cross-examined respecting a former statement made by him, the party who called him has a *right to re-examine* him to the same matter.[4] The counsel has a right upon such re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions, used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.[5] This point, after having been much discussed in the Queen's case, was brought before the court several years afterwards, when the learned judges held it as settled, that proof of a detached statement, made by a witness at a former time, does not authorize proof, by the party calling that witness, of all that he said at the same time, but only of so much as can be in some way connected with the statement proved.[6] Therefore, where a witness had been cross-examined as to what the plaintiff said in a particular conversation, it was held that he could not be re-examined as to the other assertions, made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related; although the assertions as to

[1] Gregory *v.* Tavernor, 6 C. & P. 280; *supra*, § 437, note. And see Stephens *v.* Foster, 6 C. & P. 289.

[2] Russell *v.* Rider, 6 C. & P. 416; Sinclair *v.* Stevenson, 1 C. & P. 582; 2 Bing. 514, s. c.; *supra*, § 437, note.

[3] Holland *v.* Reeves, 7 C. & P. 36.

[4] In the examination of witnesses in chancery, under a commission to take depositions, the plaintiff is not allowed to re-examine, unless upon a special case, and then only as to matters not comprised in the former interrogatories. King of Hanover *v.* Wheatley, 4 Beav. 78.

[5] Such was the opinion of seven out of eight judges, whose opinion was taken in the House of Lords, in the Queen's case, as delivered by Lord Tenterden, 2 Brod. & Bing. 297. The counsel calling a witness who gives adverse testimony, cannot, in re-examination, ask the witness whether he has not given a different account of the matter to the attorney. Winter *v.* Butt, 2 M. & Rob. 357. See *supra*, § 444. See also Holdsworth *v.* Mayor of Dartmouth, Id. 153. But he may ask the question upon his examination in chief. Wright *v.* Beckett, 1 M. & Rob. 414; Dunn *v.* Aslett, 2 M. & Rob. 122.

[6] Prince *v.* Samo, 7 Ad. & El. 627.

which it was proposed to re-examine him were connected with the subject-matter of the suit.[1]

§ 468. If the counsel chooses to cross-examine the witness to *facts, which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given. Thus, where issue was joined upon a plea of prescription, to a declaration for trespass in G., and the plaintiff's witnesses were asked, in cross-examination, questions respecting the user in other places than G., which they proved; it was held that the plaintiff, in re-examination, might show an interruption in the user in such other places.[2] But an adverse witness will not be permitted to obtrude such irrelevant matter, in answer to a question not relating to it; and if he should, the other party may either cross-examine to it, or may apply to have it stricken out of the judge's notes.[3]

§ 469. Where evidence of *contradictory statements* by a witness, or of other particular facts, as, for example, that he has been committed to the House of Correction, is offered by way of impeaching his veracity, his *general character* for truth being thus in some sort *put in issue*, it has been deemed reasonable to admit general evidence, that he is a man of strict integrity, and scrupulous regard for truth.[4] But evidence, that he has on other

[1] Prince *v.* Samo, 7 Ad. & El. 627. In this case, the opinion of Lord Tenterden, in the Queen's case, 2 Brod. & Bing. 298, quoted in 1 Stark. Evid. 180, that evidence of the whole conversation, if connected with the suit, was admissible, though it were of matters not touched in the cross-examination, was considered, and overruled. [Dutton *v.* Woodman, 9 Cush. 255.]

[2] Blewett *v.* Tregonning, 3 Ad. & El. 554.

[3] Id. 554, 565, 581, 584.

[4] Phil. & Am. on Evid. 944; Rex *v.* Clarke, 2 Stark. R. 241. And see *supra*, §§ 54, 55; Paine *v.* Tilden, 5 Washb. 554; Hadjo *v.* Gooden, 13 Ala. 718; Sweet *v.* Sherman, 6 Washb. 23. [Where a witness admitted on cross-examination, that he had been prosecuted, but not tried, for perjury, the party calling him was not permitted to give evidence of his general good character. People *v.* Gay, 1 Parker, C. R. 308; s. c. 3 Selden, 378; Wertz *v.* May, 21 Penn. St. R. 274. See Harrington *v.* Lincoln, 4 Gray, 563, 565, 566, 567. In this case a witness was asked in cross-examination, for the avowed purpose of discrediting him, whether he had not been indicted and tried for setting fire to his barn, and he answered in the affirmative, and also stated that he was acquitted on the trial of the indictment. In reply to this cross-examination, and to support the credit of the witness, the party calling him offered evidence as to his reputation for truth and veracity, which was admitted under objection. The full court decided that the testimony should not have been admitted. Thomas, J., in delivering the opinion of the court, said: "If the cross-examination of the witness showed that he had been charged with the commission of crime, it showed also that upon fair trial he had been fully acquitted. It left his character as it found it. We think, therefore, the evidence as to his reputation for truth and integrity should not have been admitted. Had the effect of the cross-examination been otherwise, we are not prepared to say the reputation of the witness for truth would have been put in issue. The doctrine stated in the text-books has but slight foundation of authority to rest upon, and as matter of reason will not bear a very careful probing. The case, however, does not render a decision of the point necessary. See also Heywood

occasions made statements, similar to what he has testified in the cause, is not admissible;[1] unless where a design to misrepresent is charged upon the witness, in consequence of his relation to the party, or to the cause; in which case, it seems, it may be proper to show that he made a similar statement before that relation existed.[2] So, if the character of a deceased attesting witness to a deed or will is impeached on the ground of fraud, evidence of his general good character is admissible.[3] But mere contradiction among witnesses examined in court supplies no ground for admitting general evidence as to character.[4]

[* § 469*a*. There is considerable conflict in the decisions, in

v. Reed, 4 Gray, 574. It is admissible to ask a witness if he has not said that he had testified for the defendant, but if called again, he thought he should testify for the plaintiff, and if he does not recollect making such a statement to prove that he did so. Chapman *v.* Coffin, 14 Gray, 454.] [* And it seems that the mere attempt to impeach a witness, by inquiring of another witness what was his character for truth, will justify general evidence of his good character, notwithstanding the witness inquired of said his character was good. Commonwealth *v.* Ingraham, 7 Gray, 46. But in Brown *v.* Mooers, 6 Gray, 451, it was held that where the character of the witness is only attempted to be impeached by proving contradictory statements made by him out of court, he could not be sustained by general evidence of good character; and the court declare that the text in the preceding section of our author "is *not* law," an inference rather too obvious to require much publication, provided the decision of the court is law. The reason of the thing is certainly in favor of Mr. Greenleaf's doctrine. And how the court in Massachusetts can expect to reconcile the spirit and principle of the two cases cited by us in this note will be for them to consider. We would not like to say, they are neither of them sound law; but it seems very obvious to us both cannot be maintained upon any sound view of the principle involved in the rule. The case of Brown *v.* Mooers is certainly too narrow in its restrictions. For if the witness is clearly shown to have made contradictory statements about the matter, he is surely far more effectually impeached than if a witness were asked for his character for truth, and declared it to be good. In the latter case it would seem no ground had been laid for the introduction of general evidence of good character, more than if the counsel had inquired of the witness himself if he had ever been impeached in court, and he had replied in the negative. But in the former case it is obvious the witness's character for truth is seriously damaged. In other states, general evidence of good character is received; and we must still maintain that our author is fairly warranted in saying that it should be. State *v.* Rowe, 12 Vt. 93; and cases cited before in this note.]

[1] Bull. N. P. 294. See Cooke *v.* Curtis, 6 H. & J. 93, *contra*; [Smith *v.* Morgan, 38 Maine, 468; Smith *v.* Stickney, 17 Barb. 489. In Deshon *v.* Merchants' Ins. Co. 11 Met. 199, 209, it was laid down as a clear rule of law that a witness cannot be allowed to state, on the direct examination, with the view of strengthening his testimony, that he communicated to third persons, at prior times, the same or other particular facts. In Commonwealth *v.* Wilson, 1 Gray, 340, where in re-examination similar testimony was offered for a like purpose, Shaw, C. J., said, "The rule excluding such testimony is confined to the examination in chief, and does not apply to a case where the other party has sought to impeach the witness on cross-examination. The purpose of the cross-examination in this particular having been to impeach the witness, the question may be put." See also Boston & Worc. R. R. Co. *v.* Dana, 1 Gray, 83, 103.]

[2] 2 Phil. Evid. 445, 446.

[3] Doe *v.* Stephenson, 3 Esp. 284; 4 Esp. 50, s. c., cited and approved by Lord Ellenborough, in The Bishop of Durham *v.* Beaumont, 1 Campb. 207–210, and in Provis *v.* Reed, 5 Bing. 135.

[4] Bishop of Durham *v.* Beaumont, 1 Campb. 207; 1 Stark. Evid. 186; Russell *v.* Coffin, 8 Pick. 143, 154; Starks *v.* The People, 5 Denio, 106.

regard to the order of proof, and the course of trial, in the different states. In some of the states, the party is only required to make a *primâ facie* case in the opening, and may reserve confirmatory proof in support of the very points made in the opening, till he finds upon what points his opening case is attacked, and then fortify it upon those points.[1] And, in some of the states, it is understood, that this process of making and answering the plaintiff's case is allowed to be repeated an indefinite number of times.[2] But, at common law, the plaintiff puts in his whole evidence upon every point which he opens, and the defendant then puts in his entire case; and the plaintiff's reply is limited to new points, first opened by defendant. And the court in banc, in passing upon the sufficiency of plaintiff's case, cannot look at the defendant's evidence.[3] And it is held to rest in the discretion of the judge, subject to review in banc, at what stage in the trial evidence may be produced.[4]]

[1] [* Claves *v.* Ferris, 10 Vt. 112. But, in this state, the defendant must put in all his evidence in the first instance, and the plaintiff in his reply is confined to fortifying those points in his case which are attacked by defendant.

[2] This is the case in New Hampshire, where, if one party give irrelevant or incompetent evidence, this will entitle the other to go into evidence in reply to it. Furbush *v.* Goodwin, 5 Foster, 425. But in general the rule is otherwise. Mitchell *v.* Sellman, 5 Md. 376; Shedden *v.* Patrick, 2 Sw. & Tr. 170.

[3] Rawlings *v.* Chandler, 9 Exch. 687.

[4] Wright *v.* Willcox, 9 C. B. 650.]

CHAPTER IV.

OF WRITTEN EVIDENCE.

§ 470. WRITINGS are divisible into two classes, namely, PUBLIC and PRIVATE. The former consists of the acts of public functionaries, in the *executive*, *legislative*, and *judicial* departments of government, including, under this general head, the transactions which official persons are required to enter in books or registers,

in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. To the same head may be referred the consideration of documentary evidence of the acts of state, the laws and judgments of courts of foreign governments. Public writings are susceptible of another division, they being either (1.) judicial, or (2.) not judicial; and with respect to the means and mode of proving them, they may be classed into, (1.) those which are of record, and (2.) those which are not of record. It is proposed to treat, *first*, of public documents, and *secondly*, of those writings which are private. And in regard to both classes, our inquiries will be directed, (1.) to the mode of obtaining an inspection of such documents and writings; (2.) to the method of proving them; and, (3.) to their admissibility and effect.

§ 471. And *first*, in regard to the INSPECTION OF PUBLIC DOCUMENTS, it has been admitted, from a very early period, that the inspection and exemplification of the *records of the king's courts* is the common right of the subject. This right was extended, by an ancient statute,[1] to cases where the subject was concerned against the king. The exercise of this right does not appear to have been restrained, until the reign of Charles II., when, in consequence of the frequency of actions for malicious prosecution, which could not be supported without a copy of the record, the judges made an order for the regulation of the sessions at the Old Bailey prohibiting the granting of any copy of an indictment for felony, without a special order, upon motion in open court, at the general jail delivery.[2] This order, it is to be observed, relates only to indictments for felony. In cases of misdemeanor, the right to a copy has never been questioned.[3] But in the United States, no

[1] 46 Ed. III., in the Preface to 3 Coke's Rep. p. iv.

[2] Orders and Directions, 16 Car. II., prefixed to Sir J. Kelyng's Reports, Order vii. With respect to the general records of the realm, in such cases, copies are obtained upon application to the attorney-general. Leggatt *v.* Tollervey, 14 East, 306. But if the copy were obtained without order, it will not, on that account, be rejected. Ibid.; Jordan *v.* Lewis, Id. 395, note (b); Caddy *v.* Barlow, 1 M. & Ry. 275. But Lord Chief Justice Willes, in Rex *v.* Brangam, 1 Leach, Cr. Cas. 32, in the case of a prosecution for robbery, evidently vexatious, refused an application for a copy of the record, on the ground that no order was necessary; declaring, that "by the laws of the realm every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use he might think fit to make of it; and that, after a demand of it had been made, the proper officer might be punished for refusing to make it out." A strong doubt of the legality of the order of 16 Car. II., was also raised in Browne *v.* Cumming, 10 B. & C. 70.

[3] Morrison *v.* Kelley, 1 W. Bl. 385.

regulation of this kind is known to have been expressly made; and any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions.[1]

§ 472. Where writs, or other papers in a cause, are officially in the *custody of an officer of the court*, he may be compelled by a rule of court, to allow an inspection of them, even though it be to furnish evidence in a civil action against himself. Thus, a rule was granted against the marshal of the King's Bench prison, in an action against him for an escape of one arrested upon mesne process, to permit the plaintiff's attorney to inspect the writ by which he was committed to his custody.[2]

§ 473. In regard to the *records of inferior tribunals*, the right of inspection is *more limited*. As all persons have not necessarily an interest in them, it is not necessary that they should be open to the inspection of all, without distinction. The party, therefore, who wishes to inspect the proceedings of any of those courts, should first apply to that court, showing that he has *some interest in the document*, and that he requires it for a proper purpose.[3] If it should be refused, the court of chancery, upon affidavit of the fact, may at any time send, by a writ of *certiorari*, either for the record itself, or an exemplification. The King's Bench in England, and the Supreme courts of common law in America, have the same power by *mandamus*;[4] and this whether an action be pending or not.[5]

§ 474. There are *other records* which partake *both of a public and private character*, and are treated as the one or the other, according to the relation in which the applicant stands to them. Thus, the books of a corporation are public with respect to its members, but private with respect to strangers.[6] In regard to its members, a rule for inspection of the writings of the corporation will be

[1] Stone *v.* Crocker, 24 Pick. 88, per Morton, J. The only case, known to the author, in which the English rule was acted on, is that of The People *v.* Pollyon, 2 Caines, 202, in which a copy was moved for and granted.

[2] Fox *v.* Jones, 7 B. & C. 732.

[3] If he has no legal interest in the record, the court may refuse the application. Powell *v.* Bradbury, 4 M. G. & Sc. 541; *infra*, § 559.

[4] Gresley on Evid. pp. 115, 116; Wilson *v.* Rogers, 2 Stra. 1242; Rex *v.* Smith, 1 Stra. 126; Rex *v.* Tower, 4 M. & S. 162; Herbert *v.* Ashburner, 1 Wils. 297; Rex *v.* Allgood, 7 T. R. 746; Rex *v.* Sheriff of Chester, 1 Chitty, R. 479.

[5] Rex *v.* Lucas, 10 East, 235, 236, per Lord Ellenborough.

[6] Gresley on Evid. 116.

granted of course, on their application, where such inspection is shown to be necessary, in regard to some particular matter in dispute, or where the granting of it is necessary, to prevent the applicant from suffering injury, or to enable him to perform his duties; and the inspection will then be granted, only so far as is shown to be essential to that end.[1] But a stranger has no right to such rule, and it will not be granted, even where he is defendant in a suit brought by the corporation.[2] In this class of records are enumerated parish books,[3] transfer books of the East India Company,[4] public lottery books,[5] the books of incorporated banking companies,[6] a bishop's registry of presentations,[7] and some others of the like kind. If an inspection is wanted by a stranger, in a case not within this rule of the common law, it can only be obtained by a bill for a discovery; a court of equity permitting a discovery in some cases, and under some circumstances, where courts of law will not grant an inspection.[8] And an inspection is granted only where civil rights are depending; for it is a constant and invariable rule, that, in criminal cases, the party shall never be obliged to furnish evidence against himself.[9]

§ 475. Inspection of the *books of public officers* is subject to the same restriction, as in the case of corporation books; and access to them will not be granted in favor of persons who have no interest in the books. Thus, an inspection of the books of the post-office has been refused, upon the application of the plaintiff, in a *qui tam* action against a clerk in the post-office, for interfering in the election of a member of parliament, because the action did not relate to any transaction in the post-office, for which alone the books were kept.[10] Upon the same ground, that the subject of

[1] Rex *v.* Merchant Tailors' Co. 2 B. & Ad. 115; State of Lonisiana, *ex rel.* Hatch *v.* City Bank of New Orleans, Sup. Court, La., March T. 1842; The People *v.* Throop, 12 Wend. 183.

[2] Mayor of Southampton *v.* Greaves, 8 T. R. 590. The party, in such case, can only give notice to the corporation to produce its books and papers, as in other cases between private persons. See, accordingly, Burrell *v.* Nicholson, 3 B. & Ad. 649; Bank of Utica *v.* Hilliard, 5 Cowen, 419; 6 Cowen, 62, s. c.; Imperial Gas Co. *v.* Clarke, 7 Bing. 95; Rex *v.* Justices of Buckingham, 8 B. & C. 375.

[3] Cox *v.* Copping, 5 Mod. 395; Newell *v.* Simkin, 6 Bing. 565; Jacocks *v.* Gilliam, 3 Murph. 17.

[4] Geery *v.* Hopkins, 2 Lord Raym. 851; 7 Mod. 129, s. c.; Shelling *v.* Farmer, 1 Str. 646.

[5] Schinotti *v.* Bumstead, 1 Tidd's Pr. 594.

[6] Brace *v.* Ormond, 1 Meriv. 409; The People *v.* Throop, 12 Wend. 183; Union Bank *v.* Knapp, 3 Pick 96; [McKavlin *v.* Bresslin, 8 Gray, 177]; Mortimer *v.* M'Callan, 6 M. & W. 58.

[7] Rex *v.* Bp. of Ely, 8 B. & C. 112; Finch *v.* Bp. of Ely, 2 M. & Ry. 127.

[8] Gresley on Evid. 116, 117.

[9] Tidd's Pr. 593. Under this rule, an information, in the nature of a *quo warranto*, is considered as merely a civil proceeding. Rex *v.* Babb, 3 T. R. 582. See also Rex *v.* Dr. Purnell, 1 Wils. 239.

[10] Crew *v.* Blackburne, cited 1 Wils. 240; Crew *v.* Saunders, 2 Str. 1005.

the action was collateral to the subject-matter and design of the books, an inspection of the books of the custom-house has been refused.[1] Such inspections are also sometimes refused on grounds of public policy, the disclosure sought being considered detrimental to the public interest. Upon the same principle of an interest in the books, the tenants of a manor are generally entitled to an inspection of the court-rolls, wherever their own rights are concerned; but this privilege is not allowed to a stranger.[2]

§ 476. But, in all cases of public writings, if the disclosure of their contents would, either in the judgment of the court or of the chief executive magistrate, or the head of department, in whose custody or under whose control they may be kept, be *injurious to the public interests*, an inspection will not be granted.[3]

§ 477. The motion for a rule to inspect and take copies of books and writings, *when an action is pending*, may be made at any stage of the cause, and is founded on an *affidavit*, stating the circumstances under which the inspection is claimed, and that an application therefor has been made to the proper quarter, and refused.[4]

§ 478. But *when no action is pending*, the proper course is to move for a rule to show cause why a *mandamus* should not issue, commanding the officer having custody of the books to permit the applicant to inspect them, and take copies. The application in this case should state some specific object sought by the inspection, and be supported by an *affidavit*, as in the case preceding. If a rule is made to show cause why an *information*, in the nature of a *quo warranto*, should not be filed, a rule for an inspection will be granted to the prosecutor, immediately upon the granting of a rule to show cause. But if a rule be made to show cause why a *mandamus* should not be awarded, the rule for an inspection will not be granted, until the *mandamus* has been issued and returned.[5]

§ 479. We proceed now, to consider the MODE OF PROOF of public documents, beginning with those which are *not judicial*. And first, of *acts of state*. It has already been seen, that courts will judicially take notice of the political constitution, or frame of the

[1] Atherfold *v.* Beard, 2 T. R. 610.

[2] Rex *v.* Shelley, 3 T. R. 141; Rex *v.* Allgood, 7 T. R. 746. See Rex *v.* Hostmen of Newcastle, 2 Stra. 1223, note (1), by Nolan.

[3] *Supra*, §§ 250, 251, and cases there cited.

[4] Tidd's Pr. 595, 596. [See Iasigi *v.* Brown, 1 Curtis, Ct. Ct. 401; *infra*, § 559.]

[5] 1 Tidd's Pr. 596; Rex *v.* Justices of Surrey, Sayer, R. 144; Rex *v.* Shelley, 3 T. R. 141; Rex *v.* Hollister, Cas. Temp. Hardw. 245.

government of their own country, its essential political agents, or officers, and its essential ordinary and regular operations. The great seal of the state and the seals of its judicial tribunals require no proof.[1] Courts also recognize, without other proof than inspection, the seals of state of other nations, which have been recognized by their own sovereign. The seals, also, of foreign courts of admiralty, and of notaries-public, are recognized in the like manner.[2] Public statutes, also, need no proof, being supposed to exist in the memories of all; but, for certainty of recollection, reference is had either to a copy from the legislative rolls, or to the book printed by public authority.[3] Acts of state may be proved by production of the original printed document, from a press authorized by government.[4] Proclamations, and other acts and orders of the executive, of the like character, may be proved by production of the government gazette, in which they were authorized to be printed.[5] Printed copies of public documents, transmitted to congress by the President of the United States, and printed by the printer to congress, are evidence of those documents.[6] And here it may be proper to observe, that, in all cases of proof by a copy, if the copy has been taken by a machine, worked by the witness who produces it, it is sufficient.[7] The certificate of the Secretary of State is evidence that a particular person has been recognized as a foreign minister.[8] And the certificate of a foreign governor, duly authenticated, is evidence of his own official acts.[9]

§ 480. Next, as to *legislative acts*, which consist of statutes, resolutions, and orders, passed by the legislative body. In regard to *private statutes*, resolutions, &c., the only mode of proof, known to the common law, is either by means of a copy, proved on oath to have been examined by the roll itself; or, by an exemplification

[1] Wearnack *v.* Dearman, 7 Port. 513.

[2] *Supra*, §§ 4, 5, 6; Story on Confl. of Laws, § 643; Robinson *v.* Gilman, 7 Shepl. 209; Coit *v.* Milliken, 1 Denio, 376. A protest of a bill of exchange, in a foreign country, is sufficiently proved by the seal of the foreign notary. Willes, 550; Anon. 12 Mod. 345; Bayley on Bills, 515 (Phillips & Sewall's edit.); Story on Bills, §§ 276, 277; La Caygas *v.* Larionda, 4 Mart. 283.

[3] Bull. N. P. 225.

[4] Rex *v.* Withers, cited 5 T. R. 436; Watkins *v.* Holman, 16 Peters, 25.

[5] Rex *v.* Holt, 5 T. R. 436; Van Omeron *v.* Dowick, 2 Campb. 42; Bull. N. P. 226; Attorney-General *v.* Theakstone, 8 Price, 89. An appointment to a commission in the army cannot be proved by the gazette. Rex *v.* Gardner, 2 Campb. 513; Kirwan *v.* Cockburn, 5 Esp. 233. See also Rex *v.* Forsyth, R. & Ry. 274, 275.

[6] Radcliff *v.* United Ins. Co. 7 Johns. 38, per Kent, C. J.

[7] Simpson *v.* Thoreton, 2 M. & Rob. 433.

[8] United States *v.* Benner, 1 Baldw. 238.

[9] United States *v.* Mitchell, 3 Wash. 5.

under the great seal. But in most if not all of the United States, the printed copies of the laws and resolves of the legislature, published by its authority, are competent evidence either by statute, or judicial decision; and it is sufficient *primâ facie*, that the book purports to have been so printed.[1] It is the invariable course of the legislatures of the several states, as well as of the United States, to have the laws and resolutions of each session printed by authority.[2] Confidential persons are selected to compare the copies with the original rolls, and superintend the printing. The very object of this provision is to furnish the people with authentic copies; and, from their nature, printed copies of this kind, either of public or private laws, are as much to be depended on, as the exemplification, verified by an officer who is a keeper of the record.[3]

§ 481. If in a *private statute* a *clause* is inserted, that it shall be *taken notice of, as* if it were *a public act;* this not only dispenses with the necessity of pleading it specially, but also changes the mode of proof, by dispensing with the production of an exemplified or sworn copy.[4]

[1] Young *v.* Bank of Alexandria, 4 Cranch, 388; Biddis *v.* James, 6 Binn. 321, 326; Rex *v.* Forsyth, Russ. & Ry. 275. See *infra*, § 489. [As to the effect to be given to the volume termed the "Revised Statutes of Connecticut," see Eld *v.* Gorham, 20 Conn. 8. The testimony of an attorney at law of another state is not legal evidence of the statute law of that state, where it affects the merits of the case. Smith *v.* Potter, 1 Williams (Vt.), 304. In *Massachusetts*, it is provided by statute that "all acts of incorporation shall be deemed public acts, and, as such, may be declared on and given in evidence, without specially pleading the same. Rev. Stat. ch. 2, § 3. In *Ohio*, it is enacted, that in pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof. Rev. Stat. by Curwen (1854), vol. 3, p. 1956.]

[2] [The edition of the Laws and Treaties of the United States, published by Little & Brown, is declared to be competent evidence of the several public and private acts of congress and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several states, without any further proof or authentication thereof. Stat. 1846, ch. c. § 2; 9 Stats. at Large, p. 76.]

[3] Per Tilghman, C. J., 6 Binn. 326. See also Watkins *v.* Holman, 16 Peters, 25; Holt, C. J., held, that an act, printed by the king's printers, was always good evidence to a jury; though it was not sufficient upon an issue of *nul tiel record*. Anon. 2 Salk. 566. [The laws revised and adopted by the territorial legislature of Michigan, in 1827, were the statutes as *previously printed*. It was held, that the printed book containing the statute is the best evidence of what the statute actually was, and that the original record is not to be received to show that the printed book is incorrect, or as evidence of the statute, as adopted and enacted at that time. Especially will this be so where the error is not discovered for a long time, and the statute is treated and considered as the actual law. Pease *v.* Peck, 18 How. U. S. 595.]

[4] Beaumont *v.* Mountain, 10 Bing. 404. The contrary seems to have been held in Brett *v.* Beales, 1 M. & Malk. 421; but that case was overruled, as to this point, in Woodward *v.* Cotton, 1 C. M. & R. 44, 47. [*An act which extends to all persons within the territorial limits defined is a public statute. Levy *v.* The State, 6 Ind. 281; and will be judicially noticed

§ 482. In regard to the *journals* of either branch of the legislature, a former remark[1] may be here repeated, equally applicable to all other *public records and documents*, namely, that they constitute an exception to the general rule, which requires the production of the best evidence, and may be proved by examined copies. This exception is allowed, because of their nature, as original public documents, which are not removable at the call of individuals, and, because, being interesting to many persons, they might be necessary, as evidence, in different places at the same time.[2] Moreover, these being public records, they would be recognized as such by the court, upon being produced, without collateral evidence of their identity or genuineness; and it is a general rule, that, whenever the thing to be proved would require no collateral proof upon its production, it is provable by a copy.[3] These journals may also be proved by the copies printed by the government printer, by authority of the house.[4]

§ 483. The next class of public writings to be considered, consists of *official registers*, or books kept by persons in public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions, occurring in the course of their public duties, and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the persons, on whose authority the truth of the documents depends. The extraordinary degree of confidence, it has been remarked, which is reposed in such documents, is founded principally upon the circumstance, that they have been made by authorized and accredited agents, appointed for the purpose; but partly also on the publicity of their subject-matter. Where the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the state; and every member of the community may be sup-

without being pleaded or proved. Courts also take judicial notice of the repeal of public laws. State *v.* O'Connor, 13 La. Ann. 486.]

[1] *Supra*, § 91.

[2] Ld. Melville's case, 29 Howell's St. Tr. 683–685; Rex *v.* Ld. George Gordon, 2 Doug. 593, and note (3); Jones *v.* Randall, Lofft, 383, 428; Cowp. 17, s. c.

[3] Rex *v.* Smith, 1 Stra. 126.

[4] Root *v.* King, 7 Cowen, 613, 636; Watkins *v.* Holman, 16 Peters, 25.

posed to be privy to the investigation. On the ground, therefore, of the credit due to agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence; and it is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth. Besides this, it would always be difficult, and often impossible, to prove facts of a public nature, by means of actual witnesses upon oath.[1]

§ 484. These books, therefore, are recognized by law, because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office, or at least under that of official duty. They belong to a particular custody, from which they are not usually taken but by special authority, granted only in cases where inspection of the book itself is necessary, for the purpose of identifying the book, or the handwriting, or of determining some question arising upon the original entry, or of correcting an error which has been duly ascertained. Books of this public nature, being themselves evidence, when produced, their contents may be proved by an immediate copy duly verified.[2] Of this description are parish registers;[3] the books of the Bank of England, which contain the transfers of public stock;[4] the transfer books of the East India Company;[5] the rolls of courts baron;[6] the books which contain the official proceedings of corporations, and matters respecting their property, if the public at large is concerned with it;[7] books of assessment of public rates and taxes;[8] vestry books;[9] bishops' registers, and chapter-house registers;[10] terriers;[11] the books of the post-office, and custom-

[1] 1 Stark. Evid. 195; *supra*, § 128.

[2] Lynch *v.* Clerke, 3 Salk. 154, per Holt, C. J.; 2 Doug. 593, 594, note (3). The handwriting of the recording or attesting officer is, *primâ facie*, presumed genuine. Bryan *v.* Wear, 4 Mis. 106.

[3] 2 Phil. Evid. 183–186; Lewis *v.* Marshall, 5 Peters, 472, 475; 1 Stark. Evid. 205. See Childress *v.* Cutter, 16 Mis. 24.

[4] Breton *v.* Cope, Peake's Cas. 30; Marsh *v.* Collnett, 2 Esp. 655; Mortimer *v.* M'Callan, 6 M. & W. 58.

[5] 2 Doug. 593, note (3).

[6] Bull. N. P. 247; Doe *v.* Askew, 10 East, 520.

[7] Warriner *v.* Giles, 2 Stra. 954; Id. 1223, note (1); Marriage *v.* Lawrence, 3 B. & Ald. 144, per Abbott, C. J.; Gibbon's case, 17 Howell's St. Tr. 810; Moore's case, Id. 854; Owings *v.* Speed, 5 Wheat. 420.

[8] Doe *v.* Seaton, 2 Ad. & El. 171, 178, per Patteson, J.; Doe *v.* Arkwright, Id. 182 (note), per Denman, C. J.; Rex *v.* King, 2 T. R. 234; Ronkendorff *v.* Taylor, 4 Peters, 349, 360; Doe *v.* Cartwright, Ry. & My. 62.

[9] Rex *v.* Martin, 2 Campb. 100. See, as to Church Records, Sawyer *v.* Baldwin, 11 Pick. 494.

[10] Arnold *v.* Bishop of Bath and Wells, 5 Bing. 316; Coombs *v.* Coether, 1 M. & Malk. 398.

[11] Bull. N. P. 248; 1 Stark. Evid. 201. [See *infra*, § 496.]

house, and registers of other public offices;[1] prison registers;[2] enrolment of deeds;[3] the registers of births and of marriages, made pursuant to the statutes of any of the United States;[4] the registration of vessels in the custom-house;[5] and the books of record of the transactions of towns, city councils, and other municipal bodies.[6] In short, the rule may be considered as settled, that every document of a public nature, which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy.[7]

§ 485. It is deemed *essential to the official character* of these books, that the entries in them be made promptly, or at least without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them, and in the mode required by law, if any has been prescribed.[8] When

[1] Bull. N. P. 249; Rex *v.* Fitzgerald, 1 Leach, Cr. Cas. 24; Rex *v.* Rhodes, Id. 29; D'Israeli *v.* Jowett, 1 Esp. 427; Barber *v.* Holmes, 3 Esp. 190; Wallace *v.* Cook, 5 Esp. 117; Johnson *v.* Ward, 6 Esp. 48; Tomkins *v.* Attor.-Gen. 1 Dow. 404; Rex *v.* Grimwood, 1 Price, 369; Henry *v.* Leigh, 3 Campb. 499; United States *v.* Johns, 4 Dall. 412, 415.

[2] Salte *v.* Thomas, 3 B. & P. 188; Rex *v.* Aikles, 1 Leach, Cr. Cas. 435.

[3] Bull. N. P. 229; Kinnersley *v.* Orpe, 1 Doug. 56; Hastings *v.* Blue Hill Turnp. Corp. 9 Pick. 80.

[4] Milford *v.* Worcester, 7 Mass. 48; Commonwealth *v.* Littlejohn, 15 Mass. 163; Sumner *v.* Sebec, 3 Greenl. 223; Wedgewood's case, 8 Greenl. 75; Jacock *v.* Gilliam, 3 Murphy, 47; Martin *v.* Gunby, 2 H. & J. 248; Jackson *v.* Boneham, 15 Johns. 226; Jackson *v.* King, 5 Cowen, 237; Richmond *v.* Patterson, 3 Ohio R. 368.

[5] United States *v.* Johns, 5 Dall. 415; Colson *v.* Bonzey, 6 Greenl. 474; Hacker *v.* Young, 6 N. Hamp. 95; Coolidge *v.* N. York Firemen's Ins. Co. 14 Johns. 308; Catlett *v.* Pacific Ins. Co. 1 Wend. 651.

[6] Saxton *v.* Nimms, 14 Mass. 320, 321; Thayer *v.* Stearns, 1 Pick. 309; Taylor *v.* Henry, 2 Pick. 401; Denning *v.* Roome, 6 Wend. 651; Dudley *v.* Grayson, 6 Monroe, 259; Bishop *v.* Cone, 3 N. Hamp. 513. [The clerk of a city or town is the proper certifying officer to authenticate copies of the votes, ordinances, and by-laws thereof; and such copies are admissible as *primâ facie* evidence, when purporting to be duly attested, without any verification of the clerk's signature. Commonwealth *v.* Chase, 6 Cush. 248. See also People *v.* Minck, 7 Smith (N. Y.), 539.]

[7] Gresley on Evid. 115. In some of the United States, office-copies are made admissible by statute. In *Georgia*, the courts are expressly empowered to require the production of the originals, in their discretion. Hotchk. Dig. p. 590. In *South Carolina*, it has been enacted, that no foreign testimonial, probate, certificate, &c., under the seal of any court, notary, or magistrate, shall be received in evidence, unless it shall appear that the like evidence from this state is receivable in the courts of the foreign state. Statutes at Large, vol. 5, p. 45. [See Pittsfield, &c., P. R. Co. *v.* Harrison, 16 Ill. 81; Raymond *v.* Longworth, 4 McLean, 481. Duly authenticated notarial copies of instruments, the originals of which the party has not the power to produce, by reason of the laws of the country where they were executed, are admissible as secondary evidence. Bowman *v.* Sanborn, 5 Foster (N. H.), 87.] [*The official record of the town clerk is conclusive as to the votes of the town, and cannot be contradicted or explained by oral proof. The People *v.* Zeyst, 23 N. Y. App. 140. But maps and surveys are not evidence in themselves, unless from having acquired authority by lapse of time and acquiescence. Johnston *v.* Jones, 1 Black, 209.]

[8] Doe *v.* Bray, 8 B. & C. 813; Walker *v.* Wingfield, 18 Ves. 443. A certificate that a certain fact appears of record is not sufficient. The officer must certify a transcript of the entire record relating to the matter. Owen *v.* Boyle, 3 Shepl. 147. And this is sufficient. Farr *v.* Swan, 2 Barr, 245.

the books themselves are produced, they are received as evidence, without further attestation. But they must be accompanied by proof that they come from the *proper repository*.[1] Where the proof is by a copy, an examined copy, duly made and sworn to by any competent witness, is always admissible.[2] Whether a *copy*, *certified* by the officer having legal custody of the book or document, he not being specially appointed by law to furnish copies, is admissible, has been doubted; but though there are decisions against the admissibility, yet the weight of authority seems to have established the rule, that a copy given by a public officer, whose duty it is to keep the original, ought to be received in evidence.[3]

[1] 1 Stark. Evid. 202; Atkins *v.* Hutton, 2 Anstr. 387; Armstrong *v.* Hewett, 4 Price, 216; Pulley *v.* Hilton, 12 Price, 625; Swinnerton *v.* Marquis of Stafford, 3 Taunt. 91; Baillie *v.* Jackson, 17 Eng. L. & Eq. R. 131. [United States *v.* Castro, 24 How. 346.] See *supra*, § 142, as to the nature of the repository required.

[2] [Whitehouse *v.* Bickford, 9 Foster, 471.]

[3] United States *v.* Percheman, 7 Peters, 51, 85 [A. D. 1833], per totam Curiam; Oakes *v.* Hill, 14 Pick. 442, 448; Abbott on Shipping, p. 63, note 1 (Story's edit.); United States *v.* Johns, 4 Dall. 412, 415; Judice *v.* Chrétien, 3 Rob. Louis. R. 15; Wells *v.* Compton, Id. 171; [Warner *v.* Hardy, 6 Md. 525.] In accordance with the principle of this rule is the statute of the United States of March 27, 1804 (3 LL. U. S. 621, ch. 409 [56], Bioren's edit.); [2 U. S. Stats. at Large (L. & B.'s edition), 298]; by which it is enacted, that "all records and exemplifications of office-books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereunto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken." By another section this provision is extended to the records and public books, &c., of all the territories of the United States. The earlier American authorities, opposed to the rule in the text, are in accordance with the English rule. 2 Phil. Evid. 130–134. Where the law does not require or authorize an instrument or matter to be recorded, a copy of the record of it is not admissible in evidence. Fitler *v.* Shotwell, 7 Watts & Serg. 14; Brown *v.* Hicks, 1 Pike, 232; Haile *v.* Palmer, 5 Mis. 403. [See also Runk *v.* Ten Eyck, 4 Zabr. (N. J.) 756; State *v.* Cake, Ib. 516.] [*Copies of deeds from the authorized registry, proof of the originals as well as of the registry. Curry *v.* Raymond, 28 Penn. St. 144. See Morton *v.* Webster, 2 Allen, 352. But where the party is entitled to the custody of the original deed, it must be produced, or its absence accounted for. Williams *v.* Wetherbee, 2 Aikens, 329; Ord *v.* McKee, 5 Cal. 515. And where the deed is found duly engrossed upon the registry, a copy is good evidence of the deed, although the record is not certified by the proper recording officer. Booge *v.* Parsons, 2 Vt. 456. But the certificate of a recording officer that a record does not exist cannot be received as evidence. Stoner *v.* Ellis, 6 Ind. 152; Cross *v.* Mill Co. 17 Id. 54.]

§ 486. In regard to *foreign laws*, the established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts. And the better opinion seems to be, that this proof must be made to the court, rather than to the jury. "For," observes Mr. Justice Story, "all matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them. The court are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of their applicability, when proved, to the case in hand."[1] [* We have ventured to question the soundness of the proposition, that proof of foreign law is in all cases addressed to the court.[2]]

§ 487. "Generally speaking, authenticated copies of the written laws, or of other public instruments of a foreign government, are expected to be produced. For it is not to be presumed, that any civilized nation will refuse to give such copies, duly authenticated, which are usual and necessary, for the purpose of administering justice in other countries. It cannot be presumed, that an application to a foreign government to authenticate its own edict or law will be refused; but the fact of such a refusal must, if relied on, be proved. But if such refusal is proved, then inferior proofs may be admissible.[3] Where our own government has promulgated

[1] Story on Confl. of Laws, § 638, and cases there cited; [Pickard *v.* Bailey, 6 Foster, 152.]

[2] [* Redf. Ed. Story, Confl. of Laws, § 688*a*; Wilde, J., in Holman *v.* King, 7 Met. 384, 388. In a recent English case, M'Cormick *v.* Garnett, 5 DeG. M. & G. 278, it was decided, that a question of foreign law, being one of fact, must be decided in each cause upon evidence adduced in that particular cause, and not by a decision, or upon evidence adduced, in another cause, although similarly circumstanced.]

[3] Church *v.* Hubbart, 2 Cranch, 237, 238. It is now settled in England, upon great consideration, that a foreign written law may be proved by parol evidence of a witness learned in the law of that country; without first attempting to obtain a copy of the law itself. Baron de Bode *v.* Reginam, 10 Jur. 217. In this case, a learned French advocate stated, on his cross-examination, that the feudal law, which had prevailed in Alsace, was abolished by a general decree of the National Assembly of France, on the 4th of August, 1789. Being asked whether he had read that decree in the books of the law, in the course of his study of the law, he replied that he had; and that it was part of the history of the law, which he learnt when studying the law. He was then asked as to the contents of that decree; and the admissibility of this question was the point in judgment. On this point, Lord Denman, C. J., said: "The objection to the question, in whatever mode put, is, that it asks the witness to give the contents of a written instrument, the decree of 1789, contrary to a general rule, that such evidence cannot be given without the production of the instrument, or accounting for it. In my opinion, however, that question is within another general rule, that the opinion of skilful and scientific persons is to be received on subjects with which they are conversant. I think that credit must be given to the opinion of legal men, who are bound to know the law of the

any foreign law, or ordinance of a public nature, as authentic, that may, of itself, be sufficient evidence of the actual existence and terms of such law or ordinance."[1]

§ 488. "In general, foreign laws are required to be verified by the sanction of an oath, unless they can be verified by some high authority, such as the law respects, not less than it respects the oath of an individual.[2] The usual mode of authenticating foreign laws (as it is of authenticating foreign judgments), is by an

country in which they practice, and that we must take from them the account of it, whether it be the unwritten law, which they may collect from practice, or the written laws, which they are also bound to know. I apprehend that the evidence sought for would not set forth generally the recollection of the witness of the contents of the instrument, but his opinion as to the effect of the particular law. The instrument itself might frequently mislead, and it might be necessary that the knowledge of the practitioner should be called in, to show that the sense in which the instrument would be naturally construed by a foreigner is not its true legal sense. It appears to me that the distinction between this decree and treaties, manorial customs, or acts of common council, is, that, with regard to them, there is no profession of men whose duty it is to make them their study, and that there is, therefore, no person to whom we could properly resort, as skilfully conversant with them. The cases which have been referred to excite much less doubt in my mind than that which I know to be entertained by one of my learned brothers, to whose opinion we are in the habit of paying more respect than to many of those cases which are most familiarly quoted in Westminster Hall." He then cited and commented on the cases of Boehtlinck *v.* Schneider, 3 Esp. 58; Clegg *v.* Levy, 3 Camp. 166; Miller *v.* Heinrick, 4 Campb. 155; Lacon *v.* Higgins, 3 Stark. 178; Gen. Picton's case, 3 Howell, St. Tr. 491; and Middleton *v.* Janverin, 2 Hagg. Cons. R. 437; and concluded as follows: "But I look to the importance of this question in a more extensive point of view. Books of authority must certainly be resorted to, upon questions of foreign law. Pothier, for instance, states the law of France, and he states it as arising out of an ordonnance made in such a year, and he gives his account of that ordonnance; and are we to say that that would not be taken as evidence of the law of France, because it is an account of the contents of a written document? Suppose a question to arise suddenly in one of our courts upon the state of the English law, could a statement in Blackstone's Commentaries, as to what the law is on the subject, and when it was altered to what it now is, be refused? And it seems to me that the circumstance of the question having reference to the period at which a statute passed, makes no difference. I attach the same credit to the witness giving his account of a branch of the French law, as I should to a book which he might accredit as a book of authority upon the law of France. I find no authority directly opposed to the admissibility of this evidence, except some expressions much stronger than the cases warranted or required; and I find some decisions which go the whole length in favor of its admissibility; for I see no distinction between absolute proof by a direct copy of the law itself, and the evidence which is now tendered; and I think that the general principle to which I have referred establishes the admissibility of it." See 10 Jur. 218, 219; 8 Ad. & El. 208, s. c. Williams, J., and Coleridge, J., concurred in this opinion. Patteson, J., *dissentiente*. See also Cocks *v.* Purday, 2 C. & K. 269.

[1] Story on Confl. of Laws, § 640; Talbot *v.* Seeman, 1 Cranch, 38. The acts of state of a foreign government can only be proved by copies of such acts, properly authenticated. Richardson *v.* Anderson, 1 Campb. 65; note (a).

[2] Church *v.* Hubbart, 2 Cranch, 237; Brackett *v.* Norton, 4 Conn. 517; Hempstead *v.* Reed, 6 Conn. 480; Dyer *v.* Smith, 12 Conn. 384. But the court may proceed on its own knowledge of foreign laws, without the aid of other proof; and its judgment will not be reversed for that cause, unless it should appear that the court was mistaken as to those laws. The State *v.* Rood, 12 Verm. 396. [Proof of the written law of a foreign country may be made by some copy of the law which the witness can swear was recognized as authoritative in the foreign country, and which was in force at the time. Spaulding *v.* Vincent, 24 Vt. 501.]

exemplification of a copy, under the great seal of a state; or by a copy proved to be a true copy, by a witness who has examined and compared it with the original; or by the certificate of an officer properly authorized by law to give the copy; which certificate must itself also be duly authenticated.[1] But foreign unwritten laws, customs, and usages may be proved, and indeed must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the laws, customs, and usages, under oath.[2] Sometimes, however, certificates of persons in high authority have been allowed as evidence, without other proof."[3]

[1] Church *v.* Hubbart, 2 Cranch, 238; Packard *v.* Hill, 2 Wend. 411; Lincoln *v.* Battelle, 6 Wend. 475.

[2] Church *v.* Hubbart, 2 Cranch, 237; Dalrymple *v.* Dalrymple, 2 Hagg. App'x, pp. 15–144; Brush *v.* Wilkins, 4 Johns. Ch. 520; Mostyn *v.* Fabrigas, Cowp. 174. It is not necessary that the witness should be of the legal profession. Regina *v.* Dent, 1 Car. & Kirw. 97. But whether a woman is admissible as *peritus, quære.* Regina *v.* Povey, 14 Eng. Law & Eq. R. 549; 17 Jur. 119. And see Wilcocks *v.* Phillips, Wallace, Jr. 47. In *Michigan,* the unwritten law of foreign states may be proved by books of reports of cases adjudged in their courts. Rev. Stat. 1846, ch. 102, § 79. So, in *Connecticut;* Rev. Stat. 1849, tit. 1, § 132. And in *Massachusetts;* Rev. Stat. 1836, ch. 94, § 60. And in *Maine;* Rev. Stat. 1840, ch. 133, § 48. And in *Alabama;* Inge *v.* Murphy, 10 Ala. R. 885. [Although a point of foreign law has been proved in England, and acted upon in reported cases, the court will not act upon such decisions without the law being proved in each case as it arises. M'Cormick *v.* Garnett, 27 Eng. Law & Eq. 339.]

[3] Story on Confl. of Laws, §§ 641, 642; Id. § 629–640. *In re* Dormay, 3 Hagg. Eccl. R. 767, 769; Rex *v.* Picton, 30 Howell's State Trials, 515–673; The Diana, 1 Dods. 95, 101, 102. A copy of the code of laws of a foreign nation, printed by order of the foreign government, it seems, is not admissible evidence of those laws; but they must be proved, as stated in the text. Chanoine *v.* Fowler, 3 Wend. 173; Hill *v.* Packard, 5 Wend. 375, 384, 389. But see United States *v.* Glass Ware, 4 Law Reporter, 36, where Betts, J., held the contrary; the printed book having been purchased of the Queen's printer. See also Farmers and Mechanics' Bank *v.* Ward, Id. 37, S. P. In regard to the *effect of foreign laws,* it is generally agreed that they are to govern everywhere, so far as may concern the validity and interpretation of all contracts made under or with respect to them; where the contract is not contrary to the laws or policy of the country in which the remedy is sought. An *exception* has been admitted in the case of foreign *revenue laws;* of which, it is said, the courts will not take notice, and which will not be allowed to invalidate a contract made for the express purpose of violating them. This exception has obtained place upon the supposed authority of Lord Hardwicke, in Boucher *v.* Lawson, Cas. Temp. Hardw. 89, 194, and of Lord Mansfield, in Planchè *v.* Fletcher, 1 Doug. 252. But in the former of these cases, which was that of a shipment of gold in Portugal, to be delivered in London, though the exportation of gold was forbidden by the laws of Portugal, the judgment was right on two grounds: first, because the foreign law was contrary to the policy and interest of England, where bullion was very much needed at that time; and, secondly, because the contract was to be performed in England; and the rule is, that the law of the *place of performance* is to govern. The latter of these cases was an action on a policy of insurance, on a voyage to Nantz, with liberty to touch at Ostend; the vessel being a Swedish bottom, and the voyage being plainly intended to introduce into France English goods, on which duties were high, as Dutch goods, on which much lower duties were charged. Here, too, the French law of high countervailing duties was contrary to British interest and policy; and, moreover, the French ministry were understood to connive at this course of trade, the supply of such goods being necessary for French consumption. Both these cases, therefore, may well stand on the ground of the admitted qualification of the general rule;

[* § 488*a*. The question, how far the court can act upon its own knowledge of the law of a foreign state, seems not entirely well settled. It would seem upon principle, that, as this is matter of fact, and, in case of dispute, to be ultimately determined by the jury, or the triers of fact, that the personal knowledge of the judge could not be regarded as proof, except as to those matters of which the court will take judicial notice, or assume by way of presumption.[1] In many cases it has been said, that, in the absence of all proof, the court will presume the foreign law is the same as that of the forum.[2] This rule may be a safe one to act upon within reasonable limits, as for instance, as to contracts relating to personal estate, and especially as to commercial matters; and also, that, where the common law is known to prevail, it is construed the same as where the action is tried. In a recent case[3] it is said, "In the absence of all proof, courts assume certain general principles of law, as existing in all Christian states; as, that contracts are of binding obligation, and that personal injuries are actionable; that flagrant violations of the fundamental principles of moral obligation, such as theft and murder, are regarded as crimes; and that to accuse one of these crimes, thus exposing him to prosecution, ignominy, and disgrace, is an actionable slander." But no such presumption will apply to statute law, or where it would operate to produce a forfeiture, by rendering a contract void.[4] The courts take judicial notice of differences of time in different longitudes.[5]]

§ 489. The relations of the *United States* to each other, in regard to all matters not surrendered to the general government by the

and the brief general observations of those learned judges, if correctly reported, may be regarded as *obiter dicta*. But it should be remembered, that the language of the learned judges seems to import nothing more than that courts will not *take* notice of foreign revenue laws; and such seems to have been the view of Lord Denman, in the recent case of Spence *v.* Chodwick, 11 Jur. 874, where he said: "We are *not bound to take* notice of the revenue laws of a foreign country; but if *we are informed* of them, that is another case." And see 10 Ad. & El. 517, N. S. The exception alluded to was tacitly disapproved by Lord Kenyon, in Waymell *v.* Reed, 5 T. R. 599, and is explicitly condemned, as not founded in legal or moral principle, by the best modern jurists. See Vattel, b. 2, ch. 5, § 64; Id. ch. 6, § 72; Pothier on Assurance, n. 58; Marshall on Ins. pp. 59–61, 2d edit.; 1 Chitty on Comm. & Manuf. pp. 83, 84; 3 Kent, Comm. 266, 267; Story, Confl. Laws, § 257; Story on Bills, § 136; Story on Agency, §§ 197, 343, note, 2d edit.

[1] [* Wheeler *v.* Webster, 1 E. D. Smith, 1.

[2] Rape *v.* Heaton, 9 Wis. 328; Green *v.* Rugely, 23 Texas, 539; Cox *v.* Morrow, 14 Ark. 603; Warren *v.* Lusk, 16 Mo. 102; Sharp *v.* Sharp, 35 Ala. 574.

[3] Langdon *v.* Young, 33 Vt. 136. See also Wright *v.* Delafield, 23 Barb. 498; Thompson *v.* Monrow, 2 Cal. 99.

[4] Cutler *v.* Wright, 22 N.Y. App. 472; Smith *v.* Whitaker, 23 Ill. 367.

[5] Curtis *v.* March, 4 Jur. N. S. 1112.]

national constitution, are those of *foreign states in close friendship*, each being sovereign and independent.[1] Upon strict principles of evidence, therefore, the laws and public documents of one state can be proved in the courts of another, only as other foreign laws. And, accordingly, in some of the states, such proof has been required.[2] But the courts of other states, and the Supreme Court of the United States, being of opinion that the connection, intercourse, and constitutional ties which bind together these several states, require some relaxation of the strictness of this rule, have accordingly held that a printed volume purporting on the face of it to contain the laws of a sister state, is admissible as *primâ facie* evidence, to prove the statute laws of that state.[3] The act of congress[4] respecting the exemplification of public office-books, is not understood to exclude any other modes of authentication, which the courts may deem it proper to admit.[5] And in regard to the laws of the states, congress has provided,[6] under the power vested for that purpose by the constitution, that the acts of the legislatures of the several states shall be authenticated, by having the seal of their respective states affixed thereto; but this method, as in the case of public books just mentioned, is not regarded as exclusive of any other which the states may respectively adopt.[7] Under this statute, it is held, that the

[1] *Infra*, § 504.

[2] Brackett *v.* Norton, 4 Conn. 517, 521; Hempstead *v.* Reed, 6 Conn. 480; Packard *v.* Hill, 2 Wend. 411.

[3] Young *v.* Bank of Alexandria, 4 Cranch, 384, 388; Thomson *v.* Musser, 1 Dall. 458, 463; Biddis *v.* James, 6 Binn. 321, 327; Muller *v.* Morris, 2 Barr, R. 85; Raynham *v.* Canton, 3 Pick. 293, 296; Kean *v.* Rice, 12 S. & R. 203; The State *v.* Stade, 1 D. Chipm. 303; Comparet *v.* Jernegan, 5 Blackf. 375; Taylor *v.* Bank of Illinois, 7 Monroe, 585; Taylor *v.* Bank of Alexandria, 5 Leigh, 471; Clarke *v.* Bank of Mississippi, 5 Eng. 516; Allen *v.* Watson, 2 Hill, 319; Hale *v.* Rost, Pennington, R. 591; [Emery *v.* Berry, 8 Foster, 473.] But see Van Buskirk *v.* Mulock, 3 Harrison, R. 185, *contra*. In some states, the rule stated in the text has been expressly enacted. See *Connecticut*, Rev. Stat. 1849, tit. 1, § 131; *Michigan*, Rev. Stat. 1846, ch. 102, § 78; *Mississippi*, Hutchins. Dig. 1848, ch. 60, art. 10; *Missouri*, Rev. Stat. 1845, ch. 59, §§ 4, 5, 6; *Wisconsin*, Rev. Stat. 1849, ch. 98, § 54; *Maine*, Rev. Stat. 1840, ch. 133, § 47; *Massachusetts*, Rev. Stat. 1836, ch. 94, § 59; *New York*, Stat. 1848, ch. 312; *Florida*, Thomps. Dig. p. 342; Kean *v.* Rice, 12 S. & R. 203; *North Carolina*, Rev. Stat. 1837, ch. 44, § 4. The common law of a sister state may be shown by the books of reports of adjudged cases, accredited in that state. Inge *v.* Murphy, 10 Ala. R. 885. [A book purporting to contain the laws of another state is not admissible in evidence in Texas, unless such book also purport to have been published by the authority of such other state. Martin *v.* Payne, 11 Texas, 292. And if a volume of laws contains on its title-page the words "By authority," it thereby purports to have been published by the authority of the state. Merrifield *v.* Robbins, 8 Gray, 150.]

[4] Stat. March 27, 1804, cited *supra*, § 485.

[5] See cases cited *supra*, note (2).

[6] Stat. May 26, 1790, 1 LL. U. S. ch. 38 [11], p. 102 (Bioren's edit.); [1 U.S. Stat. at Large (L. & B.'s edition), 122.]

[7] Lothrop *v.* Blake, 3 Barr, 483.

seal of the state is a sufficient authentication, without the attestation of any officer, or any other proof; and it will be presumed *primâ facie*, that the seal was affixed by the proper officer.[1]

§ 490. The reciprocal *relations between the national government and the several states*, comprising the United States, are not foreign, but domestic. Hence, the courts of the United States take judicial notice of all the public laws of the respective states, whenever they are called upon to consider and apply them. And, in like manner, the courts of the several states take judicial notice of all public acts of congress, including those which relate exclusively to the District of Columbia, without any formal proof.[2] But private statutes must be proved in the ordinary mode.[3]

§ 491. We are next to consider the *admissibility and effect* of the *public documents* we have been speaking of, as instruments of evidence. And here it may be generally observed, that to render such documents, when properly authenticated, admissible in evidence, their contents must be pertinent to the issue. It is also necessary that the document be made by the person whose duty it was to make it, and that the matter it contains be such as belonged to his province, or came within his official cognizance and observation. Documents having these requisites are, in general, admissible to prove, either *primâ facie* or conclusively, the facts they recite. Thus, where certain *public statutes* recited that great outrages had been committed in a certain part of the country, and a public *proclamation* was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect, in an information for a libel on the government in relation to them.[4] So, a recital of a state of war, in the preamble of a public statute, is good evidence of its existence, and it will be taken notice of without proof; and this, whether the nation be or be not a party to the war.[5] So, also, *legislative resolutions* are evidence

[1] United States *v.* Amedy, 11 Wheat. 392; United States *v.* Johns, 4 Dall. 412; [The State *v.* Carr, 5 N. Hamp. 367. [It must be the seal of the state; the seal of the Secretary of State is not sufficient, as it cannot be considered the seal of the state. Sisk *v.* Woodruff, 15 Ill. 15.]

[2] Owens *v.* Hull, 9 Peters, 607; Hinde *v.* Vattier, 5 Peters, 308; Young *v.* Bank of Alexandria, 4 Cranch, 384, 388; Canal Co. *v.* Railroad Co. 4 G. & J. 1, 63.

[3] Leland *v.* Wilkinson, 6 Peters, 317.

[4] Rex *v.* Sutton, 4 M. & S. 532.

[5] Rex *v.* De Berenger, 3 M. & S. 67, 69. See also Brazen Nose College *v.* Bp. of Salisbury, 4 Taunt. 831.

of the public matters which they recite.[1] The *journals*, also, of either house, are the proper evidence of the action of that house, upon all matters before it.[2] The *diplomatic correspondence*, communicated by the President to congress, is sufficient evidence of the acts of foreign governments and functionaries therein recited.[3] A *foreign declaration of war* is sufficient proof of the day when the state of war commenced.[4] Certified copies, under the hand and seal of the Secretary of State, of the *letters of a public agent* resident abroad, and of the official *order of a foreign colonial governor* concerning the sale and disposal of a cargo of merchandise, have been held admissible evidence of those transactions.[5] How far diplomatic correspondence may go to establish the facts recited therein does not clearly appear; but it is agreed to be generally admissible in all cases; and to be sufficient evidence, whenever the facts recited come in collaterally, or by way of introductory averment, and are not the principal point in issue before the jury.[6]

§ 492. The government *gazette* is admissible and sufficient evidence of such acts of the executive, or of the government, as are usually announced to the public through that channel, such as proclamations,[7] and the like. For besides the motives of self-interest and official duty which bind the publisher to accuracy, it is to be remembered, that intentionally to publish any thing as emanating from public authority, with knowledge that it did not so emanate, would be a misdemeanor.[8] But in regard to other acts of public functionaries, having no relation to the affairs of government, the gazette is not admissible evidence.[9]

§ 493. In regard to *official registers*, we have already stated[10] the principles on which these books are entitled to credit; to which it is only necessary to add, that where the books possess all the requisites there mentioned, they are admissible, as competent evi-

[1] Rex *v.* Francklin, 17 Howell's St. Tr. 637.

[2] Jones *v.* Randall, Cowp. 17; Root *v.* King, 7 Cowen, 613; Spangler *v.* Jacoby, 14 Ill. 299.

[3] Radcliff *v.* United Ins. Co. 7 Johns. 38, 51; Talbot *v.* Seeman, 1 Cranch, 1, 37, 38.

[4] Thelluson *v.* Cosling, 4 Esp. 266; Bradley *v.* Arthur, 4 B. & C. 292, 304. See also Foster, Disc. 1, ch. 2, § 12, that public notoriety is sufficient evidence of the existence of war.

[5] Bingham *v.* Cabot, 3 Dall. 19, 23, 39-41.

[6] Radcliff *v.* United Ins. Co. 7 Johns. 51, per Kent, C. J.

[7] Rex *v.* Holt, 5 T. R. 436, 443; Attorney-General *v.* Theakstone, 8 Price, 89; *supra*, § 480, and cases cited in note; Gen. Picton's case, 30 Howell's St. Tr. 493.

[8] 2 Phil. Evid. 108.

[9] Rex *v.* Holt, 5 T. R. 443, per Ld. Kenyon.

[10] *Supra*, §§ 483, 484, 485.

dence of the facts they contain. But it is to be remembered that they are not, in general, evidence of any facts not required to be recorded in them,[1] and which did not occur in the presence of the registering officer. Thus, a parish register is evidence only of the time of the marriage, and of its celebration *de facto;* for these are the only facts necessarily within the knowledge of the party making the entry.[2] So, a register of baptism, taken by itself, is evidence only of that fact; though if the child were proved *aliunde* to have then been very young, it might afford presumptive evidence that it was born in the same parish.[3] Neither is the mention of the child's age in the register of christenings, proof of the day of his birth, to support a plea of infancy.[4] In all these and similar cases, the register is no proof of the identity of the parties there named, with the parties in controversy; but the fact of identity must be established by other evidence.[5] It is also necessary, in all these cases, that the register be one which the law requires should be kept, and that it be kept in the manner required by law.[6] Thus, also, the registers kept at the navy office are admissible, to prove the death of a sailor, and the time when it occurred;[7] as well as to show to what ship he belonged, and the amount of wages due to him.[8] The prison calendar is evidence to prove the date and fact of the commitment and discharge of a

[1] Fitler *v.* Shotwell, 7 S. & R. 14; Brown *v.* Hicks, 1 Pike, 232; Haile *v.* Palmer, 5 Mis. 403; *supra*, § 485.

[2] Doe *v.* Barnes, 1 M. & Rob. 386, 389. As to the kind of books which may be read as registers of marriage, see 2 Phil. Evid. 112, 113, 114.

[3] Rex *v.* North Petherton, 5 B. & C. 508; Clark *v.* Trinity Church, 5 Watts & Serg. 266.

[4] Burghart *v.* Angerstein, 6 C. & P. 690. See also Rex *v.* Clapham, 4 C. & P. 29; Huet *v.* Le Mesurier, 1 Cox, R. 275; Childress *v.* Cutter, 16 Mis. 24.

[5] Birt *v.* Barlow, 1 Doug. 170; Bain *v.* Mason, 1 C. & P. 202, and note; Wedgewood's case, 8 Greenl. 75.

[6] See the cases cited *supra*, § 484, note (10); Newham *v.* Raithby, 1 Phillim. 315. Therefore the books of the Fleet and of a Wesleyan chapel have been rejected. Reed *v.* Passer, 1 Esp. 213; Whittack *v.* Waters, 4 C. & B. 375. It is said that a copy of a register of baptism, kept in the island of Guernsey, is not admissible; for which Huet *v.* Le Mesurier, 1 Cox, 275, is cited. But the report of that case is short and obscure; and, for aught appearing to the contrary, the register was rejected only as not competent to prove the *age* of the person. It is also said, on the authority of Leader *v.* Barry, 1 Esp. 353, that a copy of a register of a foreign chapel is not evidence to prove a marriage. But this point, also, is very briefly reported, in three lines; and it does not appear, but that the ground of the rejection of the register was that it was not authorized or required to be kept, by the laws of France, where the marriage was celebrated, namely, in the Swedish ambassador's chapel, in Paris. And such, probably enough, was the fact. Subsequently an examined copy of a register of marriages in Barbadoes has been admitted. Cood *v.* Cood, 1 Curt. 755. In the United States, an authenticated copy of a foreign register, legally kept, is admissible in evidence. Kingston *v.* Lesley, 10 S. & R. 383, 389.

[7] Wallace *v.* Cook, 5 Esp. 117; Barber *v.* Holmes, 3 Esp. 190.

[8] Rex *v.* Fitzgerald, 1 Leach, Cr. Cas. 24; Rex *v.* Rhodes, Id. 29.

prisoner.[1] The books of assessment of public taxes are admissible to prove the assessment of the taxes upon the individuals, and for the property therein mentioned.[2] The books of municipal corporations are evidence of the elections of their officers, and of other corporate acts there recorded.[3] The books of private corporations are admissible for similar purposes, between members of the corporation; for as between them the books are of the nature of public books.[4] And all the members of a company are chargeable with knowledge of the entries made on their books by their agent, in the course of his business, and with the true meaning of those entries, as understood by him.[5] But the books cannot, in general, be adduced by the corporation, in support of its own claims against a stranger.[6]

§ 494. The *registry of a ship* is not of the nature of the public or official registers now under consideration, the entry not being of any transaction, of which the public officer who makes the entry is conusant. Nor is it a document required by the law of nations, as expressive of the ship's national character. The registry acts are considered as institutions purely local and municipal, for purposes of public policy. The register, therefore, is not of itself evidence of property, except so far as it is confirmed by some auxiliary circumstance, showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner. Without such connecting proof, the register has been held not to be even *primâ facie* evidence, to charge a person as owner; and even with such proof, it is not conclusive evidence of ownership; for an equitable title in one person may well consist with the documentary title at the custom-house in another. Where the question of ownership is merely incidental, the register alone has been deemed sufficient *primâ facie* evidence. But in favor of the person claiming as owner it is no evidence at all, being nothing more than his own declaration.[7]

[1] Salte *v.* Thomas, 3 B. & P. 188; Rex *v.* Aicles, 1 Leach, Cr. Cas. 435.

[2] Doe *v.* Seaton, 2 Ad. & El. 178; Doe *v.* Arkwright, Id. 182, n.; Rex *v.* King, 2 T. R. 234; Ronkendorff *v.* Taylor, 4 Peters, 349, 360. Such books are also *primâ facie* evidence of domicile. Doe *v.* Cartwright, Ry. & M. 62; 1 C. & P. 218.

[3] Rex *v.* Martin, 2 Campb. 100.

[4] Marriage *v.* Lawrence, 3 B. & Ald. 144; Gibbon's case, 17 Howell's St. Tr. 810.

[5] Allen *v.* Coit, 6 Hill (N. Y.), Rep. 318.

[6] London *v.* Lynn, 1 H. Bl. 214, note (c); Commonwealth *v.* Woelper, 3 S. & R. 29; Highland Turnpike Co. *v.* McKean, 10 Johns. 154.

[7] 3 Kent, Comm. 149, 150; Weston *v.* Penniman, 1 Mason, 306, 318, per Story, J.; Bixby *v.* The Franklin Ins. Co. 8 Pick. 86; Colson *v.* Bonzey, 6 Greenl. 474; Abbott on Shipping, pp. 63–66, (Story's edit. and notes); Tinkler *v.* Wal-

§ 495. A *ship's log-book*, where it is required by law to be kept, is an official register, so far as regards the transactions required by law to be entered in it; but no further. Thus, the act of congress[1] provides, that if any seaman who has signed the shipping articles, shall absent himself from the ship without leave, an entry of that fact shall be made in the log-book, and the seaman will be liable to be deemed guilty of desertion. But of this fact the log-book, though an indispensable document, in making out the proof of desertion, in order to incur a forfeiture of wages, is never conclusive, but only *primâ facie* evidence, open to explanation, and to rebutting testimony. Indeed, it is in no sense *per se* evidence, except in the cases provided for by statute; and therefore it cannot be received in evidence, in favor of the persons concerned in making it, or others, except by force of a statute making it so; though it may be used against any persons to whom it may be brought home, as concerned either in writing or directing what should be contained therein.[2]

§ 496. To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept; nor that the nature of the office should render the book indispensable. It is sufficient, that it be *directed by the proper authority to be kept*, and that it be kept according to such directions. Thus, a book kept by the secretary of bankrupts, by order of the Lord Chancellor, was held admissible evidence of the allowance of a certificate of bankruptcy.[3] Terriers seem to be admitted, partly on the same principle; as well as upon the ground, that they are admissions by persons who stood in privity with the parties, between whom they are sought to be used.[4]

§ 497. Under this head may be mentioned *books and chronicles of public history*, as partaking in some degree of the nature of public documents, and being entitled on the same principles to a great degree of credit. Any approved public and general history,

pole, 14 East, 226; McIver *v.* Humble, 16 East, 169; Fraser *v.* Hopkins, 2 Taunt. 5; Jones *v.* Pitcher, 3 Stewart & Porter, R. 135.

[1] Stat. 1790, c. 29, § 5; [1 U. S. Stat. at Large (L. & B.'s edit.), 133.]

[2] Abbott on Shipping, p. 468, note (1), (Story's edit.); Orne *v.* Townsend, 4 Mason, 544; Cloutman *v.* Tunison, 1 Sumner, 373; United States *v.* Gibert, 2 Sumner, 19, 78; The Sociedade Feliz, 1 W. Rob. R. 303, 311. [The Hercules, Sprague's Decisions, 534.]

[3] Henry *v.* Leigh, 3 Campb. 499, 501.

[4] By the ecclesiastical canons, an inquiry is directed to be made, from time to time, of the temporal rights of the clergyman in every parish, and to be returned into the registry of the bishop. This return is denominated a terrier. Cowel, Int. verb. *Terrar*, scil. *catalogus terrarum*. Burrill, Law Dict. verb. *Terrier*.

therefore, is admissible to prove ancient facts of a public nature, and the general usages and customs of the country.[1] But in regard to matters not of a public and general nature, such as the custom of a particular town, a descent, the nature of a particular abbey, the boundaries of a county, and the like, they are not admissible.[2]

§ 498. In regard to *certificates* given *by persons in official station*, the general rule is, that the law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence.[3] If the person was bound to record the fact, then the proper evidence is a copy of the record, duly authenticated. But as to matters which he was not bound to record, his certificate, being extra-official, is merely the statement of a private person, and will therefore be rejected.[4] So, where an officer's

[1] Bull. N. P. 248, 249; Morris *v.* Harmer, 7 Peters, 554; Case of Warren Hastings, referred to in 30 Howell's St. Tr. 492; Phil. & Am. on Evid. p. 606; Neal *v.* Fry, cited 1 Salk. 281; Ld. Bridgewater's case, cited Skin. 15. The statements of the chroniclers, Stow and Sir W. Dugdale, were held inadmissible as evidence of the fact, that a person took his seat by special summons to parliament in the reign of Henry VIII. The Vaux Peerage case, 5 Clark & Fin. 538. In *Iowa*, books of history, science, and art, and published maps and charts, made by persons indifferent between the parties, are presumptive evidence of facts of general interest. Code of 1851, § 2492. [* We have often had occasion to advert to the want of symmetry in the law, in regard to the admission of books of art and science to be read before the court and jury, in order to establish the laws or rules of that particular art or profession. Redf. on Wills, Part 1, § 15, pl. 17, 18, 19, pp. 146, 147. The rule seems well settled, that such books are not to be read before the jury, either as evidence or argument. Commonwealth *v.* Wilson, 1 Gray, 337; Washburn *v.* Cuddihy, 8 Gray, 430; Ashworth *v.* Kittridge, 12 Cush. 193. But courts often manifest the consciousness of the want of principle upon which the rule excluding such books rests, by quoting the very same books in banc which they were deciding were rightfully rejected at the trial, and thus declaring a rule of law, pertaining to the veterinary art or profession, or any other subject, upon the authority of these same books, which, in the same breath, they declare to be so unreliable as not to be evidence, either of the laws or the facts involved in the same identical point upon which the court decided solely upon the evidence of these same books. This goes upon the ground, that reading or hearing read such books will be entirely safe and proper while sitting in banc, but not equally so to the same judges while sitting with a jury to determine, among others, the very same questions then before the full court. This seems to give some countenance to the complaints of the learned author of the "Jurisprudence of Insanity," in his last edition, upon this point, of the admissibility of medical books to prove the laws of the medical profession. Washburn *v.* Cuddihy, 8 Gray, 430. It is suggested in a late case, Tutton *v.* Drake, 5 H. & N. 647, that the time of the sun's rising and setting cannot be proved by the almanac. But it would seem that all courts should take judicial notice of facts of such uniformity and general notoriety. *Ante*, § 488*a*.]

[2] Stainer *v.* Droitwich, 1 Salk. 281; Skin. 623, s. c.; Piercy's case, Tho. Jones, 164; Evans *v.* Getting, 6 C. & P. 586, and note. [* Lighthouse journals received as evidence. The Maria Das Dorias, 32 Law J. Adm. 163.]

[3] Willes, 549, 550, per Willes, Ld. Ch. J.

[4] Oakes *v.* Hill, 14 Pick. 442, 448; Wolfe *v.* Washburn, 6 Cowen, 261; Jackson *v.* Miller, Id. 751; Governor *v.* McAffee, 2 Dev. 15, 18; United States *v.* Buforp, 3 Peters, 12, 29; [Childress *v.* Cutter, 16 Miss. 24.]

certificate is made evidence of certain facts, he cannot extend its effect to other facts, by stating those also in the certificate; but such parts of the certificate will be suppressed.[1] The same rules are applied to an officer's return.[2]

[1] Johnson *v.* Hocker, 1 Dal. 406, 407; Governor *v.* Bell, 3 Murph. 331; Governor *v.* Jeffreys, 1 Hawks. 297; Stewart *v.* Alison, 6 S. & R. 324, 329; Newman *v.* Doe, 4 How. 522; [Brown *v.* The Independence, Crabbe, 54.]

[2] Cator *v.* Stokes, 1 M. & S. 599; Arnold *v.* Tourtelot, 13 Pick. 172. A notary's certificate that no note of a certain description was protested by him is inadmissible. Exchange, &c. Co. of N. Orleans *v.* Boyce, 3 Rob. Louis. R. 307; [Bicknell *v.* Hill, 33 Maine, 297.] [*The return of public officers appointed to investigate a matter of fact has sometimes been held to be evidence, even between other parties. Hayward *v.* Bath, 38 N. H. 179. But, in general, such matters are regarded so far in the nature of private transactions, as not to be evidence, except between the immediate parties, and for the particular purpose of the inquiry. Wheeler *v.* Framingham, 12 Cush. 387.]

CHAPTER V.

RECORDS AND JUDICIAL WRITINGS.

§ 499. The next class of written evidence consists of *Records* and *Judicial Writings*. And here, also, as in the case of Public Documents, we shall consider, first, the *mode of proving* them; and secondly, their *admissibility and effect*.

§ 500. The case of *statutes*, which are records, has already been mentioned under the head of legislative acts, to which they seem more properly to belong, the term *record* being generally taken in the more restricted sense, with reference to judicial tribunals. It will only be observed, in this place, that, though the courts will take notice of all public statutes without proof, yet private statutes must be proved, like any other legislative documents, namely, by

an exemplification under the great seal, or by an examined copy, or by a copy printed by authority.[1]

§ 501. As *to the proofs of records*, this is done either by mere *production* of the records, without more, or by a copy.[2] Copies of record are, (1.) exemplifications; (2.) copies made by an authorized officer; (3.) sworn copies. Exemplifications are either, first, under the great seal; or, secondly, under the seal of the particular court where the record remains.[3] When a record is the *gist* of the issue, if it is not in the same court, it should be proved by an exemplification.[4] By the course of the common law, where an exemplification under the great seal is requisite, the record may be removed into the court of chancery, by a *certiorari*, for that is the centre of all the courts, and there the great seal is kept. But in the United States, the great seal being usually if not always kept by the Secretary of State, a different course prevails; and an exemplified copy, under the seal of the court, is usually admitted, even upon an issue of *nul tiel record*, as sufficient evidence.[5] When the record is not the *gist* of the issue, the last-mentioned kind of exemplification is always sufficient proof of the record at common law.[6]

§ 502. The *record itself* is produced only when the cause is in the same court, whose record it is; or, when it is the subject of proceedings in a superior court. And in the latter case, although it may by the common law be obtained through the court of chancery, yet a *certiorari* may also be issued from a superior court of common law, to an inferior tribunal, for the same purpose, whenever the tenor only of the record will suffice; for in such

[1] [See *supra*, §§ 480, 481.]

[2] [Writing done with a pencil is not admissible in public records, nor on papers drawn to be used in legal proceedings which must become public records. Meserve *v.* Hicks, 4 Foster, 295.]

[3] Bull. N. P. 227, 228. An exemplification under the great seal is said to be of itself a record of the greatest validity. 1 Gilb. Evid. by Lofft, p. 19, Bull. N. P. 226. Nothing but a record can be exemplified in this manner. 3 Inst. 173.

[4] [The rule allowing a copy of a record to be used in evidence is founded on convenience; and when the original record itself is produced, it is the highest evidence, and is admissible. Gray *v.* Davis, 27 Conn. 447.]

[5] Vail *v.* Smith, 4 Cowen, 71. See also Pepoon *v.* Jenkins, 2 Johns. Cas. 118; Colem. & Cain, Cas. 136, s. c. In some of the states, copies of record of the courts of the same state, attested by the clerk, have, either by immemorial usage, or by early statutes, been received as sufficient in all cases. Vance *v.* Reardon, 2 Nott & McCord, 299; Ladd *v.* Blunt, 4 Mass. 402. Whether the seal of the court to such copies is necessary, in *Massachusetts, quære;* and see Commonwealth *v.* Phillips, 11 Pick. 30. [In Commonwealth *v.* Downing, 4 Gray, 29, 30, it is decided that a copy of a record of a justice of the peace need not bear a seal; the court saying, "it need not bear a seal, nor is it the practice to affix one."]

[6] 1 Gilb. Evid. 26; [Tillotson *v.* Warner, 3 Gray, 574, 577.]

cases nothing is returned but the tenor, that is, a literal transcript of the record, under the seal of the court; and this is sufficient to countervail the plea of *nul tiel record*.[1] Where the record is put in issue in a superior court of concurrent jurisdiction and authority, it is proved by an exemplification out of chancery, being obtained and brought thither by a *certiorari* issued out of chancery, and transmitted thence by *mittimus*.[2]

§ 503. In proving a record by a *copy under seal*, it is to be remembered, that the courts recognize without proof the seal of state, and the seals of the superior courts of justice, and of all courts, established by public statutes.[3] And by parity of reason it would seem, that no extraneous proof ought to be required of the seal of any department of state, or public office established by law, and required or known to have a seal.[4] And here it may be observed, that copies of records and judicial proceedings, under seal, are deemed of higher credit than sworn copies, as having passed under a more exact critical examination.[5]

§ 504. In regard to the several *states composing the United States*, it has already been seen, that though they are sovereign and independent, in all things not surrendered to the national government by the constitution, and, therefore, on general principles, are liable to be treated by each other in all other respects as foreign states, yet their mutual relations are rather those of domestic independence, than of foreign alienation.[6] It is accordingly provided in the constitution, that "full faith and credit

[1] Wooderaft *v.* Kinaston, 2 Atk. 317, 318; 1 Tidd's Pr. 398; Butcher & Aldworth's case, Cro. El. 821. Where a domestic record is put in issue by the plea, the question is tried by the court, notwithstanding it is a question of fact. And the judgment of a court of record of a sister state in the Union is considered, for this purpose, as a domestic judgment. Hall *v.* Williams, 6 Pick. 227; Carter *v.* Wilson, 1 Dev. & Bat. 362. [So is the judgment of a circuit court of the United States considered a domestic judgment. Williams *v.* Wilkes, 14 Penn. State R. 228.] But if it is a foreign record, the issue is tried by the jury. The State *v.* Isham, 3 Hawks, 185; Adams *v.* Betz, 1 Watts, 425; Baldwin *v.* Hale, 17 Johns. 272. The reason is, that in the former case the judges can themselves have an inspection of the very record. But in the latter, it can only be proved by a copy, the veracity of which is a mere fact, within the province of the jury. And see Collins *v.* Matthews, 5 East, 473. But in *New York*, the question of fact, in every case, is now, by statute, referred to the jury. Troter *v.* Mills, 6 Wend. 512; 2 Rev. Stat. 507, § 4 (3d edit.).

[2] 1 Tidd's Pr. 398.

[3] Olive *v.* Guin, 2 Sid. 145, 146, per Witherington, C. B.; 1 Gilb. Evid. 19; 12 Vin. Abr. 132, 133, tit. Evid. A. b. 69; Delafield *v.* Hand, 3 Johns. 310, 314; Den. *v.* Vreelandt, 2 Halst. 555. The seals of counties Palatine and of the ecclesiastical courts are judicially known, on the same general principle. See also, as to probate courts, Chase *v.* Hathaway, 14 Mass. 222; Judge, &c. *v.* Briggs, 3 N. Hamp. 309.

[4] *Supra*, § 6.

[5] 2 Phil. Evid. 130; Bull. N. P. 227.

[6] Mills *v.* Duryee, 7 Cranch, 481; Hampton *v.* McConnel, 3 Wheat. 234; *supra*, § 489.

shall be given, in each state, to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[1] Under this provision it has been enacted, that "the records and judicial proceedings of the courts of any state shall be proved or admitted, in any other court within the United States, 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, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state, from whence said records are or shall be taken."[2] By a subsequent act, these provisions are extended to the courts of all territories, subject to the jurisdiction of the United States.[3]

§ 505. It seems to be generally agreed, that this method of authentication, as in the case of public documents before mentioned, is *not exclusive* of any other, which the states may think proper to adopt.[4] It has also been held, that these acts of congress do not extend to judgments in *criminal* cases, so as to render a witness incompetent in one state, who has been convicted of an infamous crime in another.[5] The judicial proceedings referred to in these acts are also generally understood to be the proceedings of courts of general jurisdiction, and not those which are merely of municipal authority; for it is required that the copy of the record shall be certified by the clerk of the court, and that there shall also be a certificate of the judge, chief justice, or presiding magistrate, that the attestation of the clerk is in due form. This, it is said, is founded on the supposition that the court, whose proceedings are to be thus authenticated, is so constituted as to admit of such officers; the law having wisely left

[1] Const. U. S. Art. iv. § 1.

[2] Stat. U. S. May 26, 1790, 2 LL. U. S. ch. 38 [11], p. 102 (Bioren's edit.); 1 U. S. Stat. at Large (L. & B.'s edit.), 122.]

[3] Stat. U. S. March 27, 1804, 3 LL. U. S. ch. 409 [56], p. 621 (Bioren's edit.); [2 U. S. Stat. at Large (L. & B.'s edit.), 298.]

[4] Kean *v.* Rice, 12 S. & R. 203, 208; The State *v.* Stade, 1 D. Chipm. 303; Raynham *v.* Canton, 3 Pick. 293; Biddis *v.* James, 6 Binn. 321; *ex parte* Povall, 3 Leigh's R. 816; Pepoon *v.* Jenkins, 2 Johns. Cas. 119; Ellmore *v.* Mills, 1 Hayw. 359; *supra*, § 489; Rev. Stat. Mass. ch. 94, §§ 57, 59, 60, 61.

[5] Commonwealth *v.* Green, 17 Mass. 515; *supra*, § 376, and cases there cited.

the records of magistrates, who may be vested with limited judicial authority, varying in its objects and extent in every state, to be governed by the laws of the state, into which they may be introduced for the purpose of being carried into effect.[1] Accordingly it has been held, that the judgments of *justices of the peace* are not within the meaning of these constitutional and statutory provisions.[2] But the proceedings of courts of chancery, and of probate, as well as of the courts of common law, may be proved in the manner directed by the statute.[3]

§ 506. Under these provisions it has been held, that the *attestation of the copy* must be according to the form used in the state, from which the record comes; and that it must be certified to be so, by the presiding judge of the same court, the certificate of the clerk to that effect being insufficient.[4] Nor will it suffice for the judge simply to certify that the person who attests the copy is the clerk of the court, and that the signature is in his handwriting.[5] The seal of the court must be annexed to the record with the certificate of the clerk, and not to the certificate of the judge.[6] If the court, whose record is certified, has no seal, this fact should appear, either in the certificate of the clerk, or in that of the judge.[7] And if the court itself is extinct, but its records and jurisdiction have been transferred by law to another court, it seems that the clerk and presiding judge of the latter tribunal are competent to make the requisite attestations.[8] If the copy produced purports to be a record, and not a mere transcript of minutes from the docket, and the clerk certifies "that the foregoing is truly taken from the record of the proceedings" of the

[1] Warren *v.* Flagg, 2 Pick. 450, per Parker, C. J.

[2] Warren *v.* Flagg, 2 Pick. 448; Robinson *v.* Prescott, 4 N. Hamp. 450; Mahurin *v.* Bickford, 6 N. Hamp. 567; Silver Lake Bank *v.* Harding, 5 Ohio R. 545; Thomas *v.* Robinson, 3 Wend. 267. In *Connecticut* and *Vermont*, it is held, that if the justice is bound by law to keep a record of his proceedings, they are within the meaning of the act of congress. Bissell *v.* Edwards, 5 Day, 363; Starkweather *v.* Loomis, 2 Verm. 573; Blodget *v.* Jordan, 6 Verm. 580; [Brown *v.* Edson, 23 Vt. 435.] See acc. Scott *v.* Cleaveland, 3 Monroe, 62.

[3] Scott *v.* Blanchard, 8 Martin, N. S. 303; Hunt *v.* Lyle, 8 Yerg. 142; Barbour *v.* Watts, 2 A. K. Marsh. 290, 293; Balfour *v.* Chew, 5 Martin, N. S. 517; Johnson *v.* Rannels, 6 Martin, N. S. 621; Ripple *v.* Ripple, 1 Rawle, 386; Craig *v.* Brown, 1 Peters, C. C. R. 352.

[4] Drummond *v.* Magrander, 9 Cranch, 122; Craig *v.* Brown, 1 Pet. C. C. R. 352. The judge's certificate is the only competent evidence of this fact. Smith *v.* Blagge, 1 Johns. Cas. 238. And it is conclusive. Ferguson *v.* Harwood, 7 Cranch, 408.

[5] Craig *v.* Brown, 1 Pet. C. C. R. 352. [It should also state that the attestation of the clerk is in due form. Shown *v.* Barr, 11 Ired. 296.]

[6] Turner *v.* Waddington, 3 Wash. 126. And being thus affixed, and certified by the clerk, it proves itself. Dunlap *v.* Waldo, 6 N. Hamp. 450.

[7] Craig *v.* Brown, 1 Pet. C. C. R. 352; Kirkland *v.* Smith, 2 Martin, N. S. 497.

[8] Thomas *v.* Tanner, 6 Monroe, 52.

court, and this attestation is certified to be in due form of law, by the presiding judge, it will be presumed that the paper is a full copy of the entire record, and will be deemed sufficient.[1] It has also been held, that it must appear from the judge's certificate, that at the time of certifying he is the presiding judge of that court; a certificate that he is "the judge that presided" at the time of the trial, or that he is "the senior judge of the courts of law" in the state, being deemed insufficient.[2] The clerk also who certifies the record must be the clerk himself of the same court, or of its successor, as above mentioned; the certificate of his under clerk, in his absence, or of the clerk of any other tribunal, office, or body, being held incompetent for this purpose.[3]

§ 507. An *office copy* of a record is a copy authenticated by an officer intrusted for that purpose; and it is admitted in evidence upon the credit of the officer without proof that it has been actually examined.[4] The rule on this subject is, that an office copy, in the same court, and in the same cause, is equivalent to the record; but in another court, or in another cause in the same court, the copy must be proved.[5] But the latter part of this rule is applied only to copies, made out by an officer having no other authority to make them, than the mere order of the particular court, made for the convenience of suitors; for if it is made his duty by law to furnish copies, they are admitted in all courts under the same jurisdiction. And we have already seen, that in the United States an officer having the legal custody of public records, is, *ex officio*, competent to certify copies of their contents.[6]

[1] Ferguson *v.* Harwood, 7 Cranch, 408; Edmiston *v.* Schwartz, 13 S. & R. 135; Goodman *v.* James, 2 Rob. Louis. 297.

[2] Stephenson *v.* Bannister, 3 Bibb, 369; Kirkland *v.* Smith, 2 Martin, N. S. 497; [Settle *v.* Alison, 8 Geo. 201.]

[3] Attestation by an under clerk is insufficient. Samson *v.* Overton, 4 Bibb, 409. So, by late clerk not now in office. Donohoo *v.* Brannon, 1 Overton, 328. So, by clerk of the council, in Maryland. Schnerzell *v.* Young, 3 H. & McHen. 502. See further, Conkling's Practice, p. 256; 1 Paine & Duer's Practice, 480, 481. [The authentication of the record of a judgment rendered in another state is not impaired by the addition of a superfluous certificate, if it is duly accredited by the other certificates required by law. Young *v.* Chandler, 13 Bellows, 252.] [*The certificate of the deputy clerk is not sufficient, even when the judge certifies that it is in due form. Morris *v.* Patchin, 24 N. Y. App. 394.]

[4] 2 Phil. Evid. 131; Bull. N. P. 229.

[5] Denn *v.* Fulford, 2 Burr. 1179, per Ld. Mansfield. Whether, upon trial at law of an issue out of chancery, office copies of depositions in the same cause in chancery are admissible, has been doubted; but the better opinion is, that they are admissible. Highfield *v.* Peake, 1 M. & Malk. 109 (1827); Studdy *v.* Sanders, 2 D. & Ry. 347; Hennell *v.* Lyon, 1 B. & Ald. 142; *contra*, Burnand *v.* Nerot, 1 C. & P. 578 (1824).

[6] *Supra*, § 485. But his certificate of the substance or purport of the record is inadmissible. McGuire *v.* Sayward, 9 Shepl. 230. [*Whenever the original is evidence in itself, as a public record or document, its contents may be proved by

§ 508. The proof of records, by an *examined copy*, is by producing a witness who has compared the copy with the original, or with what the officer of the court or any other person read, as the contents of the record. It is not necessary for the persons examining to exchange papers, and read them alternately both ways.[1] But it should appear that the record, from which the copy was taken, was found in the proper place of deposit, or in the hands of the officer, in whose custody the records of the court are kept. And this cannot be shown by any light, reflected from the record itself, which may have been improperly placed where it was found. Nothing can be borrowed *ex visceribus judicii*, until the original is proved to have come from the proper court.[2] And the record itself must have been finally completed, before the copy is admissible in evidence. The minutes from which the judgment is made up, and even a judgment in paper, signed by the master, are not proper evidence of the record.[3]

§ 509. If the *record is lost*, and is ancient, its existence and contents may sometimes be presumed;[4] but whether it be ancient or recent, after proof of the loss, its contents may be proved, like any other document, by any secondary evidence, where the case does not, from its nature, disclose the existence of other and better evidence.[5]

an examined copy. Reed *v.* Lamb, 6 Jur. N. S. 828. The same is true of the registry of marriages kept in duplicate by the East India Company in London, the marriages being solemnized in India. Ratcliff *v.* Ratcliff, 5 Jur. N. S. 714.]

[1] Reid *v.* Margison, 1 Campb. 469; Gyles *v.* Hill, Id. 471, n.; Fyson *v.* Kemp, 6 C. & P. 71; Rolf *v.* Dart, 2 Taunt. 52; Hill *v.* Packard, 5 Wend. 387; Lynde *v.* Judd, 3 Day, 499.

[2] Adamthwaite *v.* Synge, 1 Stark. R. 183; [Woods *v.* Banks, 14 N. Hamp. 101.]

[3] Bull. N. P. 228; Rex *v.* Smith, 8 B. & C. 341; Godefroy *v.* Jay, 3 C. & P. 192; Lee *v.* Meecock, 5 Esp. 177; Rex *v.* Bellamy, Ry. & M. 171; Porter *v.* Cooper, 6 C. & P. 354. But the minutes of a judgment in the House of Lords are the judgment itself, which it is not the practice to draw up in form. Jones *v.* Randall, Cowp. 17. [The clerk's docket is the record until the record is fully extended, and the same rules of presumed verity apply to it as to the record. Every entry is a statement of the act of the court, and must be presumed to be made by its direction, either by a particular order for that entry, or by a general order, or by a general and recognized usage and practice, which presupposes such an order. Read *v.* Sutton, 2 Cush. 115, 123; Sayles *v.* Briggs, 4 Met. 421, 424; Tillotson *v.* Warner, 3 Gray, 574, 577. Where it is the practice of the clerks to extend the judgment of the courts from the minutes and papers on file, the record thus extended is deemed by the court the original record. Willard *v.* Harvey, 4 Foster, 344.]

[4] Bull. N. P. 228; Greene *v.* Proude, 1 Mod. 117, per Lord Hale.

[5] See *supra*, § 84, note (2), and cases there cited. See also Adams *v.* Betz, 1 Watts, 425, 428; Stockbridge *v.* West Stockbridge, 12 Mass. 400; Donaldson *v.* Winter, 1 Miller, R. 137; Newcomb *v.* Drummond, 4 Leigh, 57; Bull. N. P. 228; Knight *v.* Dauler, Hard. 323; Anon. 1 Salk. 284, cited per Holt, C. J.; Gore *v.* Elwell, 9 Shepl. 442. [A paper, certified by a justice of the peace to be a copy of a record of a case before him is admissible in evidence of such proceedings, although made by him after the loss of the original, and pending a trial in which he had testi-

§ 510. A *verdict* is sometimes admissible in evidence, to prove the finding of some matter of reputation, or custom, or particular right. But here, though it is the verdict, and not the judgment, which is the material thing to be shown, yet the rule is, that, where the verdict was returned to a court having power to set it aside, the verdict is not admissible, without producing a copy of the judgment rendered upon it; for it may be that the judgment was arrested, or that a new trial was granted. But this rule does not hold in the case of a verdict upon an issue out of chancery, because it is not usual to enter up judgment in such cases.[1] Neither does it apply where the object of the evidence is merely to establish the fact that the verdict was given, without regard to the facts found by the jury, or to the subsequent proceedings in the cause.[2] And where, after verdict in ejectment, the defendant paid the plaintiff's costs, and yielded up the possession to him, the proof of these facts, and of the verdict, has been held sufficient to satisfy the rule, without proof of a judgment.[3]

§ 511. A *decree in chancery* may be proved by an exemplification, or by a sworn copy, or by a decretal order in paper, with proof of the bill and answer.[4] And if the bill and answer are recited in the order, that has been held sufficient, without other proof of them.[5] But though a former decree be recited in a subsequent decree, this recital is not proper evidence of the former.[6] The general rule is, that, where a party intends to avail himself of a decree, as an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must

fied to its contents. Tillotson *v.* Warner, 3 Gray, 574, 577. The contents of a complaint and warrant, in a criminal case, lost after being returned into court, may be proved by secondary evidence; and witnesses to prove its contents may state the substance thereof without giving the exact words. Commonwealth *v.* Roark, 8 Cush. 210, 212. See also Simpson *v.* Norton, 45 Maine, 281; Hall *v.* Manchester, 40 N. H. 410.]

[1] Bull. N. P. 234; Pitton *v.* Walter, 1 Stra. 162; Fisher *v.* Kitchingman, Willes, 367; Ayrey *v.* Davenport, 2 New Rep. 474; Donaldson *v.* Jude, 2 Bibb. 60. Hence it is not necessary, in *New York*, to produce a copy of the judgment upon a verdict given in a justice's court, the justice not having power to set it aside. Felter *v.* Mulliner, 2 Johns. 181. In *North Carolina*, owing to an early looseness of practice in making up the record, a copy of the verdict is received without proof of the judgment; the latter being presumed, until the contrary is shown. Deloah *v.* Worke, 3 Hawks, 36. See also Evans *v.* Thomas, 2 Stra. 833; Dayrell *v.* Bridge, Id. 1264; Thurston *v.* Slatford, 1 Salk. 284. If the docket is lost before the record is made up, it will be considered as a loss of the record. Pruden *v.* Alden, 22 Pick. 184.

[2] Barlow *v.* Dupuy, 1 Martin, N. S. 442.

[3] Schaeffer *v.* Kreitzer, 6 Binn. 430.

[4] Trowell *v.* Castle, 1 Keb. 21, confirmed by Bailey, B,. in Blower *v.* Hollis, 1 Cromp. & Mees. 396; 4 Com. Dig. 97, tit. *Evidence*, C. 1; Gresley on Evid. p. 109.

[5] Bull. N. P. 244; 1 Keb. 21.

[6] Winans *v.* Dunham, 5 Wend. 47; Wilson *v.* Conine, 2 Johns. 280.

show the proceedings upon which the decree was founded. "The whole record," says Chief Baron Comyns, "which concerns the matter in question, ought to be produced."[1] But where the decree is offered merely for proof of the *res ipsa*, namely, the fact of the decree, here, as in the case of verdicts, no proof of any other proceeding is required.[2] The same rules apply to sentences in the admiralty, and to judgments in courts baron, and other inferior courts.[3]

§ 512. The proof of an *answer in chancery* may, in civil cases, be made by an examined copy.[4] Regularly, the answer cannot be given in evidence without proof of the bill also, if it can be had.[5] But in general, proof of the decree is not necessary, if the answer is to be used merely as the party's admission under oath, or for the purpose of contradicting him as a witness, or to charge him upon an indictment for perjury. The absence of the bill, in such cases, goes only to the effect and value of the evidence, and not to its admissibility.[6] In an indictment for perjury in an answer, it is considered necessary to produce the original answer, together with proof of the administration of the oath; but of this fact, as well as of the place where it was sworn, the certificate of the master, before whom it was sworn, his signature also being proved, is sufficient *primâ facie* evidence.[7] The original must also be produced on a trial for forgery. In civil cases, it will be presumed that the answer was made upon oath.[8] But whether the answer be proved by production of the original, or by a copy, and in whatever case, some proof of the identity of the party will be requisite. This may be by proof of his handwriting; which was the reason of the order in chancery requiring all defendants to sign their answers; or it may be by any other competent evidence.[9]

[1] 4 Com. Dig. tit. *Evidence*, A. 4; 2 Phil. Evid. 138, 139. The rule equally applies to decrees of the ecclesiastical courts. Leake *v.* Marquis of Westmeath, 2 M. & Rob. 394.

[2] Jones *v.* Randall, Cowp. 17.

[3] 4 Com. Dig. 97, 98, tit. *Evidence*, C. 1.

[4] Ewer *v.* Ambrose, 4 B. & C. 25.

[5] 1 Gilb. Evid. 55, 56; Gresley on Evid. pp. 108, 109.

[6] Ewer *v.* Ambrose, 4 B. & C. 25; Rowe *v.* Brenton, 8 B. & C. 737, 765; Lady Dartmouth *v.* Roberts, 16 East, 334, 339, 340.

[7] Bull. N. P. 238, 239; Rex *v.* Morris, 2 Burr. 1189; Rex *v.* Benson, 2 Campb. 508; Rex *v.* Spencer, Ry. & M. 97. The *jurat* is not conclusive as to the place. Rex *v.* Embden, 9 East, 437. The same strictness seems to be required in an action on the case for a malicious criminal prosecution. 16 East, 340; 2 Phil. Evid. 140. *Sed quære.*

[8] Bull. N. P. 238.

[9] Rex *v.* Morris, 2 Burr. 1189; Rex *v.* Benson, 2 Campb. 508. It seems that slight evidence of identity will be deemed *primâ facie* sufficient. In Hennell *v.* Lyon, 1 B. & Ald. 182, coincidence of name, and character as administrator, was held sufficient; and Lord Ellenborough

§ 513. The *judgments of inferior courts* are usually proved by producing from the proper custody the book containing the proceedings. And as the proceedings in these courts are not usually made up in form, the minutes, or examined copies of them, will be admitted, if they are perfect.[1] If they are not entered in books, they may be proved by the officer of the court, or by any other competent person.[2] In either case, resort will be had to the best evidence, to establish the tenor of the proceedings; and, therefore, where the course is to record them, which will be presumed until the contrary is shown, the record, or a copy, properly authenticated, is the only competent evidence.[3] The caption is a necessary

thought, that coincidence of name alone ought to be enough to call upon the party to show that it was some other person. See also Hodgkinson *v.* Willis, 3 Campb. 401.

[1] Arundel *v.* White, 14 East, 216; Fisher *v.* Lane, 2 W. Bl. 834; Rex *v.* Smith, 8 B. & C. 342, per Lord Tenterden. [The original papers and record of proceedings in insolvency, deposited in the proper office and produced by the proper officer, are admissible in evidence equally with certified copies thereof, although such certified copies are made *prima facie* evidence by statute. Odiorne *v.* Bacon, 6 Cush. 185. See also Miller *v.* Hale, 26 Penn. St. R. 432.]

[2] Dyson *v.* Wood, 3 B. & Co. 449, 451.

[3] See, as to justices' courts, Mathews *v.* Houghton, 2 Fairf. 377; Holcomb *v.* Cornish, 8 Conn. 375, 380; Wolf *v.* Washburn, 6 Cowen, 261; Webb *v.* Alexander, 7 Wend. 281, 286. As to probate courts, Chase *v.* Hathaway, 14 Mass. 222, 227; Judge of Probate *v.* Briggs, 3 N. Hamp. 309. As to justices of the sessions, Commonwealth *v.* Bolkom, 3 Pick. 281. [The copy of a record of a justice of the peace need not, in Massachusetts, bear a seal. Commonwealth *v.* Downing, 4 Gray, 29, 30. And a copy of the record of a case before a justice of the peace, described as such in the record, is sufficiently attested, if attested by him as "justice," without adding thereto the words "of the peace." Ib. The contents of a justice's record should be proved by an authenticated copy. His certificate alleging what facts appear by the record is not receivable as proof. English *v.* Sprague, 33 Maine, 440. See also, as to records of a justice of the peace, Brown *v.* Edson, 23 Vt. 325. A record made by a justice of the peace, or by a justice of a police court in a criminal case, which does not state that an appeal was claimed from his decision by the party convicted, is conclusive evidence, in an action brought against the justice for refusing to allow the appeal and committing the party to prison, that no such appeal was claimed. Wells *v.* Stevens, 2 Gray, 115, 118. See also Kendall *v.* Powers, 4 Met. 553.] [* The law of the different states, as to what is competent evidence of judicial records within the same state, is a good deal relaxed from the requirements of the act of congress, or of the common law. It has been held, that the records of an inferior court may be proved by production of the original, or by copy duly authenticated, or by production of the original papers. State *v.* Bartlett, 47 Maine, 396. And the copy is sufficiently authenticated by the words, "a true copy," signed by the magistrate at the end of the copy. Commonwealth *v.* Ford, 14 Gray, 399. And it is no fatal objection to a copy of record, that the papers are certified separately. Goldstone *v.* Davidson, 18 Cal. 41. And a justice's judgment may be proved by the production of the original papers, verified by his testimony with the docket entry of the justice, if no extended record has been made. McGrath *v.* Seagrave, 2 Allen, 443. It has been held in some of the states, that such evidence is not sufficient; Strong *v.* Bradley, 13 Vt. 9: unless where the justice had deceased without perfecting his record; Story *v.* Kimball, 6 Vt. 541. And when the copy consisted of numerous papers, bound together with a tape, with nothing upon the separate papers to identify or authenticate them, preceded by a certificate "that the papers each and all were true copies of record," it was held insufficient as coming from a district court of the United States in another state. Pike *v.* Crehore, 40 Maine, 503. If the court has no clerk, the judge may, under the act of congress, act both as clerk and presiding

part of the record; and the record itself, or an examined copy, is the only legitimate evidence to prove it.[1]

§ 514. The usual modes of authenticating *foreign judgments* are, either by an exemplification of a copy under the great seal of a state; or by a copy, proved to be a true copy by a witness who has compared it with the original; or by the certificate of an officer, properly authorized by law to give a copy; which certificate must itself also be duly authenticated.[2] If the copy is certified under the hand of the judge of the court, his handwriting must be proved.[3] If the court has a seal, it ought to be affixed to the copy, and proved; even though it be worn so smooth, as to make no distinct impression.[4] And if it is clearly proved that the court has no seal, it must be shown to possess some other requisites to entitle it to credit.[5] If the copy is merely certified by an officer of the court, without other proof, it is inadmissible.[6]

[* § 514*a*. In a recent case[7] before the House of Lords, it was determined, that, in fixing the construction of a foreign document in the courts of that country, the court are bound to avail themselves of every aid, so as to reach the same result which would be

judge. State *v.* Hinchman, 27 Penn. St. 479. The original of a writ of attachment and execution is as good evidence as an authenticated copy. Day *v.* Moore, 13 Gray, 522. The copy coming from an inferior court, with the transfer of the case, is good evidence to show what was adjudicated. Brackett *v.* Hoitt, 20 N. H. 257. A record, certified under the seal of the court, is sufficient evidence that it is a court of record. Smith *v.* Redden, 5 Har. 321. See also Lancaster *v.* Lane, 19 Ill. 242; Brush *v.* Blanchard, 19 Ill. 31; Magee *v.* Scott, 32 Penn. St. 539.]

[1] Rex *v.* Smith, 8 B. & C. 341, per Bayley, J.

[2] Church *v.* Hubbart, 2 Cranch, 228, per Marshall, C. J.; *supra*, § 488, and cases there cited. Proof by a witness, who saw the clerk affix the seal of the court, and attest the copy with his own name, the witness having assisted him to compare it with the original, was held sufficient. Buttrick *v.* Allen, 8 Mass. 273. So, where the witness testified that the court had no seal. Packard *v.* Hill, 7 Cowen, 434.

[3] Henry *v.* Adey, 3 East, 221; Buchanan *v.* Rucker, 1 Campb. 63. The certificate of a notary-public, to this fact was deemed sufficient, in Yeaton *v.* Fry, 5 Cranch, 335.

[4] Cavan *v.* Stewart, 1 Stark. R. 525; Flindt *v.* Atkins, 3 Campb. 215, n.; Gardere *v.* Columbian Ins. Co. 7 Johns. 514.

[5] Black *v.* Ld. Braybrook, 2 Stark. R. 7, per Ld. Ellenborough; Packard *v.* Hill, 7 Cowen, 434.

[6] Appleton *v.* Ld. Braybrook, 2 Stark. R. 6; 6 M. & S. 34, s. c.; Thompson *v.* Stewart, 3 Conn. 171. [Where a copy of a judgment recovered in Canada was certified by A, as clerk, and purported to be under the seal of the court, and a witness testified that he had long known A in the capacity of clerk, and that he helped him to compare the copy with the original, and knew it to be correct, and from his acquaintance with the seal of the court, he knew that the seal affixed to the copy was genuine, it was held, that the copy was sufficiently authenticated. Pickard *v.* Bailey, 6 Foster, 152. A copy of the civil code of France, purporting to be printed at the royal press in Paris, and received in the course of our international exchanges, with the indorsement "La Garde des Sceaux de France à la cour Supreme des Etats Unis," is admissible in the courts of the United States as evidence of the law of France. Ennis *v.* Smith, 14 How. U. S. 400.]

[7] [*Di Sora (Duchess) *v.* Phillips, 33 Law, J. Ch. H. L. 129.

obtained in the courts of the foreign forum. For this end, the following particulars must be regarded: (1.) An accurate translation; (2.) an explanation of all terms of art; (3.) information as to any special law; (4.) as to any peculiar rule of construction of the foreign state, affecting the question. In regard to wills executed and proved in a foreign country, where it becomes necessary to enforce their provisions in another forum, it is generally sufficient to produce an exemplification of the foreign decree allowing the will and probate, and to record the same in the proper office of probate, in the forum where such evidence is to be used.[1]]

§ 515. In cases of *inquisitions post mortem* and other *private offices*, the return cannot be read, without also reading the commission. But in cases of more general concern, the commission is of such public notoriety, as not to require proof.[2]

§ 516. With regard to the proof of *depositions in chancery*, the general rule is, that they cannot be read, without proof of the bill and answer, in order to show that there was a cause depending, as well as who were the parties, and what was the subject-matter in issue. If there were no cause depending, the depositions are but voluntary affidavits; and if there were one, still the depositions cannot be read, unless it be against the same parties, or those claiming in privity with them.[3] But ancient depositions, given when it was not usual to enroll the pleadings, may be read without antecedent proof.[4] They may also be read upon proof of the bill, but without proof of the answer, if the defendant is in contempt, or has had an opportunity of cross-examining, which he chose to forego.[5] And no proof of the bill or answer is necessary, where the deposition is used against the deponent, as his own declaration or admission, or for the purpose of contradicting him as a witness.[6] So, where an issue is directed out of chancery, and an order is made there, for the reading of the depositions upon the trial of the issue, the court of law will read them upon the order, without antecedent proof of the bill and answer, provided the witnesses themselves cannot be produced.[7]

[1] Isham *v.* Gibbons, 1 Bradf. Sur. Rep. 69.]

[2] Bull. N. P. 228, 229.

[3] 2 Phil. Evid. 149; Gresley on Evid. 185; 1 Gilb. Evid. 56, 57.

[4] 1 Gilb. Evid. 64; Gresley on Evid. 185; Bayley *v.* Wylie, 6 Esp. 85.

[5] Cazenove *v.* Vaughan, 1 M. & S. 4; Carrington *v.* Carnock, 2 Sim. 567.

[6] Highfield *v.* Peake, 1 M. & Malk. 109; *supra*, § 512.

[7] Palmer *v.* Ld. Aylesbury, 15 Ves. 176; Gresley on Evid. 185; Bayley *v.* Wylie, 6 Esp. 85.

§ 517. Depositions taken upon interrogatories, *under a* special *commission*, cannot be read without proof of the commission, under which they were taken; together with the interrogatories, if they can be found. The absence of the interrogatories, if it renders the answers obscure, may destroy their effect, but does not prevent their being read.[1] Both depositions and affidavits, taken in another domestic tribunal, may be proved by examined copies.[2]

§ 518. *Testaments*, in England, are proved in the ecclesiastical courts; and in the United States, in those courts which have been specially charged with the exercise of this branch of that jurisdiction; generally styled courts of probate, but in some states known by other designations, as orphans' courts, &c. There are two modes of proof, namely, the common form, which is upon the oath of the executor alone, before the court having jurisdiction of the probate of wills, without citing the parties interested; and the more solemn form of law, *per testes*, upon due notice and hearing of all parties concerned.[3] The former mode has, in the United States, fallen into general disuse. By the common law, the ecclesiastical courts have no jurisdiction of matters concerning the realty; and therefore the probate, as far as the realty is concerned, gives no validity to the will.[4] But in most of the United States, the probate of the will has the same effect, in the case of real estate, as in that of the personalty; and where it has not, the effect will be stated hereafter.[5] This being the case, the present general course is to deposit the original will in the registry of the court of probate, delivering to the executor a copy of the will, and an exemplification of the decree of allowance and probate. And in all cases, where the court of probate has jurisdiction, its decree is the proper evidence of the probate of the will, and is proved in the same manner as the decrees and judgments of other courts.[6] A court of common law will not take notice of a will, as a title to personal property, until it has been thus proved[7] and where the will is required to be originally proved to the jury, as

[1] Rowe *v.* Brenton, 8 B. & C. 737, 765.

[2] *Supra*, §§ 507, 508; Highfield *v.* Peake, 1 M. & Malk. 110. In criminal cases, some proof of identity of the person is requisite. *Supra*, § 512.

[3] 2 Bl. Comm. 508.

[4] Hoe *v.* Melthorpe, 3 Salk. 154; Bull. N. P. 245, 246.

[5] See *infra*, § 550, and vol. 2, tit. WILLS, § 672.

[6] *Supra*, § 501–509, 513; Chase *v.* Hathaway, 14 Mass. 222, 227; Judge of Probate *v.* Briggs, 3 N. Hamp. 309; Farnsworth *v.* Briggs, 6 N. Hamp. 561.

[7] Stone *v.* Forsyth, 2 Doug. 707. The character of executor may be proved by the act-book, without producing the probate of the will. Cox *v.* Allingham, Jacob, R. 514. And see Doe *v.* Mew, 7 Ad. & El. 239.

documentary evidence of title, it is not permitted to be read, unless it bears the seal of the ecclesiastical court, or some other mark of authentication.[1]

§ 519. *Letters of administration* are granted under the seal of the court, having jurisdiction of the probate of wills; and the general course in the United States, as in the case of wills, is to pass a formal decree to that effect, which is entered in the book of records of the court. The letter of administration, therefore, is of the nature of an exemplification of this record, and as such is received without other proof. But where no formal record is drawn up, the book of acts, or the original minutes or memorial of the appointment, or a copy thereof duly authenticated, will be received as competent evidence.[2]

§ 520. *Examinations* of prisoners *in criminal cases* are usually proved by the magistrate or clerk who wrote them down.[3] But there must be antecedent proof of the identity of the prisoner and of the examination. If the prisoner has subscribed the examination with his name, proof of his handwriting is sufficient evidence that he has read it; but if he has merely made his mark, or has not signed it at all, the magistrate or clerk must identify the prisoner, and prove that the writing was duly read to him, and that he assented to it.[4]

§ 521. In regard to the *proof of writs*, the question whether this is to be made by production of the writ itself, or by a copy, depends on its having been returned or not. If it is only matter of inducement to the action, and has not been returned, it may be proved by producing it. But after the writ is returned, it has become matter of record, and is to be proved by a copy from the record, this being the best evidence.[5] If it cannot be found after diligent search, it may be proved by secondary evidence, as in other cases.[6] The fact, however, of the issuing of

[1] Rex *v.* Barnes, 1 Stark. R. 243; Shumway *v.* Holbrook, 1 Pick. 114. See further 2 Phil. Evid. 172; Gorton *v.* Dyson, 1 B. & B. 221, per Richardson, J.

[2] The practice on this subject is various in the different states. See Dickenson *v.* McCraw, 4 Rand. 158; Seymour *v.* Beach, 4 Verm. 493; Jackson *v.* Robinson, 4 Wend. 436; Farnsworth *v.* Briggs, 6 N. Hamp. 561; Hoskins *v.* Miller, 2 Devereaux, 360; Owings *v.* Beall, 1 Littell, 257, 259; Browning *v.* Huff, 2 Bailey, 174, 179; Owings *v.* Hull, 9 Peters, 608, 626. See also Bull. N. P. 246; Elden *v.* Keddel, 8 East, 187; 2 M. & S. 567, per Bayley, J.; 2 Phil. Evid. 172, 173; 1 Stark. Evid. 255.

[3] 2 Hale, P. C. 52, 284.

[4] See *supra*, §§ 224, 225, 227, 228.

[5] Bull. N. P. 234; Foster *v.* Trull, 12 Johns. 456; Pigot *v.* Davis, 3 Hawks, 25; Frost *v.* Shapleigh, 7 Greenl. 236; Brush *v.* Taggart, 7 Johns. 19; Jenner *v.* Jolliffe, 6 Johns. 9.

[6] *Supra*, § 84, note (2)

the writ may sometimes be proved by the admission of the party against whom it is to be proved.[1] And the precise time of suing it out may be shown by parol.[2]

§ 522. We proceed in the next place, to consider the ADMISSIBILITY AND EFFECT OF RECORDS, as instruments of evidence. The rules of law upon this subject are founded upon these evident principles, or axioms, that it is for the interest of the community that a limit should be prescribed to litigation; and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between those parties, should be closed for ever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be held bound.

§ 523. Under the term *parties*, in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defence, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as *strangers* to the cause.[3] But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity

[1] As, in an action by the officer against the bailee of the goods attached, for which he has given a forthcoming obligation, reciting the attachment. Lyman *v.* Lyman, 11 Mass. 317; Spencer *v.* Williams, 2 Verm. 209; Lowry *v.* Cady, 4 Verm. 504; Foster *v.* Trull, 12 Johns. 456. So where the sheriff is sued for an escape, and has not returned the precept on which the arrest was made. Hinman *v.* Brees, 13 Johns. 529.

[2] Lester *v.* Jenkins, 8 B. & C. 339; Morris *v.* Pugh, 3 Burr. 1241; Wilton *v.* Girdlestone, 5 B. & Ald. 847; Michaels *v.* Shaw, 12 Wend. 587; Allen *v.* Portland Stage Co. 8 Greenl. 507; Taylor *v.* Dundass, 1 Wash. 94.

[3] Duchess of Kingston's case, 20 Howell's St. Tr. 538, n.; Carter *v.* Bennett, 4 Flor. Rep. 352. Where a father, during the absence of his minor son from the country, commenced an action of crim. con. as his *prochein amy*, the judgment was held conclusive against the son, after his majority; the *prochein amy* having been appointed by the court. Morgan *v.* Thorne, 9 Dowl. 228. In *New York*, a judgment in an action on a joint obligation is conclusive evidence of the liability of those only who were personally served with the process. 2 Rev. Stat. 574, 3d edit. [It is a general and established rule of law, that when a party's right may be collaterally affected by a judgment, which for any cause is erroneous and void, but which he cannot bring a writ of error to reverse, he may, without reversing it, prove it so erroneous and void in any suit in which its validity is drawn in question. By Metcalf, J., in Vose *v.* Morton, 4 Cush. 27, 31.]

with them, are equally concluded by the same proceedings. We have already seen, that the term *privity* denotes mutual or successive relationship to the same rights of property.[1] The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings, to which he was a party, is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.[2] And if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage, assigned by him, shall produce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him.[3]

§ 524. But to prevent this rule from working injustice, it is held essential that its operation be *mutual*. Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either. For if the adverse party was not also a party to the judgment offered in evidence, it may have been obtained upon his own testimony; in which case, to allow him to derive a benefit from it would be unjust.[4] Another qualification of the rule is, that a party is not to be concluded by a judgment in a prior suit or prosecution, where, from the nature or course of the proceedings, he could not avail himself of the same means of defence, or of redress, which are open to him in the second suit.[5]

§ 525. An apparent *exception* to this rule, as to the identity of the parties, is allowed in the cases usually termed proceedings *in rem*; which include not only judgments of condemnation of

[1] *Supra*, § 189. See also §§ 19, 20.

[2] Carver *v.* Jackson, 4 Peters, 85, 86; Case *v.* Reeve, 14 Johns. 81. See also Kinnersley *v.* Wm. Orpe, 2 Doug. 517, expounded in 14 Johns. 81, 82, by Spencer, J. [A privy by representation as an executor, administrator, or assignee, is bound by a judgment against his principal. Chapin *v.* Curtis, 23 Conn. 388. A judgment on the merits against a master, in an action of trespass, for the act of his servant, is a bar to an action against the servant for the same act, though such judgment was not rendered till after the general issue was pleaded to the action against the servant, and parol evidence is admissible to show that the same matter is in controversy in both actions. Emery *v.* Fowler, 39 Maine, 326.] [* So, too, in all cases, the record of a judgment is evidence in suits where the rights of the parties are dependent upon those of the parties to such judgment, and such dependence may be shown by evidence *en pais*. Key *v.* Dent, 14 Md. 86.]

[3] Rapelye *v.* Prince, 4 Hill, R. 119.

[4] Wood *v.* Davis, 7 Cranch, 271; Davis *v.* Wood, 1 Wheat. 6.

[5] 1 Stark. Evid. 214, 215.

property, as forfeited or as prize, in the Exchequer or Admiralty, but also the decisions of other courts directly upon the personal *status*, or relations of the party, such as marriage, divorce, bastardy, settlement, and the like. These decisions are binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others; partly upon the ground that, in most cases of this kind, and especially in questions upon property seized and proceeded against, every one who can possibly be affected by the decision has a right to appear and assert his own rights, by becoming an actual party to the proceedings; and partly upon the more general ground of public policy and convenience, it being essential to the peace of society, that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined and conclusively settled and at rest.[1]

§ 526. A further exception is admitted in the case of verdicts and judgments upon subjects of a *public nature*, such as customs, and the like; in most of all of which cases, evidence of reputation

[1] 1 Stark. Evid. 27, 28. [The decree of a court of competent jurisdiction dismissing for want of proof a libel filed by a wife against her husband, after having left his house, for a divorce from bed and board for extreme cruelty, is not conclusive evidence of her having unjustifiably left his house, in an action by a third person against him for necessaries furnished the wife. Burlen *v.* Shannon, 3 Gray, 387, 389. In giving the opinion of the court in this case, Shaw, C. J., said:

"We have no doubt that a decree upon a libel for divorce, directly determining the *status* of the parties, that is, whether two persons are or are not husband and wife; or, if they have been husband and wife, that such a decree divorcing them, either *a vinculo* or *a mensâ*, would be conclusive of the fact in all courts and everywhere, that they are so divorced. If it were alleged that a marriage was absolutely void, as being within the degrees of consanguinity, a decree of this court, on a libel by one of the parties against the other, adjudging the marriage to be void, or valid, would be conclusive everywhere. So, under the Rev. Stat. 76, § 4, where one party alleges and the other denies the subsistence of a valid marriage between them, the adjudication of the competent tribunal would be conclusive. The legal, social relation and condition of the parties, as being husband and wife or otherwise, divorced or otherwise, is what we understand by the term *status*. To this extent the decree in question had its full effect, by which every party is bound. It did not establish, but it recognized and presupposed the relation of husband and wife as previously subsisting; and as the final judgment was, that the grounds on which a divorce *a mensâ* was claimed were not established in proof, and the libel was dismissed, which was a final judgment, no change in the *status* of the parties was effected, and they stood, after the judgment, in the relation in which they stood at the commencement of the suit—that of husband and wife. Beyond this legal effect of a judgment in a case for divorce—that of determining the *status* of the parties—the law applies, as in other judicial proceedings: viz., that a judgment is not evidence in another suit, except in cases in which the same parties or their privies are litigating in regard to the same subject of controversy."

Authenticated copies of decrees of certain courts in the Russian province of Lithuania, on a question of pedigree, of which they have jurisdiction, are conclusive evidence of the facts adjudicated against all the world. Ennis *v.* Smith, 14 How. U. S. 400.]

is admissible; and also in cases of judgments *in rem*, which may be again mentioned hereafter.[1]

§ 527. A judgment, when used by way of *inducement*, or to establish a *collateral* fact, may be admitted, though the parties are not the same. Thus, the record of a conviction may be shown, in order to prove the legal infamy of a witness. So, it may be shown, in order to let in the proof of what was sworn at the trial; or to justify proceedings in execution of the judgment. So, it may be used to show that the suit was determined; or, in proper cases, to prove the amount which a principal has been compelled to pay for the default of his agent; or, the amount which a surety has been compelled to pay for the principal debtor; and, in general, to show the fact, that the judgment was actually rendered at such a time, and for such an amount.[2]

§ 527*a*. A record may also be admitted in evidence in favor of a stranger, against one of the parties, as containing a *solemn admission*, or judicial declaration by such party, in regard to a certain fact. But in that case it is admitted not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs. Thus, where a carrier brought trover against a person to whom he had delivered the goods intrusted to him, and which were lost, the record in this suit was held admissible for the owner, in a subsequent action brought by him against the carrier, as amounting to a confession in a court of record, that he had the plaintiff's goods.[3] So, also, where the plaintiff, in an action of trespass *quare clausum fregit*, claimed title by disseisin, against a grantee of the heirs of the disseisee, it was held, that the count, in a writ of right sued by those heirs against him, might be given in evidence, as their declaration and admission that their ancestor died disseised, and that the present plaintiff was in possession.[4] So, where two had been sued as partners, and had suffered judgment by default, the record was held competent evidence of an admission of the partnership,

[1] See *infra*, §§ 541, 542, 544, 555.

[2] See further *infra* §§ 538, 539; Lock *v.* Winston, 10 Ala. 849; King *v.* Chase, 15 N. Hamp. R. 9; Green *v.* New River Co. 4 T. R. 589; [Chamberlain *v.* Carlisle, 6 Foster, 510; Key *v.* Dent, 14 Md. 86.]

[3] Tiley *v.* Cowling, 1 Ld. Raym. 744, per Holt, C. J.; Bull. N. P. 243, s. c.; Parsons *v.* Copeland, 33 Maine, 370.

[4] Robinson *v.* Swett, 3 Greenl. 316; *supra*, § 195; Wells *v.* Compton, 3 Rob. Louis. R. 171. And see Kellenberger *v.* Sturtevant, 7 Cush. 465.

in a subsequent action brought by a third person against them as partners.[1] And on the same ground, in a libel by a wife for a divorce, because of the extreme cruelty of the husband, the record of his conviction of an assault and battery upon her, founded upon his plea of "guilty," was held good evidence against him, as a judicial admission of the fact. But if the plea had been "not guilty," it would have been otherwise.[2]

§ 528. The principle upon which judgments are held conclusive upon the parties requires that the rule should apply only to that which was *directly in issue*, and not to every thing which was incidentally brought into controversy during the trial. We have seen that the evidence must correspond with the allegations, and be confined to the point in issue. It is only to the material allegations of one party that the other can be called to answer; it is only upon such that an issue can properly be formed; to such alone can testimony be regularly adduced; and upon such an issue only is judgment to be rendered. A record, therefore, is not held conclusive as to the truth of any allegations, which were not material nor traversable; but as to things material and traversable, it is conclusive and final. The general rule on this subject was laid down with admirable clearness, by Lord Chief Justice De Grey, in the Duchess of Kingston's case,[3] and has been repeatedly confirmed and followed, without qualification. "From the variety of cases," said he, "relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose.[4] But neither the judgment of a concurrent nor

[1] Craig *v.* Carleton, 8 Shepl. 492.

[2] Bradley *v.* Bradley, 2 Fairf. 367; Woodruff *v.* Woodruff, Id. 475.

[3] 20 Howell's St. Tr. 538; expressly adopted and confirmed in Harvey *v.* Richards, 2 Gall. 229, per Story, J.; and in Hibsham *v.* Dulleban, 4 Watts, 183, per Gibson, C. J. And see King *v.* Chase, 15 N. Hamp. R. 9. [*The judgment of a tribunal having competent authority and full jurisdiction is presumptively upon the merits, and is, *primâ facie*, a bar to any after suit. Stearns *v.* Stearns, 32 Vt. 678. And the award of an arbitrator is, *primâ facie*, conclusive upon all matters of difference submitted. Harrison *v.* Creswick, 13 Com. B. 399, 416.]

[4] Thus, a judgment at law, against the

exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment." [1]

§ 529. It is only where the point in issue has been *determined*, that the judgment is a bar. If the suit is discontinued, or the plaintiff becomes nonsuit, or for any other cause there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive.[2]

§ 530. So, also, in order to constitute the former judgment a complete bar, it must appear to have been a *decision upon the merits:* and this will be sufficient, though the declaration were essentially defective, so that it would have been adjudged bad on demurrer.[3] But if the trial went off on a technical defect,[4] or because the debt was not yet due,[5] or because the court had not jurisdiction,[6] or because of a temporary disability of the plaintiff to sue,[7] or the like, the judgment will be no bar to a future action.

§ 531. It is well settled, that a former recovery may be shown in evidence, under the general issue, as well as pleaded in bar; and that when pleaded, it is conclusive upon the parties.[8] But whether it is *conclusive when given in evidence* is a point which has been much doubted. It is agreed, that when there has been no

validity of a bill, as having been given for a gambling debt, is conclusive of that fact in equity also. Pearce *v.* Gray, 2 Y. & C. 322. Plans, and documents referred to in the pleadings are conclusive upon the parties, if they are adopted by the issues and make part of the judgment; but not otherwise. Hobbs *v.* Parker, 1 Redingt. 143.

[1] See 2 Kent, Comm. 119–121; Story on Confl. of Laws, § 591–593, 603–610. This subject, particularly with regard to the identity of the issue or subject-matter in controversy, in actions concerning the realty, is ably reviewed and illustrated by Putnam, J., in Arnold *v.* Arnold, 17 Pick. 7–11. [Vose *v.* Morton, 4 Cush. 27, 31.]

[2] Knox *v.* Waldoborough, 5 Greenl. 185; Hull *v.* Blake, 13 Mass. 155; Sweigart *v.* Berk, 8 S. & R. 305; Bridge *v.* Sumner, 1 Pick. 371; 3 Bl. Comm. 296, 377. So, if the judgment has been reversed. Wood *v.* Jackson, 8 Wend. 9. If there has been no judgment, it has been ruled that the pleadings are not admissible as evidence of the facts recited in them. Holt *v.* Miers, 9 C. & P. 191. [And where, in a decree in a suit in equity, there has been *inadvertently inserted* a direction as to the distribution of a certain fund, it was held that the parties interested were not affected thereby. Holland *v.* Cruft, 3 Gray, 162, 187.]

[3] Hughes *v.* Blake, 1 Mason, 515, 519, per Story, J. [A judgment of nonsuit by the Supreme Court of Massachusetts, entered by consent of the parties, on an agreed statement of facts, has been held not be a bar to a suit between the same parties upon the same cause of action, though the state court, in pronouncing its judgment, may have expressed an opinion upon the merits of the plaintiff's case. Homer *v.* Brown, 16 How. U. S. 354.]

[4] Ibid.; Lane *v.* Harrison, Munf. 573; McDonald *v.* Rainor, 8 Johns. 442; Lepping *v.* Kedgewin, 1 Mod. 207.

[5] N. Eng. Bank *v.* Lewis, 8 Pick. 113.

[6] Estill *v.* Taul, 2 Yerg. 467, 470.

[7] Dixon *v.* Sinclair, 4 Verm. 354.

[8] Trevivan *v.* Lawrence, 1 Salk. 276; 3 Salk. 151, s. c.; Outram *v.* Morewood. 3 East, 346; Kitchen *v.* Campbell, 3 Wils. 304; 2 W. Bl. 827, s. c.; [Warren *v.* Comings, 6 Cush. 103, 104; Chamberlain *v.* Carlisle, 6 Foster, 540.]

opportunity to plead a matter of estoppel in bar, and it is offered in evidence, it is equally conclusive, as if it had been pleaded.[1] And it is further laid down, that when the matter, to which the estoppel applies, is alleged by one party, and the other, instead of pleading the estoppel, chooses to take issue on the fact, he waives the benefit of the estoppel, and leaves the jury at liberty to find according to the fact.[2] This proposition is admitted, in its application to estoppels arising from an act of the party himself, in making a deed, or the like; but it has been denied in its application to judgments recovered; for, it is said, the estoppel, in the former case, is allowed for the benefit of the other party, which he may waive; but the whole community have an interest in holding the parties conclusively bound by the result of their own litigation. And it has been well remarked, that it appears inconsistent, that the authority of a *res judicata* should govern the *court*, when the matter is referred to them by pleading, but that a *jury* should be at liberty altogether to disregard it, when the matter is referred to them in evidence; and, that the operation of so important a principle should be left to depend upon the technical forms of pleading in particular actions.[3] And notwithstanding there are many respectable opposing decisions, the weight of authority, at least in the United States, is believed to be in favor of the position, that where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel.[4]

[1] Howard *v.* Mitchell, 14 Mass. 241; Adams *v.* Barnes, 17 Mass. 365. So, in equity. Dows *v.* McMichael, 6 Paige, 139.

[2] Ibid.

[3] Phil. & Am. on Evid. 512.

[4] This point was briefly, but very forcibly, argued by Kennedy, J., in Marsh *v.* Pier, 4 Rawle, 288, 289, in the following terms: The propriety of those decisions, which have admitted a judgment in a former suit to be given in evidence to the jury, on the trial of a second suit for the same cause between the same parties, or those claiming under them, but at the same time have held that the jury were not absolutely bound by such judgment, because it was not pleaded, may well be questioned. The maxim, *nemo debet bis vexari si constet curiæ quod sit pro una et eadem causa*, being considered, as doubtless it was, established for the protection and benefit of the party, he may therefore waive it: and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it ought to be recollected that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence it would seem to follow, that, wherever on the trial of a cause from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause, between the same parties, or those claiming under them, is properly given in evidence to the jury, that it ought to be considered conclusively binding on both court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, *expedit reipublicæ ut sit finis litium*, which is as old as

[* § 531*a*. This question is carefully examined by us, in a case in Vermont,[1] and the earlier cases reviewed. The form of pleading an estoppel is there considered, and that adopted in *Shelly* v. *Wright*[2] approved. But it is there said, that when a former adjudication is relied upon, as having determined the entire controversy now in hand, it need never be pleaded as an estoppel, but is an equitable defence, and in many actions may be given in evidence under the general issue; and when required to be pleaded specially,

the law itself, and a part of it, will be exploded and entirely disregarded. But if it be part of our law, as seems to be admitted by all that it is, it appears to me, that the court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors, to the preservation of the public tranquillity and happiness. The result, among other things, would be, that the tribunals of the state would be bound to give their time and attention to the trial of new actions, for the same causes, tried once or oftener, in former actions between the same parties or privies, without any limitation, other than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally of other causes, which never have passed *in rem judicatam*. The effect of a judgment of a court, having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, &c., which may, or may not be enforced at the election of the other party; because, whatever the parties have done by compact, they may undo by the same means. But a judgment of a proper court, being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries, ever afterwards, as long as it shall remain in force and unreversed." A similar view, with the like distinction, was taken by Huston, J., in Killhefler *v.* Herr, 17 S. & R. 325, 326. See also to the point, that the evidence is conclusive, Shafer *v.* Stonebraker, 4 G. & J. 345; Cist *v.* Zigler, 16 S. & R. 282; Betts *v.* Starr, 5 Conn. 550, 553; Preston *v.* Harvey, 2 H. & Mun. 55; Estill *v.* Taul, 2 Yerg. 467, 471; King *v.* Chase, 15 N. Hamp. R. 9. In *New York*, as remarked by Savage, C. J., in Wood *v.* Jackson, 8 Wend. 24, 25, the decisions have not been uniform, nor is it perfectly clear, where the weight of authority or of argument lies. But in the later case of Lawrence *v.* Hunt, 10 Wend. 83, 84, the learned judge, who delivered the opinion of the court, seemed inclined in favor of the conclusiveness of the evidence. [This case was confirmed in Thompson *v.* Roberts, 24 How. 233.] See, to the same point, Hancock *v.* Welch, 1 Stark. R. 347; Whately *v.* Menheim, 2 Esp. 608; Strutt *v.* Bovingdon, 5 Esp. 56–59; Rex *v.* St. Pancras, Peake's Cas. 220; Duchess of Kingston's case, 20 Howell's St. Tr. 538; Bird *v.* Randall, 3 Burr. 1353. The contrary decision of Vooght *v.* Winch, 2 B. & Ald. 662, was cited, but without being approved, by Best, C. J., in Stafford *v.* Clark, 1 C. & P. 405, and was again discussed in the same case, 2 Bing. 377; but each of the learned judges expressly declined giving any opinion on the point. This case, however, is reconciled with other English cases, by Mr. Smith, on the ground, that it means no more than this, that where the party might plead the record by estoppel, but does not, he waives its conclusive character. See 2 Smith's Leading Cases, 434, 444, 445. The learned author, in the note here referred to, has reviewed the doctrine of estoppels in a masterly manner. The judgment of a court-martial, when offered in evidence in support of a justification of imprisonment by reason of military disobedience and misconduct, is not regarded as conclusive; for the special reasons stated by Lord Mansfield in Wall *v.* McNamara, 1 T. R. 536. See acc. Hannaford *v.* Hunn, 2 C. & P. 148.

[1] [* Gray *v.* Pingry, 17 Vt. R. 419.

[2] Willes, 9.

is not required to be pleaded with greater strictness than any other plea in bar. But when the former trial is relied upon as settling some collateral matter of fact, involved in the present controversy, it must, to be conclusive, be pleaded strictly as an estoppel, and the record vouched in support of the plea must contain, upon its face, evidence that the particular fact was in issue, and was found by the triers. And if the record do not show this, and it becomes necessary to resort to oral evidence to show it, the matter cannot be pleaded as an estoppel, but it becomes a question for the jury; — but, nevertheless, if it be proved to the satisfaction of the jury, that the fact was determined in the former controversy between the same parties, it is equally conclusive, both upon the parties and the jury, as if it appeared of record. We are not aware that the more recent decisions have in any respect modified the foregoing propositions.] [1]

§ 532. When a former judgment is shown by way of bar, whether by pleading, or in evidence, it is competent for the plaintiff to reply, that it did *not relate to the same property or transaction* in controversy in the action, to which it is set up in bar; and the question of identity, thus raised, is to be determined by the jury, upon the evidence adduced.[2] And though the declaration in the

[1] Perkins *v.* Walker, 19 Vt. R. 144, where the subject is very ably discussed by Bennett, J.]

[2] So, if a deed is admitted in pleading, proof of the identity may still be required. Johnston *v.* Cottingham, 1 Armst. Macartn. & Ogle, R. 11. And see Garrott *v.* Johnson, 11 G. & J. 173. [A verdict and judgment for B in an action at law brought against him by A, for obstructing the flow of water to A's mill, in which action B put in the plea of "not guilty," and a specification of defence denying both A's right and any injury thereto, are no bar to a suit in equity by A against B to restrain such obstruction, unless it appear either by the record, or by extrinsic evidence that B prevailed in the action at law because A had failed to satisfy the jury that B had violated A's rights. McDowell *v.* Langdon, 3 Gray, 513. To prove that the 24th day of a certain month was a reasonable time in which to perform a certain contract, the record of a former judgment between the same parties establishing that the 22d day of the same month was within a reasonable time, is not competent evidence. Sage *v.* McAlpin, 11 Cush. 165.

A verdict in favor of the defendant in an action against one of two joint trespassers, which would be conclusive evidence in a subsequent action against him by the same plaintiff, will not be conclusive in an action by such plaintiff against the co-trespasser. Sprague *v.* Oakes, 19 Pick. 455–458. Judgment and satisfaction in an action on a bond given to dissolve an attachment, constitute no defence to an action on a bond given to obtain a review of the action in which the attachment was made, for a breach of a condition to enter such review at the next term of the court. Lehan *v.* Good, 8 Cush. 302–309.

To an action for goods sold, the defendant answered that he had, in part payment of the price, given a special promise to pay certain debts of the plaintiff, and had performed that promise, and that he had otherwise paid the remainder of the price. The defendant recovering in this action, the plaintiff brought an action on the special promise, and it was held that the judgment for the defendant in the former action was no bar to the subsequent action on the special promise. Harding *v.* Hale, 2 Gray, 399, 400. A having contracted to convey land to B, conveyed it to C. B brought a bill in equity against

former suit may be broad enough to include the subject-matter of the second action, yet if, upon the whole record, it remains doubtful whether the same subject-matter were actually passed upon, it seems that parol evidence may be received to show the truth.[1] So, also, if the pleadings present several distinct propositions, and the evidence may be referred to either or to all with the same propriety, the judgment is not conclusive, but only *primâ facie* evidence upon any one of the propositions, and evidence *aliunde* is admissible to rebut it.[2] Thus where the plaintiff in a former action declared upon a promissory note, and for goods sold, but upon executing the writ of inquiry, after judgment by default, he was not prepared with evidence on the count for goods sold, and therefore took his damages only for the amount of the note; he was admitted, in a second action for the goods sold, to prove the fact by parol, and it was held no bar to the second action.[3] And upon the same principle, if one wrongfully take

A and C for a specific performance of the contract, but judgment was rendered thereon for the respondents, A and C. B subsequently brought an action at law against A to recover damages for the breach of the contract, and it was held that the judgment in the equity suit was no bar to the action at law. Buttrick *v.* Holden, 8 Cush. 233–236.]

[1] It is obvious that, to prove what was the point in issue in a previous action at common law, it is necessary to produce the *entire record*. Foot *v.* Glover, 4 Blackf. 313. And see Morris *v.* Keyes, 1 Hill, 540; Glasscock *v.* Hays, 4 Dana, 59; [Drake *v.* Merrill, 2 Jones, Law, 368. A petitioner for partition, claiming title under a judgment, may show by parol evidence that his name was incorrectly stated in the judgment, through mistake; and it is not necessary for this purpose that the mistake should be previously corrected on the record. And where there is a difference between the description of the land of which partition is demanded in a petition for partition, and the description of land in a judgment under which the petitioner claims title, he may show by parol, that the land described in both is the same, and if he establishes this fact, then the former judgment is conclusive evidence of his title thereto. Wood *v.* Le Baron, 8 Cush. 471, 473; Root *v.* Fellowes, 6 Cush. 29; Washington Steam Packet Co. *v.* Sickles, 24 How. 333.]

[2] Henderson *v.* Kenner, 1 Richardson, R. 574.

[3] Seddon *v.* Tutop, 6 T. R. 608; Hadley *v.* Green, 2 Tyrwh. 390. See acc. Bridge *v.* Gray, 14 Pick. 25; Webster *v.* Lee, 5 Mass. 334; Ravee *v.* Farmer, 4 T. R. 146; Thorpe *v.* Cooper, 5 Bing. 116; Phillips *v.* Berick, 16 Johns. 136. But if the jury have passed upon the claim, it is a bar though they may have disallowed it for want of sufficient evidence. Stafford *v.* Clark, 2 Bing. 377, 382, per Best, C. J.; Phillips *v.* Berick, *supra*. So, if the fact constituting the basis of the claim was proved, among other things, before an arbitrator, but he awarded no damages for it, none having been at that time expressly claimed. Dunn *v.* Murray, 9 B. & C. 780. So, if he sues for part only of an entire and indivisible claim; as, if one labors for another a year, on the same hiring, and sues for a month's wages, it is a bar to the whole. Miller *v.* Covert, 1 Wend. 487. But it seems that, generally, a running account for goods sold and delivered does not constitute an entire demand. Badger *v.* Titcomb, 15 Pick. 415. *Contra*, Guernsey *v.* Carver, 8 Wend. 492. So, if, having a claim for a greater amount consisting of several distinct particulars, he sues in an inferior court, and takes judgment for a less amount. Bagot *v.* Williams, 3 B. & C. 235. So, if he obtains an interlocutory judgment for his whole claim, but, to avoid delay, takes a rule to compute on one item only, and enters a *nolle prosequi* as to the other. Bowden *v.* Horne, 7 Bing. 716.

another's horse and sell him, applying the money to his own use, a recovery in trespass, in an action by the owner for the taking, would be a bar to a subsequent action of *assumpsit* for the money received, or for the price, the cause of action being proved to be the same.[1] But where, from the nature of the two actions, the

[1] 17 Pick. 13, per Putnam, J.; Young *v.* Black, 7 Cranch, 565; Livermore *v.* Herschell, 3 Pick. 33; [Norton *v.* Doherty, 3 Gray, 372.] Whether parol evidence would be admissible, in such case, to prove that the damages awarded in trespass were given merely for the tortious taking, without including the value of the goods, to which no evidence had been offered; *quære*, and see Loomis *v.* Green, 7 Greenl. 386. [The assignees of an insolvent debtor brought a bill in equity to set aside conveyances of property made by the debtor to the respondents, as made and taken either without consideration and in fraud of creditors, or by way of unlawful preference, contrary to the insolvent laws. The bill charged the respondents in the common form with combining and confederating with divers other persons to the complainants unknown, and prayed for relief against the respondents jointly and severally; and the court after a hearing upon the merits decreed that the demands set up by the respondents, in their several answers were justly due them from the insolvent, and that the conveyances of property in payment thereof, were not made in violation of the insolvent laws, and dismissed the bill. The assignees subsequently brought an action of trover against one of the respondents in the equity suit, for the same property, and it was held that the decree in that suit was a bar to the action of trover. Bigelow *v.* Winsor, 1 Gray, 299, 303; Shaw, C. J., in delivering the opinion of the court in this case, said: "One valid judgment by a court of competent jurisdiction, between the same parties, upon considerations as well of justice as of public policy, is held to be conclusive, except where a review, an appeal, or rehearing in some form, is allowed and regulated by law. No man is to be twice vexed with the same controversy. *Interest reipublicæ ut finis sit litium.*

"To ascertain whether a past judgment is a bar to another suit, we are to consider, first, whether the subject-matter of legal controversy, which is proposed to be brought before any court for adjudication, has been drawn in question, and within the issue of a former judicial proceeding, which has terminated in a regular judgment on the merits, so that the whole question may have been determined by that adjudication; secondly, whether the former litigation was between the same parties, in the same right of capacity litigating in the subsequent suit, or their privies respectively, claiming through or under them, and bound and estopped by that which would bind and estop those parties; and, thirdly, whether the former adjudication was had before a court of competent jurisdiction to hear and decide on the whole matter of controversy, embraced in the subsequent suit.

"It is no objection that the former suit embraced more subjects of controversy, or more matter than the present; if the entire subject of the present controversy was embraced in it, it is sufficient, it is *res judicata*.

"Nor is it necessary that the parties should be in all respects the same. If by law a judgment could have been given in that suit for this plaintiff against this defendant, for the present cause of action, it has passed into judgment. Suppose trespass for assault and battery against five, and verdict and judgment for all the defendants; then a new suit for the same trespass, by the same plaintiff, against one of the defendants, the former judgment is a good bar. In actions of tort, the cause of action is several, as well as joint; and if, upon the evidence, one defendant was chargeable with the trespass, a verdict and judgment might have been rendered against him severally in the first suit, although the other defendants had a verdict.

"Nor is it essential, that the two tribunals should have the same jurisdiction in other respects, provided the court was of competent jurisdiction to adjudicate upon the entire matter in controversy, in the subsequent suit. Whether it be a court of law or equity, of admiralty or of probate, if in the matter in controversy between the parties, with the same object in view, that of remedy between them, the court had jurisdiction to decide, it is a legal adjudication binding on these parties."

To render a former judgment between the same parties admissible in evidence in another action pending between them, it must appear that the fact sought to be

cause of action cannot be the same in both, no averment will be received to the contrary. Therefore, in a writ of right, a plea in

proved by the record, was actually passed upon by the jury in finding their verdict in the former suit. It is not necessary that it should have been directly and specifically put in issue by the pleadings; but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled, in the suit in which the former judgment is offered in evidence. And parol evidence is admissible to show that the same fact was submitted to, and passed upon by, the jury in the former action; because, in many cases, the record is so general in its character, that it could not be known, without the aid of such proof, what the precise matter of controversy was at the trial of the former action. Thus, where the fact sought to be established by the plaintiffs in a suit is the existence of a copartnership between the defendants, under a certain name, a former judgment recovered by the same plaintiffs against the same defendants, as copartners, under such name, on a note given at the same time with the one in suit, is admissible, although not conclusive evidence, of that fact. Dutton *v.* Woodman, 9 Cush. 255, 261. Eastman *v.* Cooper, 15 Pick. 276, 279, 285. But in an action of *replevin* for a piano, a former judgment between the same parties, in an action of *trespass quare clausum*, in which the taking-away of the same piano was alleged by way of aggravation, is not conclusive as to the ownership of the piano; as the question of the title to the piano was only indirectly involved. Gilbert *v.* Thompson, 9 Cush. 348, 350; Potter *v.* Baker, 19 N. H. 166. Lamprey *v.* Nudd, 9 Foster, 299. A judgment for the demandant in a real action with possession taken under it, will preclude the tenant in that action from afterwards asserting against such demandant any personal property in the buildings which he had erected on the land. Doak *v.* Wiswell, 33 Maine, 355. See Small *v.* Leonard, 26 Verm. 209; Morgan *v.* Barker, Ib. 602; Briggs *v.* Wells, 12 Barb. 567. A sued out a writ of entry to foreclose a mortgage given by B to secure the payment of five promissory notes. B defended, pleading the general issue, and specifying certain grounds of defence. A trial was had, and a verdict found for A upon which conditional judgment was subsequently rendered for him; and the amount thereof not being paid, A took possession of the mortgaged premises. Pending the foregoing proceedings, A brought an action against B on one of the five promissory notes, and B put in his answer, defending on the same grounds as he had defended the action on the mortgage. The suit on the note came to trial after judgment was entered in the former action; and it was held, that B was estopped by said judgment from again availing himself of the grounds of defence upon which he had before insisted. Burke *v.* Miller, 4 Gray, 114, 116. See also Sargent *v.* Fitzpatrick, Ib. 511, 514. A contracted with B to forward and deliver certain goods belonging to A. B intrusted them to a carrier, who failed to deliver them. A brought trover against the carrier; and the carrier obtained in this action a judgment on the merits against A. B also sued the carrier for the non-delivery of the goods, and it was held that the judgment in the suit brought by A was a bar to the suit by B. Greene *v.* Clarke, 2 Kernan, 343. To an action by A against B on a promissory note given by B to A in payment for goods, B pleaded want of consideration by reason of false representations of A concerning the value of such goods. A recovered judgment for part only of the note. It was held that this was a bar to a subsequent action brought by B against A to recover damages for such false representations. Burnett *v.* Smith, 4 Gray, 50. In replevin by a tenant against his landlord, who had distrained for rent in arrear, it was held that a verdict in summary proceedings instituted by the landlord, to remove the tenant for default in the payment of rent, that no rent was due, was conclusive on that point — the same rent being in question in both proceedings. White *v.* Coatsworth, 2 Selden, N.Y. 137. An action brought for a part of an entire and indivisible demand, and a recovery therein, will bar a subsequent suit for the residue of the same demand. Staples *v.* Goodrich, 21 Barb. 317. Warren *v.* Comings, 6 Cush. 103.

Where it appears at a trial in this state (New York), that in a former suit between the same parties in a sister state, the causes of action here specially declared on and all growing out of the same subject-matter, could have been proved in that suit, and that the same proof offered here was, in the former suit, properly introduced and considered on the merits, and judgment rendered for the defendant, such judgment is a bar to the second suit. Baker *v.* Rand, 13 Barb. 152.]

bar that the same title had been the sole subject of litigation in a former action of trespass *quare clausum fregit*, or in a former writ of entry, between the same parties, or others privy in estate, was held to be a bad plea.[1] Whether the judgment in an action of trespass, upon the issue of *liberum tenementum*, is admissible in a subsequent action of ejectment between the same parties, is not perfectly clear; but the weight of American authority is in favor of admitting the evidence.[2]

§ 533. The effect of *former recovery* has been very much discussed, in the cases where *different actions in tort* have *successively been brought*, in regard to the same chattel; as, for example, an action of trover, brought after a judgment in trespass. Here, if title to the property was set up by the defendant in the first action, and it was found for him, it is clearly a bar to a second action for the same chattel;[3] even though brought against one not a party to the former suit, but an accomplice in the original taking.[4] So, a judgment for the defendant in trover, upon trial of the merits, is a bar to an action for money had and received, for the money arising from the sale of the same goods.[5] But, whether the plaintiff, having recovered judgment in trespass, without satisfaction, is thereby barred from afterwards maintaining trover against another person for the same goods, is a point upon which there has been great diversity of opinion. On the one hand it is said that, by the recovery of judgment in trespass for the full value, the title to the property is vested in the defendant, the judgment being a security for the price; and that the plaintiff cannot take them again, and therefore cannot recover the value of another.[6] On the other hand, it is argued, that the rule of *transit in rem judicatam* extends no farther than to bar another action for the same cause against the same party;[7] that, on principle, the original judgment can imply nothing more than a promise by the defendant to pay the amount, and an agreement by the plaintiff

[1] Arnold *v.* Arnold, 17 Pick. 4; Bates *v.* Thompson, Id. 14, n.; Bennett *v.* Holmes, 1 Dev. & Bat. 486.

[2] Hoey *v.* Furman, 1 Barr, 295. And see Meredith *v.* Gilpin, 6 Price, 146; Kerr *v.* Chess, 7 Watts, 371; Foster *v.* McDivit, 9 Watts, 349.

[3] Putt *v.* Roster, 2 Mod. 218; 3 Mod. 1, s. c. nom. Putt *v.* Rawstern, see 2 Show. 211; Skin. 40, 57; T. Raym. 472, s. c. [See also Greely *v.* Smith, 3 W. & M. 236.]

[4] Ferrers *v.* Arden, Cro. El. 668; 6 Co. 7, s. c.

[5] Kitchen *v.* Campbell, 3 Wils. 304; 2 W. Bl. 827, s. c.

[6] Broome *v.* Wooton, Yelv. 67; Adams *v.* Broughton, 2 Stra. 1078; Andrews 18, s. c.; White *v.* Philbrick, 5 Greenl. 147; Rogers *v.* Thompson, 1 Rice, 60.

[7] Drake *v.* Mitchell, 3 East, 258; Campbell *v.* Phelps, 1 Pick. 70, per Wilde, J.

that, upon payment of the money by the defendant, the chattel shall be his own; and that it is contrary to justice and the analogies of the law, to deprive a man of his property without satisfaction, unless by his express consent. *Solutio pretii emptionis loco habetur.* The weight of authority seems in favor of the latter opinion.[1]

§ 534. It is not necessary, to the conclusiveness of the former judgment, that *issue* should have been *taken upon the precise point* which is controverted in the second trial; it is sufficient, if that point was essential to the finding of the former verdict. Thus, where the parish of Islington was indicted and convicted for not repairing a certain highway, and afterwards the parish of St. Pancras was indicted for not repairing the same highway, on the ground, that the line dividing the two parishes ran along the middle of the road; it was held, that the former record was admissible and conclusive evidence for the defendants in the latter case, to show that the road was wholly in Islington; for the jury must have found that it was so, in order to find a verdict against the defendants.[2]

[1] Putt *v.* Rawstern, 3 Mod. 1; Jenk. Cent. p. 189; 1 Shep. Touchst. 227; More *v.* Watts, 12 Mod. 428; 1 Ld. Raym. 614, s. c.; Luttrell *v.* Reynell, 1 Mod. 282; Bro. Abr. tit. *Judgm.* pl. 98; Moreton's case, Cro. El. 30; Cooke *v.* Jenner, Hob. 66; Livingston *v.* Bishop, 1 Johns. 290; Rawson *v.* Turner, 4 Johns. 425; 2 Kent, Comm. 388; Curtis *v.* Groat, 6 Johns. 168; Corbett *et al. v.* Barnes, W. Jones, 377; Cro. Car. 443; 7 Vin. Abr. 341, pl. 10, s. c.; Barb *v.* Fish, 5 West. Law Journ. 278. The foregoing authorities are cited as establishing *principles* in opposition to the doctrine of Broome *v.* Wooton. The following cases are *direct adjudications* to the contrary of that case. Sanderson *v.* Caldwell, 2 Aiken, 195; Osterhout *v.* Roberts, 8 Cowen, 43; Elliott *v.* Porter, 5 Dana, 299. See also Campbell *v.* Phelps, 1 Pick. 70, per Wilde, J.; Claxton *v.* Swift, 2 Show. 111, 494; Jones *v.* McNeil, 2 Bail. 466; Cooper *v.* Shepherd, 2 M. G. & S. 266. The just deduction from all the authorities, as well as the right conclusion upon principle, seems to be this, — that the *judgment* in trespass or trover will not *transfer the title* of the goods to the defendant, although it is pleadable in bar of any action afterwards brought by the same plaintiff, or those in privity with him, against the same defendant, or those in privity with him. See 3 Am. Law Mag. pp. 49–57. And as to the original parties, it seems a just rule, applicable to all personal actions, that wherever two or more are liable *jointly* and *not severally*, a judgment against one, though without satisfaction, is a bar to another action against any of the others for the same cause; but it is not a bar to an action against a stranger. As far as an action in the form of tort can be said to be exclusively joint in its nature, this rule may govern it, but no farther. This doctrine, as applicable to joint contracts, has been recently discussed in England, in the case of King *v.* Hoare, 13 M. & W. 494, in which it was held that the judgment against one alone was a bar to a subsequent action against the other.

[2] Rex *v.* St. Pancras, Peake's Cas. 219; 2 Saund. 159, note (10), by Williams. And see Andrews *v.* Brown, 3 Cush. 130. So, where, upon a complaint for flowing the plaintiff's lands, under a particular statute, damages were awarded for the past, and a prospective assessment of damages made, for the future flowage; upon a subsequent application for an increase of the assessment, the defendant was precluded from setting up a right in himself to flow the land, for the right must necessarily have been determined in the previous proceedings. Adams *v.*

§ 535. We have already observed, in general, that *parties* in *the larger legal sense*, are all persons having a right to control the proceedings, to make defence, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies. Upon this ground, the lessor of the plaintiff in ejectment, and the tenant, are the real parties to the suit, and are concluded in any future action in their own names, by the judgment in that suit.[1] So, if there be a trial between B.'s lessee and E., who recovers judgment; and afterwards another trial of title to the same lands, between E.'s lessee and B., the former verdict and judgment will be admissible in evidence in favor of E.'s lessee against B.; for the real parties in both cases were B. and E.[2]

§ 536. The case of *privies*, which has already been mentioned, is governed by principles similar to those which have been stated in regard to admissions;[3] the general doctrine being this, that the person who represents another, and the person who is represented, have a legal identity; so that whatever binds the one, in relation to the subject of their common interest, binds the other also. Thus, a verdict and judgment for or against the ancestor bind the heir.[4] So, if several successive remainders are limited in the same deed, a judgment for one remainder-man is evidence for the next in succession.[5] But a judgment, to which a tenant for life was a party, is not evidence for or against the reversioner, unless he came into the suit upon *aid prayer*.[6] So, an assignee is bound by a judgment against the assignor, prior to the assignment.[7] There is the like privity between the ancestor and all claiming under him, not only as heir, but as tenant in dower, tenant by the courtesy, legatee, devisee, &c.[8] A judgment of ouster, in a *quo warranto*, against the incumbent of an office, is conclusive evidence against

Pearson, 7 Pick. 341. [*The judgment is conclusive, not only as to the precise facts involved directly in the former issue, but as to all facts incidentally involved, and which were in fact passed upon, as the foundation of the former decision. Reg. v. Hartington, 4 Ellis & Bl. 780.]

[1] Doe v. Huddart, 2 Cr. M. & R. 316, 322; Doe v. Preece, 1 Tyrw. 410; Aslin v. Parkin, 2 Burr. 665; Wright v. Tatham, 1 Ad. & El. 3, 19; Bull. N. P. 232; Graves v. Joice, 5 Cowen, 261, and cases there cited; [Amick v. Oyler, 25 Penn. St. R. 506.]

[2] Bull. N. P. 232; Calhoun v. Dunning, 4 Dall. 120. So, a judgment in trespass against one who justifies as the servant of J. S. is evidence against another defendant in another action, it appearing that he also acted by the command of J. S., who was considered the real party in both cases. Kinnersly v. Orpe, 2 Doug. 517; 1 Doug. 56.

[3] *Supra*, §§ 180, 189, 523.

[4] Locke v. Norborne, 3 Mod. 141.

[5] Bull. N. P. 232; Pyke v. Crouch, 1 Ld. Raym. 730.

[6] Bull. N. P. 232.

[7] Adams v. Barnes, 17 Mass. 365.

[8] Locke v. Norborne, 3 Mod. 141; Outram v. Morewood, 3 East, 353.

those who derive their title to office under him.[1] Where one sued for diverting water from his works, and had judgment; and afterwards he and another sued the same defendants for a similar injury; the former judgment was held admissible in evidence for the plaintiffs, being *primâ facie* evidence of their privity in estate with the plaintiff in the former action.[2] The same rule applies to all grantees, they being in like manner bound by a judgment concerning the same land, recovered by or against their grantor, prior to the conveyance.[3]

§ 537. Upon the foregoing principles, it is obvious that, as a general rule, a verdict and judgment in a *criminal case*, though admissible to establish the fact of the mere *rendition* of the judgment, cannot be given in evidence in a civil action, to establish *the facts on which it was rendered*.[4] If the defendant was convicted, it may have been upon the evidence of the very plaintiff in the civil action; and if he was acquitted, it may have been by collusion with the prosecutor. But beside this, and upon more general grounds, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same. The defendant could not avail himself, in the criminal trial, of any admissions of the plaintiff in the civil action; and, on the other hand, the jury in the civil action must decide upon the mere preponderance of evidence; whereas, in order to a criminal conviction, they must be satisfied of the party's guilt, beyond any reasonable doubt. The same principles render a judgment in a *civil action* inadmissible evidence in a criminal prosecution.[5]

[1] Rex *v.* Mayor, &c. of York, 5 T. R. 66, 72, 76; Bull. N. P. 231; Rex *v.* Hebden, 2 Stra. 1109, n. (1).

[2] Blakemore *v.* Glamorganshire Canal Co. 2 C. M. & R. 133.

[3] Foster *v.* E. of Derby, 1 Ad. & El. 787, per Littledale, J.

[4] Mead *v.* Boston, 3 Cush. 404. In one case it was held, that the deposition of a witness, taken before the coroner, on an inquiry touching the death of a person killed by a collision between two vessels, was receivable in evidence, in an action for the negligent management of one of them, if the witness be shown to be beyond sea. Sills *v.* Brown, 9 C. & P. 601, per Coleridge, J. But *quære*, and see 2 Phil. Evid. 74, 75; *infra*, § 553.

[5] 1 Bull. N. P. 233; Rex *v.* Boston, 4 East, 572; Jones *v.* White, 1 Stra. 68, per Pratt, J. Some of the older authorities have laid much stress upon the question, whether the plaintiff in the civil action was or was not a witness on the indictment. Upon which Parke, B., in Blakemore *v.* Glamorganshire Canal Co. 2 C. M. & R. 139, remarked as follows: "The case being brought within the general rule, that a verdict on the matter in issue is evidence for and against parties and privies, no exception can be allowed in the particular action, on the ground that a circumstance occurs in it, which forms one of the reasons why verdicts between different parties are held to be inadmissible, any more than the absence of all such circumstances, in a particular case, would be allowed to form an exception to the general rule, that verdicts between other parties cannot be received. It is much wiser, and more convenient for the administration of justice, to abide as much

§ 538. But, as we have before remarked,[1] the verdict and judgment in any case are always admissible to *prove the fact*, that the *judgment was rendered*, or the *verdict given;* for there is a material difference between proving the existence of the record and its tenor, and using the record as the medium of proof of the matters of fact recited in it. In the former case, the record can never be considered as *res inter alios acta;* the judgment being a public transaction, rendered by public authority, and being presumed to be faithfully recorded. It is therefore the only proper legal evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, whoever may be the parties to the suit in which it is offered in evidence. Thus, if one indicted for an assault and battery has been acquitted, and sues the prosecutor for malicious prosecution, the record of acquittal is evidence for the plaintiff, to establish that fact, notwithstanding the parties are not the same. But if he were convicted of the offence, and then is sued in trespass for the assault, the record in the former case would not be evidence to establish the fact of the assault; for, as to the matters involved in the issue, it is *res inter alios acta*.

§ 539. The *distinction* between the admissibility of a judgment *as a fact*, and as *evidence of ulterior facts*, may be further *illustrated* by the instances in which it has been recognized. Thus, a judgment against the sheriff for the misconduct of his deputy is evidence against the latter of the fact, that the sheriff has been compelled to pay the amount awarded, and for the cause alleged; but it is not evidence of the fact upon which it was founded,

as possible by general rules." A record of judgment in a criminal case, upon a plea of "guilty," is admissible in a civil action against the party, as a solemn judicial confession of the fact; and, according to some authorities, it is conclusive. But its conclusiveness has since been doubted; for the plea may have been made to avoid expense. See Phil. & Am. on Evid. 523, n. (4); 2 Phil. Evid. 25; Bradley *v.* Bradley, 2 Fairf. 367; Regina *v.* Moreau, 12 Jur. 626; 11 Ad. & El. 1028, N. S.; Clark *v.* Irvin, 9 Ham. 131. But the plea of *nolo contendere* is an admission for that trial only, and is not admissible in a subsequent action. Commonwealth *v.* Horton, 9 Pick. 206; Guild *v.* Lee, 3 Law Reporter, p. 423; *supra*, §§ 179, 216. In Regina *v.* Moreau, which was an indictment for perjury in an affidavit, in which the defendant had sworn that the prosecutor was indebted to him in £40, and the civil suit being submitted to arbitration, the arbitrator awarded that nothing was due, the award was offered in evidence against the prisoner, as proof of the falsity of his affidavit; but the court held it as merely the declaration of the arbitrator's opinion, and therefore not admissible in a criminal proceeding. [The record of the conviction of a thief, on his plea of "guilty" to an indictment against him alone for stealing certain property, is not admissible in evidence to prove the theft, on the trial of a receiver of that property, upon an indictment against him alone, which indictment does not aver that the thief has been convicted. Commonwealth *v.* Elisha, 3 Gray, 460.]

[1] *Supra*, § 527.

namely, the misconduct of the deputy, unless he was notified of the suit and required to defend it.[1] So it is in other cases, where the officer or party has a remedy over.[2] So, where the record is matter of inducement, or necessarily introductory to other evidence; as, in an action against the sheriff for neglect, in regard to an execution;[3] or to show the testimony of a witness upon a former trial;[4] or where the judgment constitutes one of the muniments of the party's title to an estate; as, where a deed was made under a decree in chancery,[5] or a sale was made by a sheriff, upon an execution.[6] So, where a party has concurrent remedies against several, and has obtained satisfaction upon a judgment against one, it is evidence for the others.[7] So, if one be sued alone, upon a joint note by two, it has been held, that the judgment against him may be shown by the defendants, in bar of a second suit against both, for the same cause, to prove that, as to the former defendant, the note is extinct.[8] So a judgment *inter alios* is admissible, to show the character in which the possessor holds his lands.[9]

§ 539*a*. But where the *contract is several as well as joint*, it seems that the judgment in an action against one is no bar to a subsequent action against all; nor is the judgment against all, jointly, a bar to a subsequent action against one alone. For when a party enters into a joint and several obligation, he in effect agrees that he will be liable to a joint action, and to a several action for the debt. In either case, therefore, the bar of a former judgment would not seem to apply; for, in a legal sense, it was not a judgment between the same parties, nor upon the same contract. The contract, it is said, does not merely give the obligee an election of the one remedy or the other, but entitles him at once to both, though he can have but one satisfaction.[10]

[1] Tyler *v.* Ulmer, 12 Mass. 166, per Parker, C. J.

[2] Kip *v.* Brigham, 6 Johns. 158; 7 Johns. 168; Griffin *v.* Brown, 2 Pick. 304; Weld *v.* Nichols, 17 Pick. 538; Head *v.* McDonald, 7 Monr. 203.

[3] Adams *v.* Balch, 5 Greenl. 188.

[4] Charges *v.* Sherwin, 12 Mod. 343; Foster *v.* Shaw, 7 S. & R. 156.

[5] Barr *v.* Gratz, 4 Wheat. 213.

[6] Witmer *v.* Schlatter, 2 Rawle, 359; Jackson *v.* Wood, 3 Wend. 27, 34; Fowler *v.* Savage, 3 Conn. 90, 96.

[7] Farwell *v.* Hilliard, 3 N. Hamp. 318.

[8] Ward *v.* Johnson, 13 Mass. 148. See also Lechmere *v.* Fletcher, 1 C. &. M. 623, 634, 635, per Bayley, B.

[9] Davis *v.* Loundes, 1 Bing. N. C. 607, per Tindal, C. J. See further, *supra*, § 527*a*; Wells *v.* Compton, 3 Rob. Louis. R. 171.

[10] The United States *v.* Cushman, 2 Sumn. R. 426, 437–441, per Story, J. See also Sheehy *v.* Mandeville, 6 Cranch. 253, 265; Lechmere *v.* Fletcher, 1 C. & M. 623, 634, 635, per Bayley, B.; [Kirkpatrick *v.* Stingley, 2 Carter, 269.]

§ 540. In regard to *foreign judgments*, they are usually considered in two general aspects: first, as to judgments *in rem;* and, secondly, as to judgments *in personam*. The latter are again considered under several heads: first, where the judgment is set up by way of defence to a suit in a foreign tribunal; secondly, where it is sought to be enforced in a foreign tribunal against the original defendant, or his property; and, thirdly, where the judgment is either between subjects, or between foreigners, or between foreigners and subjects.[1] But, in order to found a proper ground of recognition of a foreign judgment, under whichsoever of these aspects it may come to be considered, it is indispensable to establish, that the court which pronounced it had a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either, it is treated as a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals.[2]

§ 541. As to *foreign judgments in rem*, if the matter in controversy is land, or other *immovable property*, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto.[3] "The same principle," observes Mr. Justice Story,[4] "is applied to all other cases of proceeding *in rem*, where the subject is *movable property*, within the jurisdiction of the court pronouncing the judgment.[5] Whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of admiralty, whether they are causes of

[1] In what follows on the subject of foreign judgments, I have simply transcribed and abridged what has recently been written by Mr. Justice Story, in his learned Commentaries on the Conflict of Laws, ch. 15 (2d edit.).

[2] Story, Confl. Laws, §§ 584, 586; Rose *v.* Himely, 4 Cranch, 269, 270, per Marshall, C. J.; Smith *v.* Knowlton, 11 N. Hamp. R. 191; Bangely *v.* Webster, Id. 299. [* There seems to be no such presumption in favor of the jurisdiction of foreign courts, or of inferior domestic tribunals, according to the maxim *omnia præsumuntur rite esse acta*, as that which exists in favor of the superior courts, in a state or country, in their own tribunals. Graham *v.* Whitely, 2 Dutcher, 254; Goulding *v.* Clark, 34 N. H. 148. But where the question of jurisdiction is established, the same favorable presumption should be applied to all judgments. State *v.* Hinchman, 27 Penn. St. 479.]

[3] Story, Confl. Laws, §§ 532, 545, 551, 591.

[4] Story, Confl. Laws, § 592. See also Id. § 597.

[5] See Kames on Equity, B. 3, ch. 8, § 4.

prize, or of bottomry, or of salvage, or of forfeiture, or of any of the like nature, over which such courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject-matter.[1] The same rule is applied to other courts proceeding *in rem*, such as the court of exchequer in England, and to other courts exercising a like jurisdiction *in rem* upon seizures.[2] And in cases of this sort it is wholly immaterial whether the judgment be of acquittal or of condemnation. In both cases it is equally conclusive.[3] But the doctrine, however, is always to be understood with this limitation, that the judgment has been obtained *bonâ fide* and without fraud; for if fraud has intervened, it will doubtless avoid the force and validity of the sentence.[4] So it must appear that there have been regular proceedings to found the judgment or decree; and that the parties in interest *in rem* have had notice, or an opportunity to appear and defend their interests, either personally, or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation shall be pronounced, before the party has an opportunity to be heard."[5]

§ 542. Proceedings also by creditors against the personal property of their debtor, in the hands of third persons, or against debts due to him by such third persons (commonly called the process of *foreign attachment*, or *garnishment*, or *trustee process*), are treated as in some sense proceedings *in rem*, and are deemed entitled to

[1] Croudson *v.* Leonard, 4 Cranch, 433; Williams *v.* Armroyd, 7 Cranch, 423; Rose *v.* Himely, 4 Cranch, 241; Hudson *v.* Guestier, 4 Cranch, 293; The Mary, 9 Cranch, 126, 142–146; 1 Stark. Evid. pp. 246, 247, 248; Marshall on Insur. B. 1, ch. 9, § 6, pp. 412, 135; Grant *v.* McLachlin, 4 Johns. 34; Peters *v.* The Warren Ins. Co. 3 Sumner, 389; Bland *v.* Bamfield, 3 Swanst. 604, 605; Bradstreet *v.* Neptune Insur. Co. 3 Sumner, 600; Magoun *v.* New England Insur. Co. 1 Story, R. 157. The different degrees of credit given to foreign sentences of condemnation in prize causes, by the American state courts, are stated in 4 Cowen, R. 520, note 3. 1 Stark. Evid. 232 (6th edit.), notes by Metcalf. See also 2 Kent, Comm. 120, 121. If a foreign sentence of condemnation as prize is manifestly erroneous, as if it professes to be made on particular grounds, which are set forth, but which plainly do not warrant the decree; Calvert *v.* Bovil, 7 T. R. 523; Pollard *v.* Bell, 8 T. R. 444; or, on grounds contrary to the laws of nations; 3 B. & P. 215, per Ld. Alvanley, C. J.; or, if there be any ambiguity as to what was the ground of condemnation; it is not conclusive. Dalgleish *v.* Hodgson, 7 Bing. 495, 504.

[2] Ibid.; 1 Stark. on Evid. pp. 228–232, 246, 247, 248; Gelston *v.* Hoyt, 3 Wheaton, 246; Williams *v.* Armroyd, 7 Cranch, 423.

[3] Ibid.

[4] Duchess of Kingston's case, 11 State Trials, pp. 261, 262; s. c. 20 Howell, State Trials, p. 355; Id. p. 538, the opinion of the judges; Bradstreet *v.* The Neptune Insur. Co. 3 Sumner, 600; Magoun *v.* The New England Insur. Co. 1 Story, R. 157. If the foreign court is constituted by persons interested in the matter in dispute, the judgment is not binding. Price *v.* Dewhurst, 8 Sim. 279.

[5] Sawyer *v.* Maine Fire and Mar. Ins. Co. 12 Mass. 291; Bradstreet *v.* The Neptune Ins. Co. 3 Sumner, 600; Magoun *v.* N. England Insur. Co., 1 Story, R. 157.

the same consideration.[1] But in this last class of cases we are especially to bear in mind, that, to make any judgment effectual, the court must possess and exercise a rightful jurisdiction over the *res*, and also over the person, at least so far as the *res* is concerned; otherwise it will be disregarded. And if the jurisdiction over the *res* be well founded, but not over the person, except as to the *res*, the judgment will not be either conclusive or binding upon the party *in personam*, although it may be *in rem*.[2]

§ 543. In all these cases the same principle prevails, that the judgment, acting *in rem*, shall be held *conclusive upon the title* and transfer and disposition of the property itself, in whatever place the same property may afterwards be found, and by whomsoever the latter may be questioned; and whether it be directly or incidentally brought in question. But it is not so universally settled, that the judgment is conclusive of all points which are *incidentally* disposed of by the judgment, or of the facts or allegations upon which it professes to be founded. In this respect, *different rules* are adopted by different states, both in Europe and in America. In England, such judgments are held conclusive, not only *in rem*, but also as to all the points and facts which they professedly or incidentally decide.[3] In some of the American states the same doctrine prevails. While in other American states, the judgments are held conclusive only *in rem*, and may be controverted as to all the incidental grounds and facts on which they profess to be founded.[4]

§ 544. A similar doctrine has been contended for, and in many cases successfully, in favor of sentences which touch the general *capacity of persons*, and those which concern *marriage* and *divorce*.

[1] See cases cited in 4 Cowen, R. 520, 521, n.; Story, Confl. Laws, § 549; Holmes *v.* Remsen, 20 Johns. 229; Hull *v.* Blake, 13 Mass. 153; McDaniel *v.* Hughes, 3 East, 366; Phillips *v.* Hunter, 2 H. Black. 402, 410.

[2] Story, Confl. Laws, § 592 *a*. See also Id. § 549, and note; Bissell *v.* Briggs, 9 Mass. 498; 3 Burge, Comm. on Col. & For. Law, pt. 2, ch. 24, p. 1014–1019.

[3] In Blad *v.* Bamfield, decided by Lord Nottingham, and reported in 3 Swanst. 604, a perpetual injunction was awarded to restrain certain suits of trespass and trover for seizing the goods of the defendant (Bamfield) for trading in Iceland, contrary to certain privileges granted to the plaintiff and others. The property was seized and condemned in the Danish courts. Lord Nottingham held the sentence conclusive against the suits and awarded the injunction accordingly.

[4] Story, Confl. Laws, § 593. See 4 Cowen, R. 522, n. and cases there cited; Vandenheuvel *v.* U. Insur. Co. 2 Cain. Cases in Err. 217; 2 Johns. Cases, 451; Id. 481; Robinson *v.* Jones, 8 Mass. 536; Maley *v.* Shattuck, 3 Cranch, 488; 2 Kent, Comm. Lect. 37, pp. 120, 121, 4th edit., and cases there cited; Tarlton *v.* Tarlton, 4 M. & Selw. 20; Peters *v.* Warren Insur. Co. 3 Sumn. 389; Gelston *v.* Hoyt, 3 Wheat. 246.

Foreign jurists strongly contend that the decree of a foreign court, declaring the state (*status*) of a person, and placing him, as an idiot, or a minor, or a prodigal, under guardianship, ought to be deemed of universal authority and obligation. So it doubtless would be deemed, in regard to all acts done within the jurisdiction of the sovereign whose tribunals pronounced the sentence. But in the United States the rights and powers of *guardians* are considered as strictly local; and no guardian is admitted to have any right to receive the profits, or to assume the possession of the real estate, or to control the person of his ward, or to maintain any action for the personalty, out of the states, under whose authority he was appointed, without having received a due appointment from the proper authority of the state, within which the property is situated, or the act is to be done, or to whose tribunals resort is to be had. The same rule is also applied to the case of *executors and administrators*.[1]

§ 545. In regard to *marriages*, the general principle is, that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is invalid everywhere. The most prominent, if not the only known exceptions to this rule, are marriages involving polygamy and incest; those prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country.[2] As to *sentences confirming marriages*, some English jurists seem disposed to concur with those of Scotland and America, in giving to them the same conclusiveness, force, and effect. If it were not so, as Lord Hardwicke observed, the rights of mankind would be very precarious. But others, conceding that a judgment of a third country, on the validity of a marriage not within its territories, nor had between subjects of that country, would be entitled to credit and attention, deny that it would be universally binding.[3] In the United States,

[1] Story, Confl. Laws, §§ 499, 504, 594; Morrell *v.* Dickey, 1 Johns. ch. 153; Kraft *v.* Wickey, 4 G. & J. 332; Dixon *v.* Ramsay, 3 Cranch, 319. See, as to foreign executors and administrators, Story, Confl. Laws, § 513–523; [*supra*, § 525, and notes.]

[2] Story, Confl. Laws, §§ 80, 81, 113. [See *post*, vol. 2 (7th edit.), § 460–464, tit. MARRIAGE.]

[3] Roach *v.* Garvan, 1 Ves. 157; Story, Confl. Laws, §§ 595, 596; Sinclair *v.* Sinclair, 1 Hagg. Consist. R. 297; Scrimshire *v.* Scrimshire, 2 Hagg. Consist. R. 395, 410.

however, as well as in Scotland, it is firmly held, that a *sentence of divorce*, obtained *bonâ fide* and without fraud, pronounced between parties actually domiciled in the country, whether natives or foreigners, by a competent tribunal, having jurisdiction over the case, is valid, and ought to be everywhere held a complete dissolution of the marriage, in whatever country it may have been originally celebrated.[1]

§ 546. "In the next place, as to *judgments in personam* which are *sought to be enforced* by a suit in a foreign tribunal. There has certainly been no inconsiderable fluctuation of opinion in the English courts upon this subject. It is admitted on all sides, that, in such cases, the foreign judgments are *primâ facie* evidence to sustain the action, and are to be deemed right until the contrary is established;[2] and of course, they may be avoided, if they are founded in fraud, or are pronounced by a court not having any competent jurisdiction over the cause.[3] But the question is, whether they are not deemed conclusive; or whether the defendant is at liberty to go at large into the original merits, to show that the judgment ought to have been different upon the merits, although obtained *bonâ fide*. If the latter course be the correct one, then a still more embarrassing consideration is, to what extent, and in what manner, the original merits can be properly inquired into."[4] But though there remains no inconsiderable diversity of opinion among the learned judges of the different tribunals, yet the present inclination of the English courts seems to be, to sustain the conclusiveness of foreign judgments.[5]

[1] Story, Confl. Laws, § 597. See also the lucid judgment delivered by Gibson, C. J., in Dorsey *v.* Dorsey, 7 Watts, 350. The whole subject of foreign divorces has received a masterly discussion by Mr. Justice Story, in his Commentaries on the Conflict of Laws, ch. vii. § 200–230 *b*.

[2] See Walker *v.* Witter, 1 Doug. I, and cases there cited; Arnold *v.* Redfern, 3 Bing. 353; Sinclair *v.* Fraser, cited 1 Doug. 4, 5, note; Houlditch *v.* Donegal, 2 Clark & Finnell, 470; s. c. 8 Bligh, 301; Don *v.* Lippman, 5 Clark & Finn. 1, 19, 20; Price *v.* Dewhurst, 8 Sim. 279; Alivon *v.* Furnival, 1 Cromp. Mees. & Rosc. 277; Hall *v.* Odber, 11 East, 118; Ripple *v.* Ripple, 1 Rawle, 386.

[3] See Bowles *v.* Orr, 1 Younge & Coll. 464; Story, Confl. Laws, §§ 544, 545–550; Ferguson *v.* Mahon, 3 Perry & Dav. 143; 11 Ad. & El. 179, s. c.; Price *v.* Dewhurst, 8 Simons, 279, 302; Don *v.* Lippman, 5 Clark & Finn. 1, 19, 20, 21; Bank of Australasia *v.* Nias, 15 Jur. 967. So, if the defendant was never served with process. Ibid. And see Henderson *v.* Henderson, 6 Ad. & El. 288, N. S.

[4] Story, Confl. Laws, § 603.

[5] Id. §§ 604, 605, 606. See Guinness *v.* Carroll, 1 Barn. & Adolph. 459; Becquet *v.* McCarthy, 2 B. & A. 951. In Holditch *v.* Donegal, 8 Bligh, 301, 337–340, Lord Brougham held a foreign judgment to be only *primâ facie* evidence, and gave his reasons at large for that opinion. On the other hand, Sir L. Shadwell, in Martin *v.* Nicholls, 3 Sim. 458, held the contrary opinion, that it was conclusive; and also gave a very elaborate judgment upon the point, in which he reviewed the principal authorities. Of course, the learned judge meant to except, and did

[* § 546*a*. We have lately had occasion carefully to review the law upon this subject, and we beg leave here to repeat what we then said.[1] There is no title connected with the general subject of the conflict of laws, more embarrassing than that which we are now considering. It has undergone considerable discussion since the lamented decease of our author. We have therefore felt compelled to state, as far as we could, the present state of the English law in regard to it.

§ 546*b*. Whenever it becomes important to determine what is the law of a foreign country, the decisions of the highest judicial tribunals of that country are held conclusive in regard to it. This is partly upon the ground, that the question turns upon a fact, and that fact is the true state of the law of the country, which is but another name for the decisions of the highest legal tribunals of the country; so that, in truth, the law and the decisions of these tribunals thus become identical. This is illustrated in a recent case.[2] And a similar conclusion was arrived at in a later

except in a later case (Price *v.* Dewhurst, 8 Sim. 279, 302), judgments which were produced by fraud. See also Don *v.* Lippman, 5 Clark & Finnell, 1, 20, 21; Story, Confl. Laws, § 545–550, 605; Alivon *v.* Furnival, 1 Cromp. Mees. & Rosc. 277, 284. "It is, indeed, very difficult," observes Mr. Justice Story, "to perceive what could be done, if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the case, as formerly before the court, upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case, upon new evidence? Or, is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed *ex æquo et bono?* Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put, to show the intrinsic difficulties of the subject. Indeed the rule, that the judgment is to be *primâ facie* evidence for the plaintiff, would be a mere delusion, if the defendant might still question it, by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment, by showing that the court had no jurisdiction; or, that he never had any notice of the suit; or, that it was procured by fraud; or, that upon its face it is founded in mistake; or, that it is irregular, and bad by the local law, *Fori rei judicatæ*. To such an extent, the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to retry the merits of the original cause at large, and to put the defendant upon proving those merits." See Story, Confl. Laws, § 607; Alivon *v.* Furnival, 1 Cromp. Mees. & Rosc. 277.

[1] [* Story, Confl. Laws, Redf. edit., §§ 618 *a* – 618 *k*.

[2] Scott *v.* Pilkington, 2 B. & S. 11; 8 Jur. N. S. 557.

case.[1] In the case of *Scott* v. *Pilkington*, it was determined, that where the defendant, domiciled in England, and having his place of business there, gave a letter of credit to parties in New York, authorizing them to draw bills of exchange on his house in Liverpool, such letter being delivered to the defendant in New York, and intended to be exhibited to purchasers of such bills as authority for drawing the same, the claim of a drawer of such bills upon the defendant for non-acceptance of the same was a contract subject to the law of New York, as to its validity, force, and construction, and not to be judged of by the law of England in any respect. And when in such case an action had been brought in the courts of New York, and the defendant appearing by attorney, it had been adjudged, that, by the law of that state, the defendant was liable, and judgment had been rendered thereon against him, such judgment was conclusive as to the matter, although, if the contract had been subject to the English law, and the New-York court had mistaken it, the judgment would not have concluded an English court. The case of *Crispin* v. *Daglioni* involved the right of succession to personal estate in Portugal by one domiciled in that country, and the matter having been definitely settled by the decision of the highest judicial tribunal of that country, it was held conclusive everywhere.

§ 546*c*. But it was said in *Scott* v. *Pilkington*, that where the foreign court, in giving judgment, and as one of the elements upon which the same was based, assumed or decided a question of English law, by which the cause of action was ruled, and, in doing so, mistook its true import, in such case the judgment of the foreign courts will be of no force or validity in an English court.[2] In the case of *Simpson* v. *Fogo*, the effect of foreign judgments is very extensively discussed; and the following propositions declared, which may be regarded as embracing the present recognized principles of English law upon the question.

§ 546*d*. A judgment of a foreign court is conclusive, *inter partes*, where there is nothing on the face of the judgment which an English court can inquire into. But the courts of England may disregard such judgment, *inter partes*, if it appears on the record to be manifestly contrary to natural justice; or to be based on domestic legislation not recognized in England or other foreign

[1] Crispin *v.* Daglioni, 9 Jur. N. S. 653. 8 Jur. N. S. 557; Simpson *v.* Fogo, 9 Jur. N. S. 403.
[2] Scott *v.* Pilkington, 2 B. & S. 11;

countries; or is founded upon a misapprehension of what is the law of England; or if such judgment proceeds upon a distinct refusal to recognize the laws of the country under which the title to the subject-matter of the litigation arose. And a somewhat similar enunciation of the exceptions to the conclusiveness of foreign judgments is found in *The Bank of Australasia* v. *Nias*.[1]

§ 546*e*. There are some cases where foreign decrees have been held to operate *in rem*, and thus to transfer an effectual and absolute title to property sold under an order or execution from the foreign courts; but where, in other cases, very similarly situated, it has been held that only the title of the judgment-debtor passed under the sale. The true distinction in this class of cases seems to be, that where the court assumes to allow adverse claimants to interpose objections to the sale, and to determine the validity of such claims, and to pass a perfect title to the thing sold, it must be taken as a proceeding *in rem*, and as having effectually foreclosed all claim of title from any party who did in fact submit his claim to adjudication before the court, or who had his domicil at the time within the jurisdiction of the court, and who might therefore have been heard there, provided proper notice appears.[2]

§ 546*f*. And it will not exonerate the defendant in a foreign judgment, that he became a party to the proceedings merely to prevent his property being seized, and that the judgment is erroneous in fact and in law on the merits; whether the plea alleges, that the error does or does not appear upon the face of the judgment. Nor can the defendant plead, that the enforcement of the judgment in England is contrary to natural justice, on the ground that the defendant had discovered fresh evidence, showing that the judgment is erroneous in fact or in law upon the merits, or that evidence was improperly admitted.[3]

§ 546*g*. But a plea in bar of a suit, that the same matter has been adjudged between the parties in a foreign court, must show that the judgment is final and conclusive between the parties, according to the law of the place where such judgment is pronounced.[4] And the judgment of the foreign court may always

[1] 16 Q. B. 717; 4 Eng. L. & Eq. Rep. 252.

[2] Imrie *v.* Castrique, 8 C. B. N. S. 406, 7 Jur. N. S. 1076; Simpson *v.* Fogo, *supra*; Woodruff *v.* Taylor, 20 Vt. R. 65.

[3] De Cossè Brissac *v.* Rathbone, 6 H. & Nor. 301.

[4] Frayes *v.* Worms, 10 C. B. N. S. 149.

be impeached by showing any facts whereby it is made to appear that the court had not jurisdiction by the laws of the country where rendered. But no facts can be shown, by way of defence to such judgment, which might have been urged in the foreign court.[1]

§ 546*h*. These cases, mostly of recent occurrence, have carried the doctrine of the conclusive force of foreign judgments considerably beyond the point maintained by the earlier cases, and even so late as within the last thirty years, when it was held, by the courts in Westminster Hall, that such judgments were merely *primâ facie* evidence of debt, and did not operate as an absolute and conclusive merger of the cause of action.[2] But it was formally held, by the common consent of counsel, in the House of Lords, as early as 1845, that a judgment of the highest judicial tribunal of France, upon the same subject-matter, in favor of the present defendant, amounted to *res judicata*, and was therefore an effectual merger of the cause of action, "the foreign tribunal having jurisdiction over the matter, and both the parties having been regularly brought before" it.[3] So that now it may be regarded as fully established in England, that the contract resulting from a foreign judgment is equally conclusive, in its force and operation, with that implied by any domestic judgment.

§ 546*i*. But there is still a very essential and important distinction between the two. Domestic judgments rest upon the conclusive force of the record, which is absolutely unimpeachable. Foreign judgments are mere matters *en pais*, to be proved the same as an arbitration and award, or an account stated; to be established, as matter of fact, before the jury; and by consequence subject to any contradiction or impeachment which might be urged against any other matter resting upon oral proof. Hence any fraud which entered into the concoction of the judgment itself is proper to be adduced, as an answer to the same; but no fraud which occurred, and was known to the opposite party, before the rendition of such foreign judgment, and which might therefore have been brought to the notice of the foreign court, can be urged in defence of it.

§ 546*k*. It is proper to add, that while the English courts thus

[1] Vanquelin *v.* Bouard, 9 L. T. N. S. 582.

[2] Story, Confl. of Laws, § 599; Smith *v.* Nicolls, 5 Bing. N. C. 208.

[3] Ricardo *v.* Garcias, 12 Cl. & Fin. 368.

recognize the general force and validity of foreign judgments, it has been done under such limitations and qualifications, that great latitude still remains for breaking the force of, and virtually disregarding such foreign judgments as proceed upon an obvious misapprehension of the principles governing the case; or where they are produced by partiality, or favoritism, or corruption, or where upon their face they appear to be at variance with the instinctive principles of universal justice.[1] But these are the rare exceptions.]

§ 547. "The general doctrine maintained in the *American courts*, in relation to foreign judgments *in personam*, certainly is, that they are *primâ facie* evidence; but that they are impeachable. But how far, and to what extent, this doctrine is to be carried, does not seem to be definitely settled. It has been declared that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into; and that the judgment may be impeached for fraud. Beyond this, no definite lines have as yet been drawn."[2]

§ 548. We have already adverted to the provisions of the constitution and *statutes of the United States*, in regard to the admissibility and effect of the judgments of one state in the tribunals of another.[3] By these provisions, such judgments authenticated as the statutes provide, are put upon the same footing as domestic judgments.[4] "But this," observes Mr. Justice Story, "does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was rendered, to pronounce the judgment, nor an inquiry into the right of the state to exercise authority over the parties, or the subject-matter, nor an inquiry whether the judgment is founded in, and impeachable for, a manifest fraud.

[1] 2 Story, Eq. Jur. §§ 1575–1584, and cases cited; Boston India Rubber Factory *v.* Hoit, 14 Vt. R. 92.]

[2] Story, Confl. Laws, § 608. See also 2 Kent, Comm. 119–121; and the valuable notes of Mr. Metcalf to his edition of Starkie on Evid. vol. 1, pp. 232, 233 (6th Am. edit.); Wood *v.* Watkinson, 17 Conn. 500. The American cases seem further to agree, that when a foreign judgment comes *incidentally* in question, as, where it is the foundation of a right or title derived under it, and the like, it is conclusive. If a foreign judgment proceeds upon an error in law, apparent upon the face of it, it may be impeached everywhere; as, if a French court, professing to decide according to the law of England, clearly mistakes it. Novelli *v.* Rossi, 2 B. & Ad. 757.

[3] *Supra*, §§ 504, 505, 506. And see Flourenoy *v.* Durke, 2 Brev. 206.

[4] Taylor *v.* Bryden, 8 Johns. 173. Where the jurisdiction of an inferior court depends on a fact, which such court must necessarily and directly decide, its decision is taken as conclusive evidence of the fact. Britain *v.* Kinnaird, 1 B. & B. 432; Betts *v.* Bagley, 12 Pick. 572, 582, per Shaw, C. J.; Steele *v.* Smith, 7 Law Rep. 461.

The constitution did not mean to confer any new power upon the states; but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments, to all intents and purposes; but only gave a general validity, faith, and credit to them as evidence.[1] No execution can issue upon such judgments, without a new suit in the tribunals of other states. And they enjoy not the right of priority, or privilege, or lien, which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in the character of foreign judgments."[2]

[* § 548*a*. We had occasion to consider a very peculiar question, arising under the United States constitution and the act of congress, as to the effect of the judgment of a court in one state for the penalty of a bond, intended to secure the payment of a debt by instalments, where all the instalments were not due at the time of the judgment, and where the enforcement of the interlocutory judgment for the penalty was attempted in another state, in order to compel the payment of the instalments falling due after the rendition of the interlocutory judgment.[3] The conclusion reached was, that, as the judgment was merely interlocutory and did not create any absolute indebtedness, no action of debt could be maintained upon it; and that, as it was not a proper or perfected judgment, it could not have the same effect in any other state as in that where rendered, and could not therefore be enforced, either under the laws of congress, or upon general principles, as at common law.]

§ 549. The *common law* recognizes no *distinction* whatever, as to the effect of foreign judgments, whether they are between citizens, or between foreigners, or between citizens and foreigners; deeming them of equal obligation in all cases, whoever are the parties.[4]

[1] See Story's Comment. on the Constit. U. S. ch. 29, § 1297–1307, and cases there cited; Hall *v.* Williams, 6 Pick. 237; Bissell *v.* Briggs, 9 Mass. 462; Shumway *v.* Stillman, 6 Wend. 447; Evans *v.* Tarleton, 9 Serg. & R. 260; Benton *v.* Burgot, 10 Serg. & R. 240; Hancock *v.* Barrett, 1 Hall, 155; s. c. 2 Hall, 302; Wilson *v.* Niles, 2 Hall, 358; Hoxie *v.* Wright, 2 Verm. 263; Bellows *v.* Ingraham, 2 Verm. 573; Aldrich *v.* Kinney, 4 Conn. 380; Bennett *v.* Morley, 1 Wilcox, 100. See further, 1 Kent, Comm. 260, 261, and note (d). As to the effect of a discharge under a foreign insolvent law, see the learned judgment of Shaw, C. J., in Betts *v.* Bagley, 12 Pick. 572.

[2] Story, Confl. Laws, § 609; McElmoyle *v.* Cohen, 13 Peters, 312, 328, 329; Story, Confl. Laws, § 582 *a*, note.

[3] [* Dimick *v.* Brooks, 21 Vt. R. 569.]

[4] Story, Confl. Laws, § 610.

§ 550. In regard to the decrees and sentences of courts, exercising any branches of the *ecclesiastical jurisdiction*, the same general principles govern, which we have already stated.[1] The principal branch of this jurisdiction, in existence in the United States, is that which relates to matters of *probate and administration*. And as to these, the inquiry, as in other cases, is, whether the matter was exclusively within the jurisdiction of the court, and whether a decree or judgment has been passed directly upon it. If the affirmative be true, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as, in assignments of dower, and some other cases of jurisdiction conferred by particular statutes, the decree stands upon the footing of a judgment at common law.[2] Thus, the probate of a will at least as to the personalty is conclusive in civil cases, in all questions upon its execution and validity.[3] The grant of letters of administration is, in general, *primâ facie* evidence of the intestate's death; for only upon evidence of that fact ought they to have been granted.[4] And if the grant of administration turned upon the question as to which of the parties was next of kin, the sentence or decree upon that question is conclusive everywhere, in a suit between the same parties for distribution.[5] But the grant of administration upon a woman's estate determines nothing as to the fact whether she were a *feme covert* or not; for that is a collateral fact, to be collected merely by inference from the decree or grant of administration, and was not the point directly tried.[6] Where a court of

[1] 2 Smith's Leading Cases, 446–448.

[2] *Supra*, §§ 525, 528.

[3] Poplin *v.* Hawke, 8 N. Hamp. 124; 1 Jarman on Wills, pp. 22, 23, 24, and notes by Perkins; Langdon *v.* Goddard, 3 Story, R. 1. See *post*, vol. 2, (7th edit.) §§ 315, [673,] 693. [A decree of a probate court of another state, admitting to probate a will within its jurisdiction, is conclusive evidence, if duly authenticated, of the validity of the will, upon an application to prove it in Massachusetts; even when no notice of the offer of the will for probate was given, if by the law of that state no notice was required. Creppen *v.* Dexter, 13 Gray, 330.]

[4] Thompson *v.* Donaldson, 3 Esp. 63; French *v.* French, 1 Dick. 268; Succession of Hamblin, 3 Rob. Louis. R. 130; Jeffers *v.* Radcliff, 10 N. Hamp. R. 242. But if the fact, that the intestate is living, when pleadable in abatement is not so pleaded, the grant of administration is conclusive. Newman *v.* Jenkins, 10 Pick. 515. In Moons *v.* De Bernales, 1 Russ. 301, the general practice was stated and not denied to be, to admit the letters of administration, as sufficient proof of the death, until impeached; but the master of the rolls, in that case, which was a foreign grant of administration, refused to receive them; but allowed the party to examine witnesses to the fact.

[5] Barrs *v.* Jackson, 1 Phil. Ch. R. 582; 2 Y. & C. 585; Thomas *v.* Ketteriche, 1 Vez. 333.

[6] Blackham's case, 1 Salk. 290, per Holt, C. J. See also Hibsham *v.* Dulleban, 4 Watts, 183.

probate has power to grant letters of guardianship of a lunatic, the grant is conclusive of his insanity at that time, and of his liability, therefore, to be put under guardianship, against all persons subsequently dealing directly with the lunatic, instead of dealing, as they ought to do, with the guardian.[1]

§ 551. *Decrees in chancery* stand upon the same principles with judgments at common law, which have already been stated. Whether the statements in the *bill* are to be taken conclusively against the complainant as admissions by him, has been doubted; but the prevailing opinion is supposed to be against their conclusiveness, on the ground that the facts therein stated are frequently the mere suggestions of counsel, made for the purpose of obtaining an answer, under oath.[2] If the bill has been sworn to, without doubt the party would be held bound by its statements, so far as they are direct allegations of fact. The admissibility and effect of the *answer* of the defendant is governed by the same rules.[3] But a *demurrer* in chancery does not admit the facts charged in the bill; for if it be overruled, the defendant may still answer. So it is, as to *pleas* in chancery; these, as well as demurrers, being merely hypothetical statements, that, *supposing* the facts to be as alleged, the defendant is not bound to answer.[4] But pleadings, and depositions, and a decree, in a former suit, the same title being in issue, are admissible as showing the acts of parties, who had the same interest in it as the present party, against whom they are offered.[5]

§ 552. In regard to *depositions*, it is to be observed, that, though informally taken, yet as mere declarations of the witness, under his hand, they are admissible against him, wherever he is a party, like any other admissions; or, to contradict and impeach him, when he is afterwards examined as a witness. But, as secondary

[1] Leonard *v.* Leonard, 14 Pick. 280. But it is not conclusive against his subsequent capacity to make a will. Stone *v.* Damon, 12 Mass. 488.

[2] Doe *v.* Sybourn, 7 T. R. 3. The bill is not evidence against the party in whose name it is filed, until it is shown that he was privy to it. When this privity is established, the bill is evidence that such a suit was instituted, and of its subject-matter; but not of the plaintiff's admission of the truth of the matters therein stated, unless it were sworn to. The proceedings after answer are admissible in evidence of the privity of the party in whose name the bill was filed. Boileau *v.* Rudlin, 12 Jur. 899; 2 Exch. 665. And see Bunden *v.* Cleveland, 4 Ala. 225; Bull. N. P. 235. See further, as to the admission of bills and answers, and to what extent, Randall *v.* Parramore, 1 Cranch, 409; Roberts *v.* Tennell, 3 Monr. 247; Clarke *v.* Robinson, 5 B. Monr. 55; Adams *v.* McMillan, 7 Port. 73.

[3] *Supra*, §§ 171, 179, 186, 202.

[4] Tompkins *v.* Ashby, 1 M. & Malk. 32, 33, per Abbott, Ld. C. J.

[5] Viscount Lorton *v.* Earl of Kingston, 5 Clark & Fin. 269.

evidence, or as a substitute for his testimony *vivâ voce*, it is essential that they be regularly taken, under legal proceedings duly pending, or in a case and manner provided by law.[1] And though taken in a foreign state, yet if taken to be used in a suit pending here, the forms of our law, and not of the foreign law, must be pursued.[2] But if the deposition was taken in *perpetuam*, the forms of the law under which it was taken must have been strictly pursued, or it cannot be read in evidence.[3] If a bill in equity be dismissed merely as being in its substance unfit for a decree, the depositions, when offered as secondary evidence in another suit, will not on that account be rejected. But if it is dismissed for irregularity, as, if it come before the court by a bill of revivor, when it should have been by an original bill; so that in truth there was never regularly any such cause in the court, and consequently no proofs, the depositions cannot be read; for the proofs cannot be exemplified without bill and answer, and they cannot be read at law, unless the bill on which they were taken can be read.[4]

§ 553. We have seen, that in regard to the admissibility of a former judgment in evidence it is generally necessary that there be a perfect *mutuality* between the parties; neither being concluded, unless both are alike bound.[5] But with respect to *depositions*, though this rule is admitted in its general principle, yet it

[1] As to the manner of taking depositions, and in what cases they may be taken, see *supra*, §§ 320–325. [The answers of a party to a suit, to interrogatories filed in a case, are competent evidence against him, as admissions on his part of the facts stated therein in another suit, although the issues in the two suits be different. Williams *v.* Cheney, 3 Gray, 215, 220.]

[2] Evans *v.* Eaton, 7 Wheat. 426; Farley *v.* King, S. J. Court, Maine, in Lincoln, Oct. Term, 1822, per Preble, J. But depositions taken in a foreign country, under its own laws, are admissible here in proof of probable cause, for the arrest and extradition of a fugitive from justice, upon the preliminary examination of his case before a judge. See Metzger's case, before Betts, J., 5 N.Y. Legal Obs. 83.

[3] Gould *v.* Gould, 3 Story, R. 516.

[4] Backhouse *v.* Middleton, 1 Ch. Cas. 173, 175; Hall *v.* Hoddesdon, 2 P. Wms. 162; Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316.

[5] *Supra*, § 521. The reason given by Chief Baron Gilbert, for applying the rule, to the same extent, to depositions taken in chancery is, that otherwise great mischief would ensue; "for then a man, that never was party to the chancery proceedings, might use against his adversary all the depositions that made against him; and he, in his own advantage, could not use the depositions that made for him, because the other party, not being concerned in the suit, had not the liberty to cross-examine, and therefore cannot be encountered with any depositions, out of the cause." 1 Gilb. Evid. 62; Rushworth *v.* Countess of Pembroke, Hardr. 472. But the exception allowed in the text is clearly not within this mischief, the right of cross-examination being unlimited, as to the matters in question. [* In a recent case in the King's Bench, it was held by two of the judges, one dissenting, that where a party makes use of the depositions of witnesses in a suit with another party, in regard to the same subject-matter, that he by thus making use of the deposition as true, knowing its contents, so far affirms its truth, that it may be used as original evidence against him. Cockburn, C. J.,

is applied with more latitude of discretion; and complete mutuality, or identity of all the parties, is not required. It is generally deemed sufficient, if the matters in issue were the same in both cases, and the party, against whom the deposition is offered, had full power to cross-examine the witness. Thus, where a bill was pending in chancery, in favor of one plaintiff against several defendants, upon which the court ordered an issue of *devisavit vel non*, in which the defendants in chancery should be plaintiffs, and the plaintiff in chancery defendant; and the issue was found for the plaintiffs; after which the plaintiff in chancery brought an ejectment on his own demise, claiming as heir at law of the same testator, against one of those defendants alone, who claimed as devisee under the will formerly in controversy; it was held, that the testimony of one of the subscribing witnesses to the will, who was examined at the former trial, but had since died, might be proved by the defendant in the second action, notwithstanding the parties were not all the same; for the same matter was in controversy, in both cases, and the lessor of the plaintiff had precisely the same power of objecting to the competency of the witness, the same right of calling witnesses to discredit or contradict his testimony, and the same right of cross-examination, in the one case, as in the other.[1] If the power of cross-examination was more limited in the former suit, in regard to the matters in controversy in the latter, it would seem that the testimony ought to be excluded.[2] The same rule applies to privies, as well as to parties.

§ 554. But though the *general rule, at law*, is, that no evidence shall be admitted, but what *is or might be under the examination of both parties;*[3] yet it seems clear, that, *in equity*, a deposition is *not, of course, inadmissible*, in evidence, because there has been *no cross-examination*, and no waiver of the right. For if the witness, after his examination on the direct interrogatories, should refuse

said, "A man who brings forward another, for the purpose of asserting or proving some fact on his behalf, whether in a court of justice or otherwise, must be taken himself to assert the fact which he thus seeks to establish." Richards *v.* Morgan, 10 Jur. N. S. 559.]

[1] Wright *v.* Tatham, 1 Ad. & El. 3; 12 Vin. Abr. tit. *Evidence*, A. b. 31, pl. 45, 47. As to the persons who are to be deemed parties, see *supra*, §§ 523, 535.

[2] Hardr. 315; Cazenove *v.* Vaughan, 1 M. & S. 4. It has been held that the deposition of a witness before the coroner, upon an inquiry touching the death of a person killed by a collision of vessels, was admissible in an action for the negligent management of one of them, if the witness is shown to be beyond sea. Sills *v.* Brown, 9 C. & P. 601, 603, per Coleridge, J.; Bull. N. P. 242; Rex *v.* Eriswell, 3 T. R. 707, 712, 721; J. Kely, 55.

[3] Cazenove *v.* Vaughan, 1 M. & S. 4, 6; Attor.-Gen. *v.* Davison, 1 McCl. & Y. 160; Gass *v.* Stinson, 3 Sumn. 98, 104, 105.

to answer the cross-interrogatories, the party producing the witness will not be deprived of his direct testimony, for, upon application of the other party, the court would have compelled him to answer.[1] So, after a witness was examined for the plaintiff, but before he could be cross-examined, he died; the court ordered his deposition to stand;[2] though the want of the cross-examination ought to abate the force of his testimony.[3]. So, where the direct examination of an infirm witness was taken by the consent of parties, but no cross-interrogatories were ever filed, though the witness lived several months afterwards, and there was no proof that they might not have been answered, if they had been filed; it was held that the omission to file them was at the peril of the party, and that the deposition was admissible.[4] A new commission may be granted, to cross-examine the plaintiff's witnesses abroad, upon subsequent discovery of matter for such examination.[5] But where the deposition of a witness, since deceased, was taken, and the direct examination was duly signed by the magistrate, but the cross-examination, which was taken on a subsequent day, was not signed, the whole was held inadmissible.[6]

§ 555. *Depositions*, as well as *verdicts*, which relate to a custom, or prescription, or pedigree, where reputation would be evidence, are admissible against strangers; for as the declarations of persons deceased would be admissible in such cases, *à fortiori* their declarations on oath are so.[7] But in all cases at law, where a deposition is offered as secondary evidence, that is, as a substitute for the testimony of the witness *vivâ voce*, it must appear that the witness cannot be personally produced; unless the case is provided for by statute, or by a rule of the court.[8]

§ 556. The last subject of inquiry under this head is that of *inquisitions*. These are the results of inquiries, made under competent public authority, to ascertain matters of public interest and concern. It is said that they are analogous to proceedings *in rem*, being made on behalf of the public; and that therefore no one can strictly be said to be a stranger to them. But the principle of

[1] Courtney *v.* Hoskins, 2 Russ. 253.
[2] Arundel *v.* Arundel, 1 Chan. R. 90.
[3] O'Callaghan *v.* Murphy, 2 Sch. & Lef. 158; Gass *v.* Stinson, 3 Sumn. 98, 106, 107. But see Kissam *v.* Forrest, 25 Wend. 651.
[4] Gass *v.* Stinson, 3 Sumn. 98, where this subject is fully examined by Story, J.
[5] King of Hanover *v.* Wheatley, 4 Beav. 78.
[6] Regina *v.* France, 2 M. & Rob. 207.
[7] Bull. N. P. 239, 240; *supra*, § 127–130, 139, 140.
[8] *Supra*, §§ 322, 323.

their admissibility in evidence, between private persons, seems to be, that they are matters of public and general interest, and therefore within some of the exceptions to the rule in regard to hearsay evidence, which we have heretofore considered.[1] Whether, therefore, the adjudication be founded on oath or not, the principle of its admissibility is the same. And moreover, it is distinguished from other hearsay evidence, in having peculiar guaranties for its accuracy and fidelity.[2] The general rule in regard to these documents is, that they are admissible in evidence, but that they are not conclusive except against the parties immediately concerned, and their privies. Thus, an inquest of office, by the attorney-general, for lands escheating to the government by reason of alienage, was held to be evidence of title, in all cases, but not conclusive against any person, who was not tenant at the time of the inquest, or party or privy thereto, and that such persons, therefore, might show that there were lawful heirs *in esse*, who were not aliens.[3] So, it has been repeatedly held, that inquisitions of lunacy may be read; but that they are not generally conclusive against persons not actually parties.[4] But inquisitions, extrajudicially taken, are not admissible in evidence.[5]

[1] *Supra*, §§ 127–140.

[2] Phil. & Am. on Evid. 578, 579; 1 Stark. Evid. 260, 261, 263.

[3] Stokes *v.* Dawes, 4 Mason, 268, per Story, J.

[4] Sergeson *v.* Sealey, 2 Atk. 412; Den *v.* Clark, 5 Halst. 217, per Ewing, C. J.; Hart *v.* Deamer, 6 Wend. 497; Faulder *v.* Silk, 3 Campb. 126; 2 Madd. Chan. 578.

[5] Glossop *v.* Pole, 3 M. & S. 175; Latkow *v.* Eamer, 2 H. Bl. 437. See *supra*, § 550, that the inquisition is conclusive against persons, who undertake subsequently to deal with the lunatic, instead of dealing with the guardian, and seek to avoid his authority, collaterally, by showing that the party was restored to his reason.

CHAPTER VI.

OF PRIVATE WRITINGS.

§ 557. The last class of written evidence, which we propose to consider, is that of PRIVATE WRITINGS. And in the discussion of this subject, it is not intended separately to mention every description of writings, comprised in this class; but to state the principles which govern the proof, admissibility, and effect of them all. In general, all private writings, produced in evidence, must be proved to be genuine; but in what is now to be said, particular reference is had to solemn obligations and instruments, under the hand of the party, purporting to be evidence of title; such as deeds, bills, and notes. These must be produced, and the execution of them generally be proved; or their absence must be duly accounted for, and their loss supplied by secondary evidence.

§ 558. And first, in regard to the PRODUCTION of such documents; if the instrument is *lost*, the party is required to give some evidence, that such a paper once existed, though slight evidence is sufficient for this purpose, and that a *bonâ fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof; after which, his own affidavit is admissible to the fact of its loss.[1] The same rule prevails where the instrument is destroyed. What degree of diligence in the search is necessary,

[1] *Supra*, § 349, and cases there cited. The rule is not restricted to facts peculiarly within the party's knowledge; but permits him to state other pertinent facts, such as, his search for the document elsewhere than among his own papers. Vedder *v.* Wilking, 5 Denio, 64. In regard to the *order* of the proof, namely, whether the existence and genuineness of the paper, and of course its general character or contents, must be proved *before* any evidence can be received of its loss, the decisions are not uniform. The earlier and some later cases require that this order should be strictly observed. Goodier *v.* Lake, 1 Atk. 446; Sims *v.* Sims, 2 Rep. Const. Ct. 225; Kimball *v.* Morrell, 4 Greenl. 368; Stockdale *v.* Young, 3 Strobh. 501, n. In other cases it has been held, that in the order of proof, the loss or destruction of the paper must first be shown. Willis *v.* McDole, 2 South. 501; Sterling *v.* Potts, Id. 773; Shrouders *v.* Harper, 1 Harringt. 444; Finn *v.* M'Conigle, 9 Watts & Serg. 75; Murray *v.* Buchanan, 7 Blackf. 549; Parke *v.* Bird, 3 Barr, 360. But on the one hand it is plain, that the proof of the loss of a document necessarily involves some descriptive proof of the document itself, though not to the degree of precision subsequently necessary in order to establish a title under it; and on the other hand, a strong probability of its loss has been held sufficient to let in the secondary evidence of its contents. Bouldin *v.* Massie, 7 Wheat. 122, 154, 155. These considerations will go far to reconcile most of the cases apparently conflicting. In Fitch *v.* Bogue, 19 Conn. 285, the order of the proof was held to be immaterial, and to rest in the discretion of the court. It is sufficient, if the party has done all that could reasonably be expected of him, under the circumstances of the case, in searching for the instrument. Kelsey *v.* Hammer, 18 Conn. R. 311. After the loss of a deed has been established, the secondary evidence of the contents or substance of the contents of its operative parts must be clear and direct, and its execution must be distinctly proved. And the declarations of the grantor are admissible, in corroboration of the other evidence. Metcalf *v.* Van Benthuysen, 3 Comst. 424; Mariner *v.* Saunders, 5 Gilm. 113.

it is not easy to define, as each case depends much on its peculiar circumstances, and the question, whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents, is to be determined by the court and not by the jury.[1] But it seems, that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.[2] It should be recollected, that the object of the proof is merely to establish a reasonable presumption of the loss of the instrument; and that this is a preliminary inquiry addressed to the discretion of the judge. If the paper was supposed to be of little value, or is ancient, a less degree of diligence will be demanded, as it will be aided by the presumption of loss, which these circumstances afford. If it belonged to the custody of certain persons, or is proved or may be presumed to have been in their possession, they must, in general, be called and sworn to account for it, if they are within reach of the process of the court.[3] And so, if it might or ought to have been deposited in a public office, or other particular place, that place must be searched. If the search was made by a third person, he must be called to testify respecting it. And if the paper belongs to his custody, he must be served with a *subpœna duces tecum*, to produce it.[4] If it be an instrument,

[1] Page *v.* Page, 16 Pick. 368. [While it is a general rule that the affidavit of the plaintiff must be produced where a paper is alleged to be lost, of which he must be presumed to have the custody, before secondary evidence of its contents can be admitted, yet the rule is not inflexible. Where the nominal party to the record is not the party actually seeking to recover, and the party interested has used due diligence to find the plaintiff and produces proof that he has absconded to parts unknown, he has done all that can be reasonably required of him, and the production of the affidavit of the absent party to the record may be dispensed with. Foster *v.* Mackay, 7 Met. 531, 537.]

[2] Rex *v.* Morton, 4 M. & S. 48; Rex *v.* Castleton, 6 T. R. 236; 1 Stark. Evid. 336–340; Willis *v.* McDole, 2 South. 501; Thompson *v.* Travis, 8 Scott, 85; Parks *v.* Dunklee, 3 Watts & Serg. 291; Gathercole *v.* Miall, 15 Law Journ. 179; Doe *v.* Lewis, 15 Jur. 512; 5 Eng. L. & Eq. R. 400. The admission of the nominal plaintiff, that he had burnt the bond, he being interested adversely to the real plaintiff, has been held sufficient to let in secondary evidence of its contents. Shortz *v.* Unangst, 3 Watts & Serg. 45. [Where a party has been deprived of an instrument by fraud, secondary evidence of its contents is admissible. Grimes *v.* Kimball, 3 Allen, 518. And even where a party who offers to prove the contents of a paper has himself destroyed it, he may explain the circumstances of the destruction, in order to prove the contents. Tobin *v.* Shaw, 45 Maine, 331.]

[3] Ralph *v.* Brown, 3 Watts & Serg. 395.

[4] The duty of the witness to produce such a document is thus laid down by Shaw, C. J.: "There seems to be no difference in principle between compelling a witness to produce a document in his possession, under a *subpœna duces tecum*, in a case where the party calling the witness has a right to the use of such document, and compelling him to give testimony, when the facts lie in his own knowl-

which is the foundation of the action, and which, if found, the defendant may be compelled again to pay to a *bonâ fide holder*, the plaintiff must give sufficient proof of its destruction, to satisfy the court and jury that the defendant cannot be liable to pay it a second time.[1] And if the instrument was executed in duplicate, or triplicate, or more parts, the loss of all the parts must be proved, in order to let in secondary evidence of the contents.[2] Satisfactory proof being thus made of the loss of the instrument, the party will be admitted to give secondary evidence of its contents.[3] [*Where the party voluntarily destroys written evidence in his favor, he cannot be allowed to give evidence of the contents of such writing in a suit in his own favor founded upon the writing, without first introducing evidence to rebut any inference of fraud arising from his destroying such written evidence.[4]]

§ 559. The *production of private writings*, in which another person has an interest, may be had either by a bill of discovery, in proper cases, or in trials at law by a writ of *subpœna duces tecum*,[5]

edge. It has been decided, though it was formerly doubted, that a *subpœna duces tecum* is a writ of compulsory obligation, which the court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it. Amey *v.* Long, 9 East, 473; Corsen *v.* Dubois, 1 Holt's N. P. R. 239. But of such lawful or reasonable excuse, the court at *nisi prius*, and not the witness, is to judge. And when the witness has the paper ready to produce, in obedience to the summons, but claims to retain it on the ground of legal or equitable interests of his own, it is a question to the discretion of the court, under the circumstances of the case, whether the witness ought to produce, or is entitled to withhold the paper." Bull *v.* Loveland, 10 Pick. 14.

[1] Hansard *v.* Robinson, 7 B. & C. 90; Lubbock *v.* Tribe, 3 M. & W. 607. See also Peabody *v.* Denton, 2 Gall. 351; Anderson *v.* Robson, 2 Day, 495; Davis *v.* Todd, 4 Taunt. 602; Pierson *v.* Hutchinson, 2 Campb. 211; Rowley *v.* Ball, 3 Cowen, 303; Kirby *v.* Sisson, 2 Wend. 550; Murray *v.* Carrett, 3 Call. 373; Mayor *v.* Johnson, 3 Campb. 324; Swift *v.* Stevens, 8 Conn. 431; Ramuz *v.* Crowe, 11 Jur. 715; *post*, vol. 2, § 156.

[2] Bull. N. P. 254; Rex *v.* Castleton, 6 T. R. 236; Doe *v.* Pulman, 3 Ad. & El 622, N. S.

[3] See, as to secondary evidence, *supra*, § 84, and note. Where secondary evidence is resorted to, for proof of an instrument which is lost or destroyed, it must, in general, be proved to have been executed. Jackson *v.* Frier, 16 Johns. 196; Kimball *v.* Morrell, 4 Greenl. 368; Kelsey *v.* Hanmer, 11 Conn. R. 311; Porter *v.* Ferguson, 4 Flor. R. 102. But if the secondary evidence is a copy of the instrument which appears to have been attested by a witness, it is not necessary to call this witness. Poole *v.* Warren, 3 Nev. & P. 693. In case of the loss or destruction of the instrument, the admissions of the party may be proved to establish both its existence and contents. Mauri *v.* Heffernan, 13 Johns. 58, 74; Thomas *v.* Harding, 8 Greenl. 417; Corbin *v.* Jackson, 14 Wend. 619. A copy of a document, taken by a machine, worked by the witness who produces it, is admissible as secondary evidence. Simpson *v.* Thoreton, 2 M. & Rob. 433. [*A machine copy of a letter of the plaintiff to a third party was received as evidence of an admission on his part, although not admissible as a letter. Nathan *v.* Jacob, 1 F. & F. 452.]

[4] [* Joannes *v.* Bennett, 5 Allen, 169. See also Bagley *v.* McMickle, 9 Cal. 430.]

[5] See the course in a parallel case, where a witness is out of the jurisdiction,

directed to the person who has them in his possession. The courts of common law may also make an *order for the inspection of writings* in the possession of one party to a suit, in favor of the other. The extent of this power, and the nature of the order, whether it should be peremptory, or in the shape of a rule to enlarge the time to plead, unless the writing is produced, does not seem to be very clearly agreed;[1] and, in the United States, the courts have been unwilling to exercise the power, except where it is given by statute.[2] It seems, however, to be agreed, that where the action is *ex contractu*, and there is but one instrument between the parties, which is in the possession or power of the defendant, to which the plaintiff is either an actual party, or a party in interest, and of which he has been refused an inspection, upon request, and the production of which is necessary to enable him to declare against the defendant, the court, or a judge at chambers, may grant him a rule on the defendant to produce the document, or give him a copy, for that purpose.[3] Such order may also be obtained by the defendant, on a special case; such as, if there is reason to suspect that the document is forged, and the defendant wishes that it may be seen by himself and his witnesses.[4] But, in all such cases, the application should be supported by the *affidavit* of the party, particularly stating the circumstances.[5] [*And it

supra, § 320. It is no sufficient answer for a witness not obeying this subpœna, that the instrument required was not material. Doe *v.* Kelly, 4 Dowl. 273. But see Rex *v.* Ld. John Russell, 7 Dowl. 693.

[1] *Supra*, § 320. If the applicant has no legal interest in the writing, which he requests leave to inspect, it will not be granted. Powell *v.* Bradbury, 4 M. G. & S. 511; 13 Jur. 349. And see *supra*, § 473.

[2] [By the act of Sept. 24, 1789 (1 U. S. Stat. at Large, 82), it is provided that the courts of the United States "shall have power in all actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery;" and in case of the non-production thereof upon such order, the court may direct a nonsuit or default. Under this statute, an order to produce may be applied for before trial, upon notice. A *primâ facie* case of the existence of the paper and its materiality must be made out, and the court will then pass an order *nisi*, leaving the opposite party to produce, or to show cause at the trial, where alone the materiality can be finally decided. Iasigi *v.* Brown, 1 Curtis, C. C. 401. For other decisions under this section of the statute, see Hylton *v.* Brown, 1 Wash. C. C. R. 298; Bas *v.* Steele, 3 Ib. 381; Dunham *v.* Riley, 4 Ib. 126; Vasse *v.* Mifflin, Ib. 519.]

[3] 3 5 Chitty's Gen. Pr. 433, 434; 1 Tidd's Pr. 590, 591, 592; 1 Paine & Duer's Pr. 486–488; Graham's Practice, p. 524; Lawrence *v.* Ocean Ins. Co. 11 Johns. 245, n. (a); Jackson *v.* Jones, 3 Cowen, 17; Wallis *v.* Murray, 4 Cowen, 399; Denslow *v.* Fowler, 2 Cowen, 592; Davenport *v.* M'Kinnie, 5 Cowen, 27; Utica Bank *v.* Hilliard, 6 Cowen, 62.

[4] Brush *v.* Gibbon, 3 Cowen, 18, n (a).

[5] 3 Chitty's Gen. Pr. 434. This course being so seldom resorted to in the American common-law courts, a more particular statement of the practice is deemed unnecessary in this place. See Law's

seems that in most cases the defendant will be entitled to an inspection of his own letters, in the hands of the opposite party, when the action is based upon evidence contained in them, where no copies were retained and the inspection was necessary to the defence.[1] And so also a plaintiff, who claimed damages of a railway company for dismissing him from the office of superintendent, it was held that he was entitled to have an inspection of all entries or minutes in the company's books having reference to his employment.[2] But the defendant is not entitled to inspect his own letters to the plaintiff, in an action for breach of promise of marriage, upon an affidavit, that the promise, if any, was contained in the letters.[3] And the court will not grant an inspection of documents produced at the trial, with a view to discover grounds to move a new trial.[4]]

§ 560. When the instrument or writing is in the *hands or power of the adverse party*, there are, in general, except in the cases above mentioned, no means at law of compelling him to produce it; but the practice, in such cases, is, to give him or his attorney a regular *notice to produce* the original. Not that, on proof of such notice, he is compellable to give evidence against himself; but to lay a foundation for the introduction of secondary evidence of the contents of the document or writing, by showing that the party has done all in his power to produce the original.[5]

U. S. Courts, 35, 36. [In England it has been held that under the Common-Law Procedure Act (1854), 17 & 18 Vict. ch. 125, the court will not grant a discovery of documents except upon the affidavit of the *party* to the suit; the affidavit of the *attorney* not being sufficient, although the party himself is abroad. Herschfield *v.* Clark, 34 Eng. Law & Eq. 549. [*But in the case of a corporation, the affidavit may be made by attorney. Bull *v.* Clarke, 15 C. B. N. S. 851.] Before a party can be called upon to produce a document for the purposes of evidence, it must be shown that it is in his possession. Laxton *v.* Reynolds, 28 Ib. 553. It is not an answer to an application for an order for a discovery of documents, that they are privileged from being produced; if such be the fact it must be shown in the affidavit made in obedience to the order. Forshaw *v.* Lewis, 29 Ib. 488. The right of a plaintiff under the statute (14 & 15 Vict. c. 99), to inspect deeds in the defendant's custody, where such a right exists, is not limited by what is necessary to make out a *primâ facie* case; but it extends to any deeds which may tend to support or strengthen the case on the part of the plaintiff. The rule that one party has no right to inspect documents which make out the title of the other does not apply, if they also make out his own. Coster *v.* Baring, Ib. 365.]

[1] [*Price *v.* Harrison, 8 C. B. N.S. 617.

[2] Hill *v.* Great Western Railway Co. 10 C. B. N. S. 148.

[3] Hamer *v.* Sowerby, 3 Law T. N. S. 734, Q. B.

[4] Pratt *v.* Goswell, 9 C. B. N. S. 706.]

[5] 2 Tidd's Pr. 802; 1 Paine & Duer's Pr. 483; Graham's Practice, p. 528. Notice to produce the instrument is not alone sufficient to admit the party to give secondary evidence of its contents. He must prove the existence of the original. Sharpe *v.* Lambe, 3 P. & D. 454. He must also show that the instrument is in the possession, or under the control, of the party required to produce it. Smith *v.* Sleap, 1 Car. & Kirw. 48. But of this fact very slight evidence will raise a suffi-

§ 561. There are *three cases* in which such *notice to produce is not necessary*. First, where the instrument to be produced and that to be proved are *duplicate originals;* for, in such case, the original being in the hands of the other party, it is in his power to contradict the duplicate original by producing the other, if they vary;[1] secondly, where the instrument to be proved is *itself a notice*, such as a notice to quit, or notice of the dishonor of a bill of exchange; and, thirdly, where, from the *nature of the action*,

cient presumption, where the instrument exclusively belongs to him, and has recently been, or regularly ought to be, in his possession, according to the course of business. Henry *v.* Leigh, 3 Campb. 499, 502; Harvey *v.* Mitchell, 2 M. & Rob. 366; Robb *v.* Starkey, 2 C. & K. 143. And if the instrument is in the possession of another, in privity with the party, such as his banker, or agent, or servant, or the like, notice to the party himself is sufficient. Baldney *v.* Ritchie, 1 Stark. R. 338; Sinclair *v.* Stevenson, 1 C. & P. 582; Burton *v.* Payne, 2 C. & P. 520; Partridge *v.* Coates, Ry. & M. 153, 156; Taplin *v.* Atty, 3 Bing. 164. If a deed is in the hands of an attorney, having a lien upon it, as security for money due from his client, on which ground he refuses to produce it in obedience to a *subpœna duces tecum*, as he justly may; Kemp *v.* King, 2 M. & Rob. 437; Regina *v.* Hankins, 2 C. & K. 823; the party calling for it may give secondary evidence of its contents. Doe *v.* Ross, 7 M. & W. 102. So, if the deed is in court, in the hands of a third person as mortgagee, who has not been subpœnaed in the cause, and he declines to produce it, secondary evidence of its contents is admissible; but if the deed is not in court, and he has not been subpœnaed, it is otherwise. In such case, the person having custody of the deed must only state the date and names of the parties, in order to identify it. Doe *v.* Clifford, 2 C. & K. 448. The notice to produce may be given verbally. Smith *v.* Young, 1 Campb. 440. After notice and refusal to produce a paper, and secondary evidence given of its contents, the adverse party cannot afterwards produce the document as his own evidence. Doe *v.* Hodgson, 4 P. & D. 142; 12 Ad. & El. 135, s. c. [Where the plaintiff gave notice to the defendant to produce at the trial an original contract, and affixed what purported to be a copy of it to the notice, and, although the pretended copy was not in all respects correct, secondary evidence was allowed on the neglect of the defendant to produce the original, it was held, that the defendant could not use the copy attached to the notice, although certified to be correct by the plaintiff, while he had the original in his possession. Bogart *v.* Brown, 5 Pick. 18. In *New York*, it has been held that certain courts have authority to compel a defendant in a suit pending therein to produce and discover books, papers, and documents, in his possession or power, relating to the merits of such suit, and if the defendant refuses to comply, his answer may be stricken out, and judgment rendered against him as for a neglect to answer. Gould *v.* McCarty, 1 Kernan, 575. In *Georgia*, a party may be required in a proper case, to produce documents to be annexed to interrogatories propounded by the party calling for them; the courts requiring that a copy of the documents shall be left in the place of the original to be used as such in case the original be not returned, and that the party calling for the document shall give security to the party producing it, for its being safely returned. Faircloth *v.* Jordan, 15 Geo. 511.

Where the counsel in a case have agreed that either party shall produce upon notice at the trial, any papers which may be in his possession, the failure of the plaintiff (the agent in America of a firm in London), to produce upon such notice an invoice of goods consigned to his principals in London, is not such a failure to comply with the agreement as will admit parol testimony of the contents of the invoice, for it is to be presumed that the invoice had been forwarded to the consignees. The offer of the plaintiff to prove that such was the fact, and the concession without proof by the defendant that it was so, preclude him from afterwards objecting that proof was not given. Turner *v.* Yates, 16 How. U. S. 14.]

[1] Jury *v.* Orchard, 2 B. & P. 39, 41; Doe *v.* Somerton, 7 Ad. & El. 58, N. S.; 9 Jur. 775, S. C.; Swain *v.* Lewis, 2 C. M. & R. 261.

the defendant has notice that the plaintiff intends to charge him with possession of the instrument, as, for example, in trover for a bill of exchange. And the principle of the rule does not require notice to the adverse party to produce a paper belonging to a third person, of which he has fraudulently obtained possession; as, where, after service of a *subpœna duces tecum*, the adverse party had received the paper from the witness, in fraud of the *subpœna*.[1] [*But where the notice is an act of possession, warn-

[1] 2 Tidd's Pr. 803. Proof that the adverse party, or his attorney, has the instrument in court, does not, it seems, render notice to produce it unnecessary; for the object of the notice is not only to procure the paper, but to give the party an opportunity to provide the proper testimony to support, or impeach it. Doe *v.* Grey, 1 Stark. R. 283; Exall *v.* Partridge, Ib. cit.; Knight *v.* Marquis of Waterford, 4 Y. & Col. 284. The rule, as to dispensing with notice, is the same in equity as at law. 2 Dan. Ch. Pr. 1023. [A rule of court, that a notice to produce a paper must precede parol evidence of its contents, is waived by a party's offering to produce it. If he then fails to find it, but asks for no further time, the parol evidence is admissible. Dwinell *v.* Larrabee, 38 Maine, 464. For the purpose of proving that the defendant has fraudulently conveyed his real estate to third persons, copies of the deeds thereof from the registry are admissible, the originals not being presumed to be in the possession of either party to the suit. Blanchard *v.* Young, 11 Cush. 341, 345. But a registry copy of a deed of land is not admissible in evidence against the grantee without notice to him to produce the original. Commonwealth *v.* Emery, 2 Gray, 80, 81; Bourne *v.* Boston, Ib. 494, 497. In delivering the opinion of the court in Commonwealth *v.* Emery, *ut supra*, Shaw, C. J., said, "The rule, as to the use of deeds as evidence, in this commonwealth, is founded partly on the rules of common law, but modified to some extent, by the registry system established here by statute. The theory is this: that an original deed is in its nature more authentic and better evidence than any copy can be; that a copy is in its nature secondary; and therefore in all cases original deeds should be required, if they can be had. But as this would be burdensome and expensive, if not impossible, in many cases, some relaxation of this rule was necessary for practical purposes. The law assumes that the grantee is the keeper of deeds made directly to himself; when then he has occasion to prove any fact by such deed, he cannot use a copy, because it would be offering inferior evidence, when in theory of law the superior is in his own possession or power. It is only on proof of the loss of the original, in such case, that any secondary evidence can be received. Our system of conveyancing, modified by the registry law, is, that each grantee retains the deed made immediately to himself, to enable him to make good his warranties. Succeeding grantees do not, as a matter of course, take possession of deeds made to preceding parties, so as to be able to prove a chain of title, by a series of original deeds. Every grantee therefore is the keeper of his own deed, and of his own deed only. But there is another rule of practice arising from the registry law, and the usage under it, which is, that all deeds, before being offered in evidence as proof of title, must be registered. The register of deeds therefore is an officer of the law, with competent authority to receive, compare, and record deeds; his certificate verifies the copy as a true transcript of the original, and the next best evidence to prove the existence of the deed; though it follows as a consequence, that such copy is legal and competent evidence, and dispenses with original proof of its execution by attesting witnesses. In cases therefore, in which the original, in theory of law, is not in the custody or power of the party having occasion to use it, the certified office copy is *primâ facie* evidence of the original and its execution, subject to be controlled by rebutting evidence. But as this arises from the consideration, that the original is not in the power of the party relying on it, the rule does not apply, where such original is, in theory of law, in possession of the adverse party; because upon notice the adverse party is bound to produce it, or put himself in such position, that any secondary evidence may be given. Should it be objected that, upon notice to the adverse party to produce an original, and the tender of a paper in answer to the notice, the party calling

ing others of the plaintiff's claim, a copy is not evidence, until the absence of the original is accounted for.[1]]

§ 562. The *notice may* be *directed* to the party, or to his attorney, and may *be served* on either; and it must describe the writing demanded, so as to leave no doubt that the party was aware of the particular instrument intended to be called for.[2] But as to the time and place of the service, no precise rule can be laid down, except that it must be such as to enable the party, under the known circumstances of the case, to comply with the call. Generally, if the party dwells in another town than that in which the trial is had, a service on him at the place where the trial is had, or after he has left home to attend the court, is not sufficient.[3] But if the party has gone abroad, leaving the cause in the hands of his attorney, it will be presumed that he left with the attorney all the papers material to the cause, and the notice should therefore be served on the latter. The notice, also, should generally be served previous to the commencement of the trial.[4]

§ 563. The *regular time for calling for the production* of papers is not until the party who requires them has entered upon his case: until which time the other party may refuse to produce them, and no cross-examination, as to their contents, is usually

for the deed might deny that the paper tendered was the true paper called for; it would be easy to ascertain the identity of the paper, by a comparison of the contents of the paper tendered with the copy offered, and by the official certificate, which the register of deeds is required to make on the original, when it is recorded. This construction of the rule will carry out the principle on which it is founded, to insist on the better evidence when it can practically be had, and allow the secondary only when it is necessary."] [*See as to fraud, or the form of the action, excusing notice to produce papers in the hands of the adversary, Nealley *v.* Greenough, 5 Foster, 325.]

[1] [*Lombardo *v.* Ferguson, 15 Cal. 372.]

[2] Rogers *v.* Custance, 2 M. & Rob. 179.

[3] George *v.* Thompson, 4 Dowl. 656; Foster *v.* Pointer, 9 C. & P. 718; [Glenn *v.* Rogers, 3 Md. 312.] See also, as to the time of service, Holt *v.* Miers, 9 C. & P. 191; Reg. *v.* Kitsen, 20 Eng. L. & Eq. R. 590. As to the form and service of notice to quit, see *post*, vol. 2, §§ 322–324; Doe *v.* Somerton, 7 Ad. & El. 58.

[4] 2 Tidd's Pr. 803; Hughes *v.* Budd, 8 Dowl. 315; Firkin *v.* Edwards, 9 C. & P. 478; Gibbons *v.* Powell, Id. 634; Bate *v.* Kinsey, 1 C. M. & R. 38; Emerson *v.* Fisk, 6 Greenl. 200; 1 Paine & Duer's Pr. 485, 486. The notice must point out, with some degree of precision, the papers required. Notice to produce "all letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered," has been held too general. France *v.* Lucy, Ry. & M. 341. So, "to produce letters, and copies of letters, and all books relating to this cause." Jones *v.* Edwards, 1 McCl. & Y. 139. But notice to produce all letters written by the party to and received by the other, between the years 1837 and 1841, inclusive, was held sufficient to entitle the party to call for a particular letter. Morris *v.* Hauser, 2 M. & Rob. 392. [And as a general rule the notice is not a reasonable one, unless given before the trial is commenced. Choteau *v.* Raitt, 20 Ohio, 132.]

permitted.[1] The production of papers, upon notice, does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case, the English rule is, that they are admitted as evidence for both parties.[2] The reason is, that it would give an unconscionable advantage, to enable a party to pry into the affairs of his adversary for the purpose of compelling him to furnish evidence against himself, without, at the same time, subjecting him to the risk of making whatever he inspects evidence for both parties. But in the American courts, the rule on this subject is not uniform.[3]

§ 564. If, on the production of the instrument, it *appears* to *have been altered*, it is *incumbent on the party offering it* in evidence, *to explain* this appearance.[4] Every alteration on the face of a

[1] *Supra*, §§ 447, 463, 464. [*But where the plaintiff on his examination in chief denies the existence of a written contract, the defendant may interpose, and give evidence upon a collateral issue, whether there was a written contract, before the plaintiff is allowed to give evidence of its terms. Cox *v.* Couveless, 2 F. & F. 139.]

[2] 2 Tidd's Pr. 804; Calvert *v.* Flower, 7 C. & P. 386. [So in *Maine*. Blake *v.* Russ, 33 Maine, 360.]

[3] 1 Paine & Duer's Pr. 484; Withers *v.* Gillespy, 7 S. & R. 14. The English rule was adopted in Jordan *v.* Wilkins, 2 Wash. C. C. R. 482, 484, n.; Randel *v.* Chesapeake & Del. Can. Co. 1 Harringt. R. 233, 284; Penobscot Boom Corp. *v.* Lamson, 4 Shepl. 224; Anderson *v.* Root, 8 Sm. & M. 362; Commonwealth *v.* Davidson, 1 Cush. 33. [A party who produces a paper at the trial on the call of the adverse party is not entitled to read such paper in evidence for himself, after the party calling for it has inspected it, and declined to read it, unless it appear to be the identical instrument called for. Reed *v.* Anderson, [*12 Cush. 481; Clark *v.* Fletcher, 1 Allen, 53. But in New Hampshire, in a recent case, Austin *v.* Thompson, 45 N. Hamp. ——, the question is thoroughly reviewed, and the English rule, stated above, denied, and it seems to us the reason of the thing is in favor of the rule here maintained.]

[4] The Roman Civil Law on the subject of alterations agrees in the main with the common law; but the latter, in this as in other cases, has greatly the advantage, in its facility of adaptation to the actual state of the facts. The general rule is the same, in both codes. Rasa scriptura falsa præsumitur, et tanquam falsa rejicitur; præsertim quando rasura facta est per eum, qui utitur instrumento raso. Mascard. vol. 4; Concl. 1261, n. 1, 3. But if immaterial, or free from suspicion, an alteration or rasure does not vitiate. Si rasura non sit in loco substantiali, et suspecto, non reddit falsum instrumentum. Id. n. 9. If it appeared, on its face, to be the autography of the notary who drew the instrument, that is, a contemporaneous act, it was by some deemed valid; quamvis scriptura sit abrasa in parte substantiali, sed ita bene rescripta, ut aperte dignoscatur, id manu ejusdem Notarii fuisse. Id. n. 14. But others contended, that this was not sufficient to remove all suspicion, and render the instrument valid, unless the alteration was mentioned and explained at the end of the instrument. Si Notarius erravit in scriptura, ita ut oporteat aliquid radere et reponere, vel facere aliquam lineam in margine, debet, ad evitandam suspicionem, in fine scripturæ ac chirographi continuando facere mentionem, qualiter ipse abrasit tale verbum, in tali lineâ, vel facit talem lineam in margine. Id. n. 16. But, in the absence of all evidence to the contrary, it seems that alterations were presumed to be contemporaneous with the execution of the instrument. In dubio autem hujusmodi abrasiones seu cancellationes præsumuntur semper factæ tempore conceptionis scripturæ, antequam absoluta fuerit. Id. n. 18. If the suspicion, arising from the alteration when considered by itself, were removed, by taking it in connection with the context, it was sufficient; — cum verba antecedentia et sequentia demon-

written instrument detracts from its credit, and renders it suspicious; and this suspicion the party, claiming under it, is ordinarily held bound to remove.[1] If the alteration is noted in the attestation clause, as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from that suspicion. And if it appears in the same handwriting and ink with the body of the instrument, it may suffice. So, if the alteration is against the interest of the party deriving title under the instrument, as, if it be a bond or note, altered to a less sum, the law does not so far presume that it was improperly made, as to throw on him the burden of accounting for it.[2] And, generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument.[3] But if any ground of suspicion

strant necessario ita esse legendum, ut in rasura scripturæ reperitur. Id. n. 19. The instrument might also be held good at the discretion of the judge, if the original reading were still apparent — si sensus rectus percipi potest — notwithstanding the rasure; Id. n. 20; or if the part erased could be ascertained by other instruments; — si per alias scripturas pars abrasa declarari possit. Id. n. 21. If the instrument were produced in court by the adverse party, upon legal compulsion, no alterations apparent upon it were permitted to operate to the prejudice of the instrument, against the party calling for its production. Si scriptura, ac instrumentum reperiatur penes adversarium, et judex eum cogit tale instrumentum exhibere in judicio; quamvis enim eo casu scriptura sit abrasa in parte substantiali; tamen non vitiata, nec falsa redditur contra me, et in mei præjudicium; imo, ei præstatur fides in omnibus, in quibus ex illa potest sumi sensus; præsumitur enim adversarium dolose abrasisse. Abrasio, sive cancellatio, præsumitur facta ab eo penes quem repetitur instrumentum. Id. n. 22, 23. And if a written contract or act were executed in duplicate, an alteration of one of the originals was held not to operate to the injury of the other. Si de eadem re, et eodem contractu, fuerint confectæ duæ scripturæ, sive instrumenta, abrasio in uno harum scripturarum, etiam substantiali loco est alterum non vitiat. Id. n. 24.

[1] Perk. Conv. 55; Henman *v.* Dickinson, 5 Bing. 183, 184; Knight *v.* Clements, 8 Ad. & El. 215; Newcombe *v.* Presbrey, 8 Met. 406. But where a farm was devised from year to year by parol, and afterwards an agreement was signed, containing stipulations as to the mode of tillage, for breach of which an action was brought, and, on producing the agreement, it appeared that the term of years had been written seven, but altered to fourteen; it was held that this alteration, *being immaterial* to the parol contract, need not be explained by the plaintiff. Earl of Falmouth *v.* Roberts, 9 M. & W. 469. See further, Cariss *v.* Tattershall, 2 Man. & Gr. 890; Clifford *v.* Parker, Id. 909.

[2] Bailey *v.* Taylor, 11 Conn. R. 531; Coulson *v.* Walton, 9 Pet. 789.

[3] Trowell *v.* Castle, 1 Keb. 22; Fitzgerald *v.* Fauconberg, Fitzg. 207, 213; Bailey *v.* Taylor, 11 Conn. R. 531, 534; Gooch *v.* Bryant, 1 Shepl. 386, 390; Crabtree *v.* Clark, 7 Shepl. 337; Vanhorne *v.* Dorrance, 2 Dall. 306. And see Pullen *v.* Hutchinson, 12 Shepl. 249, 254; Wickoff's Appeal, 3 Am. Law Jour. 493, 503, N. S. In Morris *v.* Vanderen, 1 Dall. 67, and Prevost *v.* Gratz, 1 Pet. C. C. R. 364, 369, it was held, that an alteration should be presumed to have been made *after* the execution of the instrument; but this has been overruled in the United States, as contrary to the principle of the law, which never presumes wrong. The reporter's marginal notes in Burgoyne *v.* Showler, 1 Rob. Eccl. R. 5, and Cooper *v.* Brockett, 4 Moore, P. C. C. 419, state the broad proposition, that alterations in a *will*, not accounted for, are *primâ facie* presumed to have been made after its execution. But, on examination of these cases, they are found to turn entirely on the provisions of the Statute of Wills, 1 Vict. c. 26, § 21, which directs that all alterations, made before the execution of the will, be noted in a memorandum upon the will,

is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact, to be ultimately found by the jury, upon proofs to be adduced by the party offering the instrument in evidence.[1]

and attested by the testator and witnesses. If this direction is not complied with, it may well be presumed that the alterations were subsequently made. And so it was held, upon the language of that statute, and of the statute of frauds respecting wills, in Doe *v.* Palmer, 15 Jur. 836, 839; in which the case of Cooper *v.* Brockett was cited by Lord Campbell, and approved, upon the ground of the statute. The application of this rule to deeds was denied in Doe *v.* Catamore, 15 Jur. 728; 5 Eng. Law & Rep. 349, [and cases cited in note]; where it was held, that if the contrary be not proved, the interlineation in a deed is to be presumed to have been made at the time of its execution. And see Co. Lit. 225 *b*, and note by Butler; Best on Presumptions, § 75.

In the case of alterations in a will, it was held, in Doe *v.* Palmer, *supra*, that the declarations of the testator were admissible, to rebut the presumption of fraud in the alterations. [In the absence of evidence or circumstances from which an inference can be drawn as to the time when it was made, every alteration of an instrument will be presumed to have been made after its execution. Burnham *v.* Ayre, 20 Law Rep. (10 N. S.) 339.]

[1] The cases on this subject are not in perfect harmony; but they are understood fully to support the doctrine in the text. They all agree, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection, or made so by extraneous evidence, the party producing the instrument, and claiming under it, is bound to remove the suspicion by accounting for the alteration. It is also generally agreed, that inasmuch as fraud is never to be presumed, therefore, if no particular circumstances of suspicion attach to an altered instrument, the alteration is to be presumed innocent, or made prior to its execution. Gooch *v.* Bryant, 1 Shepl. 386; Crabtree *v.* Clark, 7 Shepl. 337; Wickes *v.* Caulk, 5 H. & J. 41; Gillet *v.* Sweat, 1 Gilm. 475; Doe *v.* Catamore, 15 Jur. 728; 5 Eng. Law & Eq. R. 349 [and cases cited in note]; Co. Lit. 225 *b*, note by Butler; [Boothby *v.* Stanley, 34 Maine, 115; North River Meadow Co. *v.* Shrewsbury Church, 2 N. J. 424. In an action to foreclose a mortgage, the burden of proof is on the plaintiff to show that the interlineations, alterations, and erasures therein were made before, or at the time of its execution, and there is no presumption that they were so made, or that they were made without fraud. Ely *v.* Ely, 19 Law Rep. (9 N. S.) 697. See also Wilde *v.* Armsby, 6 Cush. 314; Acker *v.* Ledyard, 8 Barb. 514; Jordan *v.* Stewart, 23 Penn. St. R. 244; Huntington *v.* Finch, 3 Ohio (N. S.), 445.] In Jackson *v.* Osborn, 2 Wend. 555, it was held, that the party claiming under a deed was bound to account for the alterations in it, and that no presumption was to be made in its favor; but in Bailey *v.* Taylor, 11 Conn. 531, it was held, that nothing was to be presumed, either way, but the question was to be submitted freely to the jury.

But an exception to this rule of the presumption of innocence seems to be admitted in the case of negotiable paper; it having been held, that the party producing and claiming under the paper is bound to explain every apparent and material alteration, the operation of which would be in his own favor. Knight *v.* Clements, 8 Ad. & El. 215; Clifford *v.* Parker, 2 M. & G. 909; Simpson *v.* Stackhouse, 9 Barr, 186; McMicken *v.* Beauchamp, 2 Miller, Louis. R. 290. See also Henman *v.* Dickinson, 5 Bing. 183; Bishop *v.* Chambre, 3 C. & P. 55; Humphreys *v.* Guillow, 13 N. Hamp. 385; Hills *v.* Barnes, 11 N. Hamp. 395; Taylor *v.* Mosely, 6 C. & P. 273; Whitfield *v.* Collingwood, 1 Car. & Kir. 325; Davis *v.* Carlisle, 6 Ala. 707; Walters *v.* Short, 5 Gilm. 252; Cariss *v.* Tattershall, 2 M. & G. 890. But in Davis *v.* Jenney, 1 Met. 221, it was held that the burden of proof was on the defendant. [Clark *v.* Eckstein, 22 Penn. State R. 507; Paine *v.* Edsell, 19 Ib. 178. See also Agawam Bank *v.* Sears, 4 Gray, 95, 97.]

Another exception has been allowed, where the instrument is, by the rules of practice, to be received as genuine, unless its genuineness is denied on oath by the party, and he does so; for his oath is deemed sufficient to destroy the presump-

§ 565. Though the effect of the alteration of a legal instrument is generally discussed with reference to deeds, yet the principle is *applicable to all other instruments*. The early decisions were chiefly upon deeds, because almost all written engagements were anciently in that form; but they establish the general proposition, that written instruments, which are *altered*, in the legal sense of that term, as hereafter explained, are *thereby made void*.[1] The grounds of this doctrine are twofold. The first is that of public policy, to prevent fraud, by not permitting a man to take the chance of committing a fraud without running any risk of losing by the event, when it is detected.[2] The other is, to insure the identity of the instrument, and prevent the substitution of another, without the privity of the party concerned.[3] The instrument derives its

tion of innocence in regard to the alteration, and to place the instrument in the condition of a suspected paper. Walters *v.* Short, 5 Gilm. 252.

It is also clear, that it is for the court to determine, in the first instance, whether the alteration is so far accounted for, as to permit the instrument to be read in evidence to the jury, who are the ultimate judges of the fact. Tillou *v.* The Clinton, &c. Ins. Co. 7 Barb. 564; Ross *v.* Gould, 5 Greenl. 204. [But see Clark *v.* Eckstein, 22 Penn. State R. 507.] But whether, in the absence of all other evidence, the jury may determine the time and character of the alteration from inspection alone is not universally agreed. In some cases they have been permitted to do so. Bailey *v.* Taylor, 11 Conn. 531; Gooch *v.* Bryant, 1 Shepl. 386; Crabtree *v.* Clark, 7 Shepl. 337; Doe *v.* Catamore, 15 Jur. 728, 5 Eng. Law & Eq. R. 349; Vanhorne *v.* Dorrance, 2 Dall. 306; [Printup *v.* Mitchell, 17 Geo. 558.] And see Wickes *v.* Caulk, 5 H. & J. 41; Pullen *v.* Shaw, 3 Dev. 238; in which last case it was held, that where the alteration was apparently against the interest of the holder of the instrument, it should be presumed to have been made prior to its execution. But in some other cases, the courts have required the exhibition of some adminicular proof, being of opinion that the jury ought not to be left to conjecture alone, upon mere inspection of the instrument. See Knight *v.* Clements, Clifford *v.* Parker, and Cariss *v.* Tattershall, *supra*.

Other cases, in accordance with the rules above stated, are the following: Cumberland Bank *v.* Hall, 1 Halst. 215; Sayre *v.* Reynolds, 2 South. 737; Mathews *v.* Coalter, 9 Mis. 705; Herrick Malin, 22 Wend. 388; Barrington *v.* Bank of Washington, 14 S. & R. 405; Horry District *v.* Hanion, 1 N. & McC. 554; Haffelfinger *v.* Shutz, 16 S. & R. 44; Beaman *v.* Russell, 20 Verm. 205. In this last case, the subject of alterations is very fully considered, and the authorities classed and examined in the able judgment delivered by Hall, J. Where an alteration is apparent, it has been held, that the party impeaching the instrument may prove collateral facts of a general character, such as alterations in other notes, which formed the consideration for the note in question, tending to show that the alteration in it was fraudulent. Rankin *v.* Blackwell, 2 Johns. Cas. 198.

[1] Masters *v.* Miller, 4 T. R. 329, 330; Newell *v.* Mayberry, 3 Leigh, R. 250. [A probate bond executed by a principal and two sureties was altered by the judge of probate, with the consent of the principal, but without the knowledge of the sureties, by increasing the penal sum, and was then executed by two additional sureties who did not know of the alteration, and was approved by the judge of probate, and it was held that the bond, though binding on the principal, was void as to all the sureties. Howe *v.* Peabody, 2 Gray, 556. See Taylor *v.* Johnson, 17 Geo. 521; Phillips *v.* Wells, 2 Sneed, 154; Ledford *v.* Vandyke, Busbee, Law, 480; Burchfield *v.* Moore, 25 Eng. Law & Eq. 123.]

[2] Masters *v.* Miller, 4 T. R. 329, per Ld. Kenyon.

[3] Sanderson *v.* Symonds, 1 B. & B. 430, per Dallas, C. J. It is on this ground that the alteration of a deed, in an immaterial part, is sometimes fatal, where its identity is put in issue by the pleadings, every part of the writing being then ma-

legal virtue from its being the sole repository of the agreement of the parties, solemnly adopted as such, and attested by the signature of the party engaging to perform it. Any alteration, therefore, which causes it to speak a language different in legal effect from that which it originally spake, is a material alteration.

§ 566. A distinction, however, is to be observed, between the *alteration* and the *spoliation* of an instrument, as to the legal consequences. An *alteration* is an act done upon the instrument, by which its meaning or language is changed. If what is written upon or erased from the instrument has no tendency to produce this result, or to mislead any person, it is not an alteration. The term is, at this day, usually applied to the act of the party entitled under the deed or instrument, and imports some fraud or improper design on his part, to change its effect. But the act of a stranger, without the participation of the party interested, is a mere *spoliation*, or mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible, and, if it be a deed, any trace remains of the seal. If, by the unlawful act of a stranger, the instrument is mutilated or defaced, so that its identity is gone, the law regards the act, so far as the rights of the parties to the instrument are concerned, merely as an accidental destruction of primary evidence, compelling a resort to that which is secondary; and, in such case, the mutilated portion may be admitted as secondary evidence of so much of the original instrument. Thus, if it be a deed, and the party would plead it, it cannot be pleaded with a profert, but the want of profert must be excused by an allegation that the deed, meaning its legal identity as a deed, has been accidentally, and without the fault of the party, destroyed.[1] And whether it be a deed or other instrument,

terial to the identity. See *supra*, §§ 58, 69; Hunt *v.* Adams, 6 Mass. 521.

[1] Powers *v.* Ware, 2 Pick. 451; Read *v.* Brookman, 3 T. R. 152; Morrill *v.* Otis, 12 N. Hamp. R. 466. The necessity of some fraudulent intent, carried home to the party claiming under the instrument, in order to render the alteration fatal, was strongly insisted on by Buller, J., in Masters *v.* Miller, 4 T. R. 334, 335. And, on this ground, at least tacitly assumed, the old cases, to the effect that an alteration of a deed by a stranger, in a material part, avoids the deed, have been overruled. In the following cases, the alteration of a writing, without fraudulent intent, has been treated as a merely accidental spoliation. Henfree *v.* Bromley, 6 East, 309; Cutts, in error, *v.* United States, 1 Gall. 69; United States *v.* Spalding, 2 Mason, 478; Rees *v.* Overbaugh, 6 Cowen, 746; Lewis *v.* Payn, 8 Cowen, 71; Jackson *v.* Malin, 15 Johns. 297, per Platt, J.; Nichols *v.* Johnson, 10 Conn. 192; Marshall *v.* Gougler, 10 S. & R. 164; Palm. 403; Wilkinson *v.* Johnson, 3 B. & C. 428; Raper *v.* Birkbeck, 15 East, 17; [Boyd *v.* McConnell, 10 Humph. 68; Lee *v.* Alexander, 9 B. Mon. 25.] The old doctrine, that every material alteration of a deed, even by a stranger, and without privity of either party, avoided the deed, was

its original tenor must be substantially shown, and the alteration or mutilation accounted for, in the same manner as if it were lost.

§ 567. In considering the effect of alterations *made by the party himself*, who holds the instrument, a *further distinction* is to be observed between the insertion of those *words which the law would supply*, and those of a different character. If the law would have supplied the words which were omitted, and were afterwards inserted by the party, it has been repeatedly held, that even his own insertion of them will not vitiate the instrument; for the assent of the obliger will, in such cases, be presumed. It is not an *alteration* in the sense of the law, avoiding the instrument; although, if it be a deed, and to be set forth *in hæc verba*, it should be recited as it was originally written.[1]

§ 568. It has been strongly doubted, whether an *immaterial* alteration in any matter, though made *by the obligee himself*, will avoid the instrument, provided it be done innocently, and to no injurious purpose.[2] But if the alteration be *fraudulently made*, by the party claiming under the instrument, it does not seem important whether it be in a material or an immaterial part; for, in either case, he has brought himself under the operation of the rule established for the prevention of fraud; and, having fraudulently destroyed the identity of the instrument, he must take the peril of all the consequences.[3] But here, also, a further distinction is

strongly condemned by Story, J., in United States *v.* Spalding, *supra*, as repugnant to common sense and justice, as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven; and which ought to have the support of unbroken authority before a court of law was bound to surrender its judgment to what deserved no better name than a technical quibble. [Goodfellow *v.* Inslee, 1 Beasley, 355.]

[1] Hunt *v.* Adams, 6 Mass. 519, 522; Waugh *v.* Bussell, 5 Taunt. 707; Paget *v.* Paget, 3 Chan. Rep. 410; Zouch *v.* Clay, 1 Ventr. 185; Smith *v.* Crooker, 5 Mass. 538; Hale *v.* Russ, 1 Greenl. 334; Knapp *v.* Maltby, 13 Wend. 587; Brown *v.* Pinkham, 18 Pick. 172.

[2] Hatch *v.* Hatch, 9 Mass. 311, per Sewall, J.; Smith *v.* Dunbar, 8 Pick. 246; [Reed *v.* Kemp, 16 Ill. 445. A promissory note was made payable to a partnership under one name, and was so indorsed by a surety. It was afterwards altered by the payee and maker, without the knowledge of the surety, so as to be payable to the same partnership by a different name. In an action on the note by the payee against the surety, it was held, that the alteration was immaterial, and that it did not affect the validity of the note. Arnold *v.* Jones, 2 R. I. 345. The making a note payable at a particular place is a material alteration. Burchfield *v.* Moore, 25 Eng. Law & Eq. R. 123. See also Warrington *v.* Early, 22 Ib. 208.]

[3] If an obligee procure a person, who was not present at the execution of the bond, to sign his name as an attesting witness, this is *primâ facie* evidence of fraud, and voids the bond. Adams *v.* Frye, 3 Met. 103. But it is competent for the obligee to rebut the inference of fraud, by proof that the act was done without any fraudulent purpose; in which case the bond will not be thereby rendered void. Ibid. And see Homer *v.* Wallis, 11 Mass. 309; Smith *v.* Dunham, 8 Pick.

to be observed, between deeds of conveyance and covenants; and also between covenants or agreements executed, and those which are still executory. For if the grantee of land alter or destroy his title-deed, yet his title to the land is not gone. It passed to him by the deed; the deed has performed its office, as an instrument of conveyance; and its continued existence is not necessary to the continuance of title in the grantee; but the estate remains in him, until it has passed to another by some mode of conveyance recognized by the law.[1] The same principle applies to contracts executed, in regard to the acts done under them. If the estate lies in grant, and cannot exist without deed, it is said that any alteration, by the party claiming the estate, will avoid the deed as to him, and that therefore the estate itself, as well as all remedy upon the deed, will be utterly gone.[2] But whether it be a deed conveying real estate or not, it seems well settled that any alteration in the instrument, made by the grantee or obligee, if it be made with a fraudulent design, and do not consist in the insertion of words which the law would supply, is fatal to the instrument, as the foundation of any remedy at law, upon the covenants or undertakings contained in it.[3] And, in such case, it seems that the party will not be permitted to prove the covenant or promise, by other evidence.[4] But where there are several parties to an indenture,

246. But this latter point was decided otherwise in Marshall *v.* Gougler, 10 S. & R. 164. And where the holder of a bond or a note under seal procured a person to alter the date, for the purpose of correcting a mistake in the year and making it conform to the truth, this was held to avoid the bond. Miller *v.* Gilleland, s. c. Pa. 1; 1 Am. Law Reg. 672. *Lowrie* and *Woodward*, Js. dissenting.

[1] Hatch *v.* Hatch, 9 Mass. 307; Dr. Leyfield's case, 10 Co. 88; Bolton *v.* Carlisle, 2 H. Bl. 359; Davis *v.* Spooner, 3 Pick. 284; Barrett *v.* Thorndike, 1 Greenl. 73; Lewis *v.* Payn, 8 Cowen, 71; Jackson *v.* Gould, 7 Wend. 364; Beckrow's case, Hetl. 138; [Tibeau *v.* Tibeau, 19 Mis. 78.] Whether the deed may still be read by the party, as evidence of title, is not agreed. That it may be read, see Doe *v.* Hirst, 3 Stark. R. 60; Lewis *v.* Payn, 8 Cowen, 17; Jackson *v.* Gould, 7 Wend. 364. That it may not, see Babb *v.* Clemson, 10 S. & R. 419; Withers *v.* Atkinson, 1 Watts, 236; Chesley *v.* Frost, 1 N. Hamp. 145; Newell *v.* Mayberry, 3 Leigh, R. 250; Bliss *v.* McIntyre, 18 Verm. 466. [An alteration in a material part of a bond given by a trustee to show the interest of a *cestui que trust*, made without the knowledge of the trustee, by a party beneficially interested therein, will destroy the bond, but will not operate to destroy an estate which existed before, and independently of, the bond. Williams *v.* Van Tuyl, 2 Ohio, N. S. 336.]

[2] Moore *v.* Salter, 3 Bulstr. 79, per Coke, C. J.; Lewis *v.* Payn, 8 Cowen, 71; *supra*, § 265.

[3] Ibid; Davidson *v.* Cooper, 11 M. & W. 778; Jackson *v.* Gould, 7 Wend. 364; Hatch *v.* Hatch, 9 Mass. 307; Barrett *v.* Thorndike, 1 Greenl. 73; Withers *v.* Atkinson, 1 Watts, 236; Arrison *v.* Harmstead, 2 Barr, 191; Whitmer *v.* Frye, 10 Missouri, R. 348; Mollett *v.* Wackerbarth, 5 M. Gr. & Sc. 181; Agriculturist Co. *v.* Fitzgerald, 15 Jur. 489; 4 Eng. L. & Eq. R. 211.

[4] Martindale *v.* Follett, 1 N. Hamp. 95; Newell *v.* Mayberry, 3 Leigh, R. 250; Blade *v.* Nolan, 12 Wend. 173; Arrison *v.* Harmstead, 2 Barr, 191. The strictness of the English rule, that every alteration of a bill of exchange, or promissory note, even by consent of the parties, renders it

some of whom have executed it, and in the progress of the transaction it is altered as to those who have not signed it, without the knowledge of those who have, but yet in a part not at all affecting the latter, and then is executed by the residue, it is good as to all.[1]

§ 568*a*. In all these cases of alterations, it is further to be remarked, that they are supposed to have been made without the consent of the other party. For, if the alteration is *made by consent of parties*, such as by filling up of blanks, or the like, it is valid.[2] But here, also, a distinction has been taken between the insertion of matter, essential to the existence and operation of the instrument as a deed, and that which is not essential to its operation. Accordingly it has been held that an instrument, which, when formally executed, was deficient in some material part, so as to be incapable of any operation at all, and was no deed, could not afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, and unauthorized by an instrument under seal.[3] Yet this rule, again, has its exceptions, in divers cases, such as powers of attorney to transfer stock,[4] navy bills,[5] custom-house bonds,[6] appeal bonds,[7] bail bonds,[8] and the like, which have been held good, though executed in blank and afterwards filled up by parol authority only.[9]

utterly void, has particular reference to the stamp act of 1 Ann. stat. 2, c. 22. Chitty on Bills, pp. 207–214.

[1] Doe *v.* Bingham, 4 B. & Ald. 672, 675, per Bayley, J.; Hibblewhite *v.* McMorine, 6 M. & W. 208, 209.

[2] Markham *v.* Gonaston, Cro. El. 626; Moor, 547; Zouch *v.* Clay, 1 Ventr. 185; 2 Lev. 35. So, where a power of attorney was sent to B, with his christian name in blank, which he filled by inserting it, this was held valid. Eagleton *v.* Gutteridge, 11 M. & W. 468. This consent may be implied. Hale *v.* Russ, 1 Greenl. 31; Smith *v.* Crooker, 5 Mass. 538; 19 Johns. 496, per Kent, C.; [Plank-Road Co. *v.* Wetsel, 21 Barb. 56; Ratcliff *v.* Planters' Bank, 2 Sneed, 425; Shelton *v.* Deering, 10 B. Mon. 105. Where the date of a note under seal was altered from 1836 to 1838, at the request of the payee, and in the presence of the surety, but without his assent, the note was avoided as to the surety. Miller *v.* Gilleland, 19 Penn. St. R. 119.]

[3] Hibblewhite *v.* McMorine, 6 M. & W. 200, 216.

[4] Commercial Bank of Buffalo *v.* Kortwright, 22 Wend. 348.

[5] Per Wilson, J., in Masters *v.* Miller, 1 Anstr. 229.

[6] 22 Wend. 366.

[7] *Ex parte* Decker, 6 Cowen, 59; *Ex parte* Kerwin, 8 Cowen, 118.

[8] Hale *v.* Russ, 1 Greenl. 334; Gordon *v.* Jeffreys, 2 Leigh, R. 410; Vanhook *v.* Barrett, 4 Dev. Law R. 272. But see Harrison *v.* Tiernans, 1 Randolph, R. 177; Gilbert *v.* Anthony, 1 Yerger, 69.

[9] In Texira *v.* Evans, cited 1 Anstr. 228, where one executed a bond in blank, and sent it into the money-market to raise a loan upon, and it was negotiated, and filled up by parol authority only, Lord Mansfield held it a good bond. This decision was questioned by Mr. Preston in his edition of Shep. Touchst. p. 68, and it was expressly overruled in Hibblewhite *v.* McMorine, 6 M. & W. 215. It is also contradicted by McKee *v.* Hicks, 2 Dev. Law R. 379, and some other American cases. But it was confirmed in Wiley *v.* Moor, 17 S. & R. 438; Knapp *v.* Maltby, 13 Wend. 587; Commercial Bank of Buf-

§ 569. The instrument, being thus produced and freed from suspicion, must be *proved by the subscribing witnesses*, if there be any, or at least by one of them.[1] Various reasons have been

falo *v.* Kortwright, 22 Wend. 348; Boardman *v.* Gore, 1 Stewart, Alab. R. 517; Duncan *v.* Hodges, 4 McCord, 239; and in several other cases the same doctrine has been recognized. In the United States *v.* Nelson, 2 Brockenbrough, R. 64, 74, 75, which was the case of a paymaster's bond, executed in blank and afterwards filled up, Chief-Justice Marshall, before whom it was tried, felt bound by the weight of authority, to decide against the bond; but expressed his opinion, that in principle it was valid, and his belief that his judgment would be reversed in the Supreme Court of the United States; but the cause was not carried farther. Instruments executed in this manner have become very common, and the authorities as to their validity are distressingly in conflict. But upon the principle adopted in Hudson *v.* Revett, 5 Bing. 368, there is very little difficulty in holding such instruments valid, and thus giving full effect to the actual intentions of the parties, without the violation of any rule of law. In that case, the defendant executed and delivered a deed, conveying his property to trustees, to sell for the benefit of his creditors, the particulars of whose demands were stated in the deed; but a blank was left for one of the principal debts, the exact amount of which was subsequently ascertained and inserted in the deed, in the grantor's presence, and with his assent, by the attorney who had prepared the deed and had it in his possession, he being one of the trustees. The defendant afterwards recognized the deed as valid, in various transactions. It was held that the deed was not intended to be a complete and perfect deed, until all the blanks were filled, and that the act of the grantor, in assenting to the filling of the blank, amounted to a delivery of the deed, thus completed. No formality, either of words or action, is prescribed by the law as essential to delivery. Nor is it material how or when the deed came into the hands of the grantee. Delivery, in the legal sense, consists in the transfer of the possession and dominion; and whenever the grantor assents to the possession of the deed by the grantee, as an instrument of title, then, and not until then, the delivery is complete. The possession of the instrument by the grantee may be simultaneous with this act of the grantor's mind, or it may have been long before; but it is this assent of the grantor which changes the character of that prior possession, and imparts validity to the deed. Mr. Preston observes that "all cases of this sort depend on the inquiry whether the intended grantor has given sanction to the instrument, so as to make it conclusively his deed." 3 Preston on Abstracts, p. 64. And see Parker *v.* Hill, 8 Met. 447; Hope *v.* Harman, 11 Jur. 1097; *post*, vol. 2, § 297. The same effect was given to clear and unequivocal acts of assent *en pais*, by a feme mortgagor, after the death of her husband, as amounting to a redelivery of a deed of mortgage, executed by her while a feme covert. Goodright *v.* Straphan, Cowp. 201, 204; Shep. Touchst. by Preston, p. 58. "The general rule," said Mr. Justice Johnson, in delivering the judgment of the court, in Duncan *v.* Hodges, "is, that if a blank be signed, sealed, and delivered, and afterwards written, it is no deed; and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But the rule was never intended to prescribe to the grantor the order of time, in which the several parts of a deed should be written. A thing to be granted, a person to whom, and the sealing and delivery, are some of those which are necessary, and the whole is consummated by the delivery; and if the grantor should think proper to reverse this order, in the manner of execution, but in the end makes it perfect before delivery, it is a good deed. See 4 McCord, R. 239, 240. Whenever, therefore, a deed is materially altered, by consent of the parties, after its formal execution, the grantor or obligor assents that the grantee or obligee shall retain it in its altered and completed form, as an instrument of title; and this assent amounts to a delivery or redelivery, as the case may require, and warrants the jury in finding accordingly. Such plainly was the opinion of the learned judges in Hudson *v.* Revett, as stated by Best, C. J., in 5 Bing. 388, 389; and further expounded in West *v.* Steward, 14 M. & W. 47. See also Hartley *v.* Manson, 4 M. & G. 172; Story on Bailments, § 55. [Filling in the date of a warrant of attorney after execution is not such an alteration as will avoid the instrument. Keane *v.* Smallbone, 33 Eng. Law & Eq. 198.]

[1] A written instrument, not attested by a subscribing witness, is sufficiently

assigned for this rule: but that upon which it seems best founded is, that a fact may be known to the subscribing witness, not within the knowledge or recollection of the obligor; and that he is entitled to avail himself of all the knowledge of the subscribing witness, relative to the transaction.[1] The party, to whose execution he is a witness, is considered as invoking him, as the person to whom he refers, to prove what passed at the time of attesta-

proved to authorize its introduction, by competent proof that the signature of the person, whose name is undersigned, is genuine. The party producing it is not required to proceed further upon a mere suggestion of a false date when there are no indications of falsity found upon the paper, and prove, that it was actually made on the day of the date. After proof that the signature is genuine, the law presumes that the instrument in all its parts is genuine also, when there are no indications to be found upon it to rebut such a presumption. See Pullen *v.* Hutchinson, 12 Shepl. 254, per Shepley, J.

In regard to instruments duly attested, the rule in the text is applied where the instrument is the foundation of the party's claim, or he is privy to it, or where it purports to be executed by his adversary; but not where it is wholly *inter alios*, under whom neither party can claim or deduce any right, title, or interest to himself. Ayres *v.* Hewett, 1 Applet. 286, per Whitman, C. J.

In *Missouri, two* witnesses are required to prove the signature of a deceased subscribing witness to a *deed*. Rev. Stat. 1845, ch. 32, § 22. See *supra*, § 260, note.

In *Virginia*, every written instrument is presumed to be genuine, if the party purporting to have signed it be living, unless he will deny the signature, on oath. Rev. Stat. 1849, ch. 98, § 85. So, in *Illinois*. Linn *v.* Buckingham, 1 Scam. 451. And see *Missouri*, Rev. Stat. 1835, p. 163, §§ 18, 19. *Texas*, Hartley's Dig. § 711. *Delaware*, Rev. Stat. 1852, ch. 106, § 5.

In *South Carolina*, the signature to a bond or note may be proved by any other person, without calling the subscribing witness; unless the defendant will swear that it is not his signature, or that of his testator or intestate, if the case be such. Stat. at Large, vol. 5, p. 331. And foreign deeds, bonds, &c., attested to have been proved on oath before a notary or other magistrate qualified therefor, are admissible in evidence without proof by the subscribing witnesses; provided the courts of the foreign state receive similar evidence from this state. Id. vol. 3, p. 285; vol. 5, p. 45.

In *Virginia*, foreign deeds or powers of attorney, &c., duly acknowledged, so as to be admitted to record by the laws of that state; also, policies, charter-parties, and copies of record or of registers of marriages and births, attested by a notary, to be made, entered, or kept according to the law of the place, are admissible in evidence in the courts of that state, without further proof. Rev. Stat. 1849, ch. 121, § 3; Id. ch. 176, § 16. A similar rule, in substance, is enacted in *Mississippi*. Hutchinson's Dig. ch. 60, art. 2. And see *infra*, § 573, note. [And where the instrument which the plaintiff offered as part of his case was a lease not under seal, executed on the part of the lessor by an attorney, in the presence of an attesting witness, it was held, that the testimony of the attorney was inadmissible to prove the execution of the lease, without first calling the attesting witness, or accounting for his absence. "The person whose signature appeared to it as attorney of the supposed lessor could not affect the rights of the defendants, who objected to it, by way of admission or confession, for he never represented, or was intrusted by, the defendants for any purpose. His handwriting was secondary evidence only, and could not be proved, until the plaintiff had proved that the testimony of the attesting witness could not be obtained. The attorney, therefore, stood in the same position as any other person, not a subscribing witness, who might have happened to be present at the execution of the instrument. The evidence was incompetent, and rightly rejected." By Shaw, C. J. Barry *v.* Ryan, 4 Gray, 523, 525. Where one witness testifies that the other witness and himself were present and saw the execution of a deed, it is not necessary to call such other witness. Melcher *v.* Flanders, 40 N. H. 139.]

[1] Per Le Blanc, J., in Call *v.* Dunning, 4 East, 54; Manners *v.* Postan, 4 Esp. 240, per Ld. Alvanley, C. J.; 3 Preston on Abstracts of Title, p. 73.

tion.[1] The rule, though originally framed in regard to deeds, is now extended to every species of writing, attested by a witness.[2] Such being the principle of the rule, its application has been held indispensable, even where it was proved that the obligor had admitted that he had executed the bond;[3] and though the admission were made in answer to a bill of discovery.[4]

§ 569*a*. A *subscribing witness* is one who was present when the instrument was executed, and who, at that time, at the request or with the assent of the party, subscribed his name to it, as a witness of the execution. If his name is signed not by himself, but by the party, it is no attestation. Neither is it such, if, though present at the execution, he did not subscribe the instrument at that time, but did it afterwards, and without request, or by the fraudulent procurement of the other party. But it is not necessary that he should have actually seen the party sign, or have been present at the very moment of signing; for if he is called in immediately afterwards, and the party acknowledges his signature to the witness, and requests him to attest it, this will be deemed part of the transaction, and therefore a sufficient attestation.[5]

[1] Cussons *v.* Skinner, 11 M. & W. 168, per Ld. Abinger; Hollenback *v.* Fleming, 6 Hill, N.Y. Rep. 303.

[2] Doe *v.* Durnford, 2 M. & S. 62; which was a notice to quit. So, of a warrant to distrain. Higgs *v.* Dixon, 2 Stark. R. 180. A receipt. Heckert *v.* Haine, 6 Binn. 16; Wishart *v.* Downey, 15 S. & R. 77; Mahan *v.* McGrady, 5 S. & R. 314.

[3] Abbott *v.* Plumbe, 1 Doug. 216, referred to by Lawrence, J., in 7 T. R. 267, and again in 2 East, 187, and confirmed by Lord Ellenborough, as an inexorable rule, in Rex *v.* Harringworth, 4 M. & S. 353. The admission of the party may be given in evidence; but the witness must also be produced, if to be had. This rule was broken in upon, in the case of the admitted execution of a promissory note, in Hall *v.* Phelps, 2 Johns. 451; but the rule was afterwards recognized as binding in the case of a deed, in Fox *v.* Reil, 3 Johns. 477, and confirmed in Henry *v.* Bishop, 2 Wend. 575. [*The rule requiring the production of the subscribing witness, to prove the paper, is most inflexible. Story *v.* Lovett, 1 E. D. Smith, 153. And the fact that such witness is the sole justice of the court will not dispense with it. Jones *v.* Phelps, 5 Mich. 218.]

[4] Call *v.* Dunning, 4 East, 43. But see Bowles *v.* Langworthy, 5 T. R. 366. So, in order to prove the admission of a debt, by the medium of an entry in a schedule filed by the defendant in the Insolvent-Debtors' Court, it was held necessary to prove his signature by the attesting witness, although the document had been acted upon by that court. Streeter *v.* Bartlett, 5 M. G. & Sc. 562. In *Maryland*, the rule in the text is abrogated by the statute of 1825, ch. 120. [The English statute rendering parties to suits competent witnesses has not changed the rule. Whyman *v.* Garth, 20 Eng. Law & Eq. R. 359. And the same has been held in Massachusetts. Brigham *v.* Palmer, 3 Allen, 450.]

[5] Hollenback *v.* Fleming, 6 Hill, N. Y. Rep. 303; Cussons *v.* Skinner, 11 M. & W. 168; Ledgard *v.* Thompson, Id. 41, per Parke, B. *Si* [*testes*] *in confectione chartæ præsentes non fuerint, sufficit si postmodum, in præsentia donatoris et donatorii fuerint recitate et concessa.* Bracton, b. 2, c. 16, § 12, fol. 38, a; Fleta, l. 3, c. 14, § 13, p. 200. And see Brackett *v.* Mountfort, 2 Fairf. 115. See further, on signature and attestation, *post*, vol. 2, tit. WILLS, §§ 674, 676, 678.

§ 570. To this rule, requiring the production of the subscribing witnesses, there are several *classes of exceptions*. The *first* is, where the *instrument is thirty years old;* in which case, as we have heretofore seen,[1] it is said to prove itself, the subscribing witnesses being presumed to be dead, and other proof being presumed to be beyond the reach of the party. But such documents must be free from just grounds of suspicion, and must come from the proper custody,[2] or have been acted upon, so as to afford some corroborative proof of their genuineness.[3] And, in this case, it is not necessary to call the subscribing witnesses, though they be living.[4] This exception is co-extensive with the rule, applying to ancient writings of every description, provided they have been brought from the proper custody and place; for the finding them in such a custody and place is a presumption that they were honestly and fairly obtained, and preserved for use, and are free from suspicion of dishonesty.[5] But whether it extends to the seal of a private corporation, has been doubted, for such a case does not seem clearly to be within the principle of the exception.[6]

[1] *Supra*, § 21, and cases there cited. See also Doe *v.* Davis, 10 Ad. & El. 314, n. s.; Crane *v.* Marshall, 4 Shepl. 27; Green *v.* Chelsea, 24 Pick. 71. From the dictum of Parker, C. J., in Emerson *v.* Tolman, 4 Pick. 162, it has been inferred that the subscribing witnesses must be produced, if living, though the deed be more than thirty years old. But the case of Jackson *v.* Blanshan, 3 Johns. 292, which is there referred to, contains no such doctrine. The question in the latter case, which was the case of a will, was, whether the thirty years should be computed from the date of the will, or from the time of the testator's death, and the court held that it should be computed from the time of his death. But on this point Spencer, J., differed from the rest of the court; and his opinion, which seems more consistent with the principle of the rule, is fully sustained by Doe *v.* Deakin, 3 C. & P. 402; Doe *v.* Wolley, 8 B. & C. 22; McKenire *v.* Frazer, 9 Ves. 5; Gough *v.* Gough, 1 T. R. 707, n. See Adams on Eject. p. 260. And it was accordingly so decided in Man *v.* Ricketts, 7 Beavan, 93.

[2] *Supra*, § 142. And see Slater *v.* Hodgson, 9 Ad. & El. 727, n. s. [An ancient book kept among the records of the town and coming therefrom, purporting to be the selectmen's book of accounts, with the treasury of the town, is admissible in evidence of the facts therein stated. Boston *v.* Weymouth, 4 Cush. 538, 542. See also Whitehouse *v.* Bickford, 9 Foster, 471; Adams *v.* Stanyan, 4 Foster, 405.]

[3] See *supra*, §§ 21, 142, and cases there cited; Doe d. Edgett *v.* Stiles, 1 Kerr's Rep. (New Br.) 338. Mr. Evans thinks that the antiquity of the deed is alone sufficient to entitle it to be read; and that the other circumstances only go to its effect in evidence; 2 Poth. Obl. App. xvi. sect. 5, p. 149. See also Doe *v.* Burdett, 4 Ad. & El. 1, 19; Brett *v.* Beales, 1 M. & Malk. 416, 418; Jackson *v.* Larroway, 3 Johns. Cas. 283. In some cases, proof of possession, under the deed or will, seems to have been deemed indispensable; but the principle pervading them all is that of corroboration merely; that is, that some evidence shall be offered, auxiliary to the apparent antiquity of the instrument, to raise a sufficient presumption in its favor. As to this point, see *supra*, § 144, note.

[4] Marsh *v.* Colnett, 2 Esp. 665; Doe *v.* Burdett, 4 Ad. & El. 1, 19; Doe *v.* Deakin, 3 C. & P. 402; Jackson *v.* Christman, 4 Wend. 277, 282, 283; Doe *v.* Wolley, 8 B. & C. 22; Fetherley *v.* Waggoner, 11 Wend. 603; *supra*, 142.

[5] 12 Vin. Abr. tit. *Evidence*, A. b. 5, pl. 7, cited by Ld. Ellenborough, in Roe *v.* Rawlins, 7 East, 291; Gov. &c. of Chelsea Waterworks *v.* Cowper, 1 Esp. R. 275; Forbes *v.* Wale, 1 W. Bl. 532; Winne *v.* Tyrwhitt, 4 B. & Ald. 376.

[6] Rex *v.* Bathwick, 2 B. & Ad. 639, 648.

§ 571. A *second exception* to this rule is allowed, where the instrument is *produced by the adverse party*, pursuant to notice, the party producing it *claiming an interest* under the instrument. In this case, the party producing the instrument is not permitted to call on the other for proof of its execution; for, by claiming an interest under the instrument, he has admitted its execution.[1] The same principle is applied where both parties claim similar interests, under the same deed; in which case, the fact of such claim may be shown by parol.[2] So, where both parties claim under the same ancestor, his title-deed, being equally presumable to be in the possession of either, may be proved by a copy from the registry.[3] But it seems that the interest claimed in these cases must be of an *abiding nature.* Therefore, where the defendant would show that he was a partner with the plaintiff, and, in proof thereof, called on the plaintiff to produce a written personal contract, made between them both, as partners of the one part, and a third person of the other part, for labor which had been performed, which was produced accordingly, the defendant was still held bound to prove its execution.[4] The interest, also, which is claimed under the instrument produced on notice, must, in order to dispense with this rule, be *an interest claimed in the same cause.* Therefore, where in an action by an agent against his principal, for his commission due

[1] Pearce *v.* Hooper, 3 Taunt. 60; Carr *v.* Burdiss, 1 C. M. & R. 784, 785; Orr *v.* Morice, 3 Br. & Bing. 139; Bradshaw *v.* Bennett, 1 M. & Rob. 143. In assumpsit by a servant against his master, for breach of a written contract of service, the agreement being produced under notice, proof of it by the attesting witness was held unnecessary. Bell *v.* Chaytor, 1 Car. & Kirw. 162; 5 C. & P. 48.

[2] Doe *v.* Wilkins, 4 Ad. & El. 86; 5 Nev. & M. 434, s. c.; Knight *v.* Martin, 1 Gow, R. 26.

[3] Burghardt *v.* Turner, 12 Pick. 534. It being the general practice, in the United States, for the grantor to retain his own title-deeds, instead of delivering them over to the grantee, the grantee is not held bound to produce them; but the person making title to lands is, in general, permitted to read certified copies, from the registry, of all deeds and instruments under which he claims, and to which he is not himself a party, and of which he is not supposed to have the control. Scanlan *v.* Wright, 13 Pick. 523; Woodman *v.* Coolbroth, 7 Greenl. 181; Loomis *v.* Bedel, 11 N. Hamp. 74. And where a copy is, on this ground, admissible, it has been held that the original might be read in evidence, without proof of its formal execution. Knox *v.* Silloway, 1 Fairf. 201. This practice, however, has been restricted to instruments which are by law required to be registered, and to transmissions of title *inter vivos;* for if the party claims by descent from a grantee, it has been held that he must produce the deed to his ancestor, in the same manner as the ancestor himself would be obliged to do. Kelsey *v.* Hanmer, 18 Conn. R. 311. Where proof of title had been made by a copy from the registry of an officer's levy of an execution, and the adverse party thereupon produced the original return, in which were material alterations, it was held that this did not affect the admissibility of the copy in evidence, and that the burden of explaining and accounting for the alterations in the original did not rest on the party producing the copy. Wilbur *v.* Wilbur, 13 Met. 405; [*ante*, § 561, and notes.]

[4] Collins *v.* Bayntum, 1 Ad. & El. N. S. 117.

for procuring him an apprentice, the indenture of apprenticeship was produced by the defendant on notice; it was held that the plaintiff was still bound to prove its execution by the subscribing witness; and that, having been nonsuited for want of this evidence, he was not entitled to a new trial on the ground of surprise, though he was not previously aware that there was a subscribing witness, it not appearing that he had made any inquiry on the subject.[1] So, where the instrument was taken by the party producing it, in the course of his official duty, as, for example, a bail bond, taken by the sheriff, and produced by him on notice, its due execution will *primâ facie* be presumed.[2] Subject to these exceptions, the general rule is, that where the party producing an instrument on notice is not a party to it and claims no beneficial interest under it, the party calling for its production, and offering it in evidence, must prove its execution.[3]

§ 572. A *third class* of exceptions to this rule arises from the circumstances of the witnesses themselves, the party, either from *physical or legal obstacles*, being *unable to adduce* them. Thus, if the witness is proved or presumed to be dead;[4] or cannot be found after diligent inquiry;[5] or, is resident beyond the sea;[6] or, is out of the jurisdiction of the court;[7] or, is a fictitious person, whose name has been placed upon the deed by the party who made it;[8] or, if the instrument is lost, and the name of the sub-

[1] Rearden *v.* Minter, 5 M. & Gr. 204.

[2] Scott *v.* Waithman, 3 Stark. R. 168.

[3] Betts *v.* Badger, 12 Johns. 223; Jackson *v.* Kingsley, 17 Johns. 158.

[4] Anon. 12 Mod. 607; Barnes *v.* Trompowsky, 7 T. R. 265; Adams *v.* Kerr, 1 B. & P. 360; Banks *v.* Farquharson, 1 Dick. 167; Mott *v.* Doughty, 1 Johns. Cas. 230; Dudley *v.* Sumner, 5 Mass. 463. That the witness is sick, even though despaired of, is not sufficient. Harrison *v.* Blades, 3 Campb. 457. See *supra*, § 272, n., as to the mode of proving the attestation of a marksman.

[5] Coghlan *v.* Williamson, 1 Doug. 93; Cunliffe *v.* Sefton, 2 East, 183; Call *v.* Dunning, 5 Esp. 16; 4 East, 53; Crosby *v.* Piercy, 1 Taunt. 364; Jones *v.* Brinkley, 1 Hayw. 20; Anon. 12 Mod. 607; Wardell *v.* Fermor, 2 Campb. 282; Jackson *v.* Burton, 11 Johns. 64; Mills *v.* Twist, 8 Johns. 121; Parker *v.* Haskins, 2 Taunt. 223; Whittemore *v.* Brooks, 1 Greenl. 57; Burt *v.* Walker, 4 B & Ald. 697; Pytt *v.* Griffith, 6 Moore, 538; Austin *v.* Rumsey, 2 C. & K. 736.

[6] Anon. 12 Mod. 607; Barnes *v.* Trompowsky, 7 T. R. 266.

[7] Holmes *v.* Pontin, Peake's Cas. 99; Banks *v.* Farquharson, 1 Dick. 167; Cooper *v.* Marsden, 1 Esp. 1; Prince *v.* Blackburn, 2 East, 250; Sluby *v.* Champlin, 4 Johns. 461; Dudley *v.* Sumner, 5 Mass. 444; Homer *v.* Wallis, 11 Mass. 309; Cook *v.* Woodrow, 5 Cranch, 13; Baker *v.* Blunt, 2 Hayw. 404; Hodnett *v.* Forman, 1 Stark. R. 90; Glubb *v.* Edwards, 2 M. & Rob. 300; Engles *v.* Bruington, 4 Yeates, 345; Wiley *v.* Bean, 1 Gilman, 302; Dunbar *v.* Marden, 13 N. Hamp. 311. If the witness has set out to leave the jurisdiction by sea, but the ship has been beaten back, he is still considered absent. Ward *v.* Wells, 1 Taunt. 461. See also Emery *v.* Twombly, 5 Shepl. 65; [Teall *v.* Van Wyck, 10 Barb. 376; Foote *v.* Cobb, 18 Ala. 585; Cox *v.* Davis, 17 Ib. 714.]

[8] Fassett *v.* Brown, Peake's Cas. 23.

scribing witness is unknown;[1] or, if the witness is insane;[2] or, has subsequently become infamous;[3] or, has become the adverse party;[4] or, has been made executor or administrator to one of the parties, or has otherwise, and without the agency of the party, subsequently become interested, or otherwise incapacitated;[5] or, was incapacitated at the time of signing, but the fact was not known to the party;[6] in all these cases, the execution of the instrument may be proved by other evidence. If the adverse party, pending the cause, solemnly agrees to admit the execution, other proof is not necessary.[7] And if the witness, being called, denies, or does not recollect having seen it executed, it may be established by other evidence.[8] If the witness has become blind, it has been held that this did not excuse the party from calling him; for he may be able still to testify to other parts of the *res gestæ* at the time of signing.[9] If the witness was infamous at the time of

[1] Keeling *v.* Ball, Peake's Ev. App. 78.

[2] Currie *v.* Child, 3 Campb. 283. See also 3 T. R. 712, per Buller, J.

[3] Jones *v.* Mason, 2 Stra. 833. If the conviction were previous to the attestation, it is as if not attested at all. 1 Stark. Evid. 325.

[4] Strange *v.* Dashwood, 1 Cooper's Ch. Cas. 497.

[5] Goss *v.* Tracy, 1 P. Wms. 289; Godfrey *v.* Norris, 1 Stra. 34; Davison *v.* Bloomer, 1 Dall. 123; Bulkley *v.* Smith, 2 Esp. 697; Cunliffe *v.* Sefton, 2 East, 183; Burrett *v.* Taylor, 9 Ves. 381; Hamilton *v.* Marsden, 6 Binn. 45; Hamilton *v.* Williams, 1 Hayw. 139; Hovill *v.* Stephenson, 5 Bing. 439, per Best, C. J.; Saunders *v.* Ferrill, 1 Iredell, 97. And see, as to the manner of acquiring the interest, *supra*, § 418.

[6] Nelius *v.* Brickell, 1 Hayw. 19. In this case, the witness was the wife of the obligor. And see Amherst Bank *v.* Root, 2 Met. 522, that if the subscribing witness was interested at the time of attestation, and is dead at the time of trial, his handwriting may not be proved. For such evidence would be merely secondary, and therefore admissible only in cases where the primary evidence could have been admitted. [If a subscribing witness to an instrument merely makes his mark, instead of writing his name, the instrument is to be proved by evidence of the handwriting of the party executing it. Watts *v.* Kilburn, 7 Geo. 356.]

[7] Lang *v.* Raine, 2 B. & P. 85.

[8] Abbott *v.* Plumbe, 1 Doug. 216; Lesher *v.* Levan, 1 Dall. 96; Ley *v.* Ballard, 3 Esp. 173, n.; Powell *v.* Blackett, 1 Esp. 97; Park *v.* Mears, 3 Esp. 171; Fitzgerald *v.* Elsee, 2 Campb. 635; Blurton *v.* Toon, Skin. 639; McCraw *v.* Gentry, 3 Campb. 132; Grellier *v.* Neale, Peake's Cas. 145; Whitaker *v.* Salisbury, 15 Pick. 534; Quimby *v.* Buzzell, 4 Shepl. 470; *supra*, § 272. Where one of the attesting witnesses to a will has no recollection of having subscribed it, but testifies that the signature of his name thereto is genuine; the testimony of another attesting witness, that the first did subscribe his name in the testator's presence, is sufficient evidence of that fact. Dewey *v.* Dewey, 1 Met. 349. See also Quimby *v.* Buzzell, 4 Shepl. 470; New Haven Co. Bank *v.* Mitchell, 15 Conn. R. 206. If the witness to a deed recollects seeing the signature only, but the attesting clause is in the usual formula, the jury will be advised, in the absence of controlling circumstances to find the sealing and delivery also. Burling *v.* Paterson, 9 C. & P. 570. See *supra*, § 38*a*.

[9] Cronk *v.* Frith, 9 C. & P. 197; 2 M. & Rob. 262, s. c., per Ld. Abinger, C. B.; Rees *v.* Williams, 1 De Gex & Smale, 314. In a former case of Pedler *v.* Paige, 1 M. & Rob. 258, Parke, J., expressed himself of the same opinion, but felt bound by the opposite ruling of Ld. Holt, in Wood *v.* Drury, 1 Ld. Raym. 734.

attestation, or was interested, and continues so, the party not then knowing the fact, the attestation is treated as a nullity.[1]

§ 573. A *fourth* exception has been sometimes admitted, in regard to *office bonds*, required by law to be taken in the name of some public functionary, in trust for the benefit of all persons concerned, and to be preserved in the public registry for their protection and use; of the due execution of which, as well as of their sufficiency, such officer must first be satisfied and the bond approved, before the party is qualified to enter upon the duties of his office. Such, for example, are the bonds given for their official fidelity and good conduct, by *guardians*, *executors*, *and administrators*, to the judge of probate. Such documents, it is said, have a high character of authenticity, and need not be verified by the ordinary tests of truth, applied to merely private instruments, namely, the testimony of the subscribing witnesses; but when they are taken from the proper public repository, it is only necessary to prove the identity of the obligor with the party in the action.[2] Whether this exception, recently asserted, will be generally admitted, remains to be seen.

§ 573*a*. A further exception to the rule requiring proof of hand-

[1] Swire *v.* Bell, 5 T. R. 371; Honeywood *v.* Peacock, 3 Campb. 196; Amherst Bank *v.* Root, 2 Met. 522.

[2] Kello *v.* Maget, 1 Dev. & Bat. 414. The case of *deeds enrolled* would require a distinct consideration in this place, were not the practice so various in the different states, as to reduce the subject to a mere question of local law, not falling within the plan of this work. In general, it may be remarked, that in all the United States, provision is made for the registration and enrolment of deeds of conveyance of lands; and that prior to such registration, the deed must be acknowledged by the grantor, before the designated magistrate; and, in case of the death or refusal of the grantor, and in some other enumerated cases, the deed must be *proved* by witnesses, either before a magistrate, or in a court of record. But generally speaking, such acknowledgment is merely designed to entitle the deed to registration, and registration is, in most states, not essential to passing the estate, but is only intended to give notoriety to the conveyance, as a substitute for livery of seisin. And such acknowledgment is not generally received, as *primâ facie* evidence of the execution of the deed, unless by force of some statute, or immemorial usage, rendering it so; but the grantor, or party to be affected by the instrument, may still controvert its genuineness and validity. But where the deed falls under one of the exceptions, and has been proved *per testes*, there seems to be good reason for receiving this probate, duly authenticated, as sufficient *primâ facie* proof of the execution, and such is understood to be the course of practice, as settled by the statutes of many of the United States. See 4 Cruise's Dig. tit. 32, ch. 29, § 1, note, and ch. 2, §§ 77, 80, notes (Greenleaf's ed.); 2 Lomax's Dig. 353; Doe *v.* Johnson, 2 Scam. 522; Morris *v.* Wadsworth, 17 Wend. 103; Thurman *v.* Cameron, 24 Wend. 87. The English doctrine is found in 2 Phil. Evid. 243–247; 1 Stark. Evid. 355–358. And see Mr. Metcalf's note to 1 Stark. Evid. 357; Brotherton *v.* Livingston, 3 Watts & Serg. 334; Vance *v.* Schuyler, 1 Gilm. Ill. R. 160. Where a deed executed by an officer acting under authority of law is offered in evidence, not in proof of title, but in proof of a collateral fact, the authority of the officer needs not to be shown. Bolles *v.* Beach, 3 Am. Law Journ. 122, N. S. See Rev. St. Wisconsin, p. 525; Rev. St. Illinois, p. 108.

writing, has been admitted, in the case of letters received in reply to others proved to have been sent to the party. Thus where the plaintiff's attorney wrote a letter addressed to the defendant at his residence, and sent it by the post, to which he received a reply purporting to be from the defendant; it was held, that the letter thus received was admissible in evidence, without proof of the defendant's handwriting, and that letters of an earlier date in the same handwriting, might also be read, without other proof.[1]

§ 573*b*. A *fifth* exception to the rule requiring proof by the subscribing witness, is admitted, where the instrument is not directly in issue, but comes incidentally in question in the course of the trial; in which case, its execution may be proved by any competent testimony, without calling the subscribing witness.[2]

§ 574. The *degree of diligence in the search* for the subscribing witnesses is the same which is required in the search for a lost paper, the principle being the same in both cases.[3] It must be a strict, diligent, and honest inquiry and search, satisfactory to the court, under the circumstances of the case. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found; and inquiry should be made of his relatives, and others who may be supposed to be able to afford information. And the answers given to such inquiries may be given in evidence, they being not hearsay, but parts of the *res gestæ*.[4] If there is more than one attesting witness, the absence of them all must be satisfactorily accounted for, in order to let in the secondary evidence.[5]

§ 575. When secondary evidence of the execution of the instrument is thus rendered admissible, it will not be necessary to prove the *handwriting* of more than one witness.[6] And this evidence is, in general, deemed sufficient to admit the instrument to be read,[7]

[1] Ovenston *v.* Wilson, 2 Car. & Kir. 1.

[2] Curtis *v.* Belknap, 6 Washb. 433. [On the trial of an indictment for obtaining the signature to a deed by false pretences, the deed may be proved by the testimony of the grantor, without calling the attesting witness. Commonwealth *v.* Castles, 20 Law Rep (10 N. S.) 411.]

[3] *Supra*, § 558.

[4] The cases on this subject are numerous; but as the application of the rule is a matter in the discretion of the judge, under the particular circumstances of each case, it is thought unnecessary to encumber the work with a particular reference to them.

[5] Cunliffe *v.* Sefton, 2 East, 183; Kelsey *v.* Hanmer, 18 Conn. R. 311; Doe *v.* Hathaway, 2 Allen, 69.

[6] Adams *v.* Kerr, 1 B. & P. 360; 3 Preston on Abstracts of Title, pp. 72, 73.

[7] Kay *v.* Brookman, 3 C. & P. 555; Webb *v.* St. Lawrence, 3 Bro. P. C. 640; Mott *v.* Doughty, 1 Johns. Cas. 230; Sluby *v.* Champlin, 4 Johns. 461; Adams *v.* Kerr, 1 B. & P. 360; Cunliffe *v.* Setton, 2 East, 183; Prince *v.* Blackburn, 2 East, 250; Douglas *v.* Sanderson, 2 Dall. 116; Cooke *v.* Woodrow, 5 Cranch, 13; Hamilton *v.* Marsden, 6 Binn. 45; Powers *v.* McFerran, 2 S. & R. 44; McKinder *v.* Littlejohn, 1 Iredell, 66. Some courts

being accompanied with proof of the *identity of the party* sued with the person who appears to have executed the instrument; which proof, it seems, is now deemed requisite,[1] especially where the deed

have also required proof of the handwriting of the obligor, in addition to that of the subscribing witness; but on this point the practice is not uniform. Clark *v.* Courtney, 5 Peters, 319; Hopkins *v.* De Graffenreid, 2 Bay, 187; Oliphant *v.* Taggart, 1 Bay, 255; Irving *v.* Irving, 2 Hayw. 27; Clark *v.* Saunderson, 3 Binn. 192; Jackson *v.* La Grange, 19 Johns. 386; Jackson *v.* Waldron, 13 Wend. 178, 183, 197, 198, *semble*. See also Gough *v.* Cecil, 1 Selw. N. P. 538, n. (7), (10th edit.) See *supra*, § 84, n.; Thomas *v.* Turnley, 2 Rob. Louis. R. 206; Dunbar *v.* Marden, 13 N. Hamp. 311.

[1] Whitelocke *v.* Musgrove, 1 C. & M. 511. But it seems that slight evidence of identity will suffice. See Nelson *v.* Whittall, 1 B. & Ald. 19; Warren *v.* Anderson, 8 Scott, 384. See also 1 Selw. N. P. 538, n. (7), (18th edit.); Phil. & Am. on Evid. 661, n. (4). This subject has recently been reviewed, in the cases of Sewell *v.* Evans, and Roden *v.* Ryde, 4 Ad. & El. N. S. 626. In the former case, which was an action for goods sold, against *William Seal Evans*, it was proved that the goods had been sold to a person of that name, who had been a customer, and had written a letter acknowledging the receipt of the goods; but there was no other proof that this person was the defendant. In the latter case, which was against *Henry Thomas Ryde*, as the acceptor of a bill of exchange, it appeared that a person of that name had kept cash at the bank where the bill was payable, and had drawn checks, which the cashier had paid. The cashier knew the person's handwriting by the checks, and testified that the acceptance was in the same writing; but he had not paid any check for some time, and did not personally know him; and there was no other proof of his identity with the defendant. The court, in both these cases, held that the evidence of identity was *primâ facie* sufficient. In the latter case, the learned judges gave their reasons as follows: Lord Denman, C. J., "The doubt raised here has arisen out of the case of Whitelocke *v.* Musgrove (1 C. & M. 511; s. c. 8 Tyrwh. 541); but there the circumstances were different. The party to be fixed with liability was a marksman, and the facts of the case made some explanation necessary. But where a person, in the course of the ordinary transactions of life, has signed his name to such an instrument as this, I do not think there is an instance in which evidence of identity has been required, except Jones *v.* Jones (9 M. & W. 75). There the name was proved to be very common in the country; and I do not say that evidence of this kind may not be rendered necessary by particular circumstances, as, for instance, length of time since the name was signed. But in cases where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were only *John Smith*, which is of very frequent occurrence, there might not be much ground for drawing the conclusion. But *Henry Thomas Ryde* are not so numerous; and from that, and the circumstances generally, there is every reason to believe that the acceptor and the defendant are identical. The dictum of Bolland, B. (3 Tyrwh. 558), has been already answered. Lord Lyndhurst, C. B., asks (3 Tyrwh. 543), why the onus of proving a negative in these cases should be thrown upon the defendant; the answer is, because the proof is so easy. He might come into court and have the witness asked whether he was the man. The supposition that the right man has been sued is reasonable, on account of the danger a party would incur, if he served process on the wrong; for, if he did so wilfully, the court would no doubt exercise their jurisdiction of punishing for a contempt. But the fraud is one which, in the majority of cases, it would not occur to any one to commit. The practice, as to proof, which has constantly prevailed in cases of this kind, shows how unlikely it is that such frauds should occur. The doubt now suggested has never been raised before the late cases which have been referred to. The observations of Lord Abinger and Alderson, B., in Greenshields *v.* Crawford (9 M. & W. 314), apply to this case. The transactions of the world could not go on, if such an objection were to prevail. It is unfortunate that the doubt should ever have been raised; and it is best that we should sweep it away as soon as we can." — Patteson, J.: "I concur in all that has been said by my Lord. And the rule always laid down in books of evidence agrees with our present decision. The execution of a deed has always been proved, by mere evidence of the subscribing witness's handwriting, if he was dead. The party executing an instrument may have changed his

on its face excites suspicion of fraud.[1] The instrument may also in such cases be read, upon proof of the handwriting of the obligor, or party by whom it was executed;[2] but in this case also it is conceived, that the like proof of the identity of the party should be required. If there be no subscribing witness, the instrument is sufficiently proved by any competent evidence that the signature is genuine.[3]

§ 576. In considering the proof of private writings, we are naturally led to consider the subject of the *comparison of hands*, upon which great diversities of opinion have been entertained. This expression seems formerly to have been applied to every case, where the genuineness of one writing was proposed to be tested before the jury, by comparing it with another, even though the latter were an acknowledged autograph; and it was held inadmissible, because the jury were supposed to be too illiterate to judge of this sort of evidence; a reason long since exploded.[4]

residence. Must a plaintiff show where he lived at the time of the execution, and then trace him through every change of habitation, until he is served with the writ? No such necessity can be imposed." — Williams, J.: "I am of the same opinion. It cannot be said here there was not some evidence of identity. A man of the defendant's name had kept money at the branch bank; and this acceptance is proved to be his writing. Then, is that man the defendant? That it is a person of the same name is some evidence, until another party is pointed out who might have been the acceptor. In Jones *v.* Jones (9 M. & W. 75), the same proof was relied upon; and Lord Abinger said: 'The argument for the plaintiff might be correct, if the case had not introduced the existence of many Hugh Joneses in the neighborhood where the note was made.' It appeared that the name Hugh Jones, in the particular part of Wales, was so common as hardly to be a name; so that a doubt was raised on the evidence by cross-examination. That is not so here; and therefore the conclusion must be different."

[1] Brown *v.* Kimball, 25 Wend. 469.

[2] In Jackson *v.* Waldron, 11 Wend. 178, 183, 196, 197, proof of the handwriting of the obligor was held not regularly to be offered, unless the party was unable to prove the handwriting of the witness. But in Valentine *v.* Piper, 22 Pick. 90, proof of the handwriting of the party was esteemed more satisfactory than that of the witnesses. The order of the proofs, however, is a matter resting entirely in the discretion of the court.

[3] Pullen *v.* Hutchinson, 12 Shepl. 249.

[4] The admission of evidence by comparison of hands, in Col. Sidney's case, 8 Howell's St. Tr. 467, was one of the grounds of reversing his attainder. Yet, though it clearly appears that his handwriting was proved by two witnesses, who had seen him write, and by a third who had paid bills purporting to have been indorsed by him, this was held illegal evidence in a criminal case. [*In Jumpertz *v.* The People, 21 Ill. 375, the English rule is adhered to. In some of the states, the witnesses are allowed to testify from comparison of handwriting with that admitted to be genuine. Power *v.* Frick, 2 Grant's Cases, 306. That is not generally allowed to ordinary witnesses, the jury being supposed as competent to make the comparison as such witnesses. Chandler *v.* Le Barron, 45 Maine, 534; Adams *v.* Field, 21 Vt. R. 256. But experts are allowed to testify whether the signature in dispute is by the same hand as another admitted to be genuine. And while comparison of handwriting by the jury is restricted in the English practice to writings put in the case for other purposes, it is allowed in the American states to put in genuine signatures, written before the controversy arose, for the mere purpose of enabling the jury to judge by comparison. Adams *v.* Field, *supra*, by Bennett, J. But those having much experience in the trial of questions depending upon the genuineness of handwriting will not require to be re-

All evidence of handwriting, except where the witness saw the document written, is, in its nature, comparison. It is the belief which a witness entertains, upon comparing the writing in question with its exemplar in his mind, derived from some previous knowledge.[1] The admissibility of some evidence of this kind is now too well established to be shaken. It is agreed that, if the witness has the proper knowledge of the party's handwriting, he *may declare his belief* in regard to the genuineness of the writing in question. He may also be interrogated as to the circumstances on which he founds his belief.[2] The point upon which learned judges have differed in opinion is, upon the source from which this knowledge is derived, rather than as to the degree or extent of it.

§ 577. There are *two modes of acquiring this knowledge* of the handwriting of another, either of which is universally admitted to be sufficient, to enable a witness to testify to its genuineness. The *first* is from *having seen him write*. It is held sufficient for this purpose, that the witness has seen him write but once, and then only his name. The proof in such case may be very light; but the jury will be permitted to weigh it.[3] The *second* mode is,

minded that there is nothing in the whole range of the law of evidence, more unreliable, or where courts and juries are more liable to be imposed upon.]

[1] Doe *v.* Suckermore, 5 Ad. & El. 730, per Patteson, J. See, also, the remarks of Mr. Evans, 2 Poth. Obl. App. xvi. § 6, ad. calc. p. 162.

[2] Regina *v.* Murphy, 8 C. & P. 297; Commonwealth *v.* Webster, 5 Cush. 295; [Keith *v.* Lathrop, 10 Ib. 453.]

[3] Garrells *v.* Alexander, 4 Esp. 37. In Powell *v.* Ford, 2 Stark. R. 164, the witness had never seen the defendant write his christian name; but only "M. Ford," and then but once; whereas the acceptance of the bill in question was written with both the christian and surname at full length; and Lord Ellenborough thought it not sufficient, as the witness had no perfect exemplar of the signature in his mind. But in Lewis *v.* Sapio, 1 M. & Malk. 39, where the signature was "L. B. Sapio," and the witness had seen him write several times, but always "Mr. Sapio," Lord Tenterden held it sufficient. A witness has also been permitted to speak as to the genuineness of a person's mark, from having seen it affixed by him on several occasions. George *v.* Surrey, 1 M. & Malk. 516. But where the knowledge of the handwriting has been obtained by the witness from seeing the party write his name, *for that purpose*, after the commencement of the suit, the evidence is held inadmissible. Stranger *v.* Searle, 1 Esp. 14. See also Page *v.* Homans, 2 Shepl. 478. In Slaymaker *v.* Wilson, 1 Penn. R. 216, the deposition of a witness, who swore positively to her father's hand, was rejected, because she did not say *how* she knew it to be his hand. But in Moody *v.* Rowell, 17 Pick. 490, such evidence was very properly held sufficient on the ground, that it was for the other party to explore the sources of the deponent's knowledge, if he was not satisfied that it was sufficient. [Bowman *v.* Sanborn, 5 Foster, 87; Hopkins *v.* Megquire, 35 Maine, 78; West *v.* State, 2 N. Jersey, 212. Before being admitted to testify as to the genuineness of a controverted signature from his knowledge of the handwriting of the party, a witness ought, beyond all question, to have seen the party write, or be conversant with his acknowledged signature. The teller of a bank, who as such has paid many checks purporting to be drawn by a person who has a deposit account with the bank, but has not seen him write, if the testimony shows nothing further, is a competent witness to testify as to the handwriting of such person; but he is not a competent witness to testify to the hand-

from *having seen letters*, bills, or other documents, purporting to be the handwriting of the party, and having afterwards *personally communicated* with him respecting them; or *acted upon them* as his, the party having known and acquiesced in such acts, founded upon their supposed genuineness; or, by such *adoption* of them into the *ordinary business transactions* of life, as induces a reasonable presumption of their being his own writings; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him.[1] In both these cases, the witness acquires his knowledge by his own observation of facts, occurring under his own eye, and which is especially to be remarked, without having regard to any particular person, case, or document.

§ 578. This rule, requiring personal knowledge on the part of the witness, has been *relaxed in two cases*. (1.) Where writings are of such *antiquity*, that living witnesses cannot be had, and yet are not so old as to prove themselves.[2] Here the course is, to produce other documents, either admitted to be genuine, or proved to have been respected and treated and acted upon as such, by all parties; and to call *experts* to compare them, and to testify their opinion concerning the genuineness of the instrument in question.[3] (2.) Where *other writings*, admitted to be genuine, are *already in the case*. Here the comparison may be made by the jury, with or without the aid of experts. The reason assigned for this is, that as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice and direction of the court, to examine them for all purposes, than to

writing of such person, if it appears that some of the checks so paid were forged, and that the witnessed paid alike the forged and genuine checks. Brigham *v.* Peters, 1 Gray, 139, 145, 146. A witness who has done business with the maker of the note, and seen him write, *but only since the date* of the disputed note, may nevertheless give his opinion in regard to the genuineness of the note, the objection going to the weight and not to the competency of the evidence. Keith *v.* Lathrop, 10 Cush. 453.]

[1] Doe *v.* Suckermore, 5 Ad. & El. 731, per Patteson, J.; Lord Ferrers *v.* Shirley, Fitzg. 195; Carey *v.* Pitt, Peake's Evid. App. 81; Thorpe *v.* Gisburne, 2 C. & P. 21; Harrington *v.* Fry, Ry. & M. 90; Commonwealth *v.* Carey, 2 Pick. 47; Johnson *v.* Daverne, 19 Johns. 134; Burr *v.* Harper, Holt's Cas. 420; Pope *v.* Askew, 1 Iredell, R. 16. If a letter has been sent to the adverse party, by post, and an answer received, the answer may be read in evidence, without proof of the handwriting. Ovenston *v.* Wilson, 2 C. & K. 1; *supra*, § 573*a*. [See also Kinney *v.* Flynn, 2 R.I. 319; McKonkey *v.* Gaylord, 1 Jones, Law, N. C. 94.]

[2] *Supra*, § 570.

[3] See 20 Law Mag. 323; Brune *v.* Rawlings, 7 East, 282; Morewood *v.* Wood, 14 East, 328; Gould *v.* Jones, 1 W. Bl. 384; Doe *v.* Tarver, Ry. & M. 143; Jackson *v.* Brooks, 8 Wend. 426.

embarrass them with impracticable distinctions, to the peril of the cause.[1]

§ 579. A *third mode* of acquiring knowledge of the party's handwriting was proposed to be introduced in the case of *Doe* v. *Suckermore*;[2] upon which, the learned judges being equally divided in opinion, no judgment was given: namely, by first satisfying the witness, by some information or evidence not falling under either of the two preceding heads, that certain papers were genuine, and then desiring the witness to study them, so as to acquire a knowledge of the party's handwriting, and fix an exemplar in his mind; and then asking him his opinion in regard to the disputed paper; or else, by offering such papers to the jury, with proof of their genuineness, and then asking the witness to testify his opinion, whether those and the disputed paper were written by the same person. This method supposes the writing to be generally that of a stranger; for if it is that of the party to the suit, and is denied by him, the witness may well derive his knowledge from papers, admitted by that party to be genuine, if such papers were not selected nor fabricated for the occasion, as has already been stated in the preceding section. It is obvious, that if the witness does not speak from his own knowledge, derived in the first or second modes before mentioned, but has derived it from papers shown to him for that purpose, the production of these papers may be called for, and their genuineness contested. So that the third mode of information proposed resolves itself into this question, namely, whether documents, irrelevant to the issues on the record, may be received in evidence at the trial, to enable the jury to institute a comparison of hands, or to enable a witness so to do.[3]

[1] See 20 Law Mag. 319, 323, 324; Griffith *v.* Williams, 1 C. & J. 47; Solita *v.* Yarrow, 1 M. & Rob. 133; Rex *v.* Morgan, Id. 134, n.; Doe *v.* Newton, 5 Ad. & El. 514; Bromage *v.* Rice, 7 C. & P. 548; Hammond's case, 2 Greenl. 33; Waddington *v.* Cousins, 7 C. & P. 595; [* Van Wyck *v.* McIntosh, 4 Kernan, 439.]

[2] 5 Ad. & El. 703. In this case, a defendant in ejectment produced a will, and, on one day of the trial (which lasted several days), called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions, respecting the same will, in an ecclesiastical court, and several other signatures, were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness, to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard in court. Per Lord Denman, C. J., and Williams, J., such evidence was receivable; per Patteson and Coleridge, Js., it was not.

[3] See 5 Ad. & El. 734, per Patteson, J.

§ 580. In regard to admitting such evidence, upon an examination in chief, for the mere *purpose* of enabling the jury to judge of the handwriting, the modern English decisions are clearly opposed to it.[1] For this, two reasons have been assigned: namely, first, the danger of *fraud in the selection* of the writings, offered as specimens for the occasion; and, secondly, that, if admitted, the genuineness of these specimens may be contested, and others successively introduced, to the infinite multiplication of *collateral issues*, and the subversion of justice. To which may be added, the danger of surprise upon the other party, who may not know what documents are to be produced, and, therefore, may not be prepared to meet the inferences drawn from them.[2] The same mischiefs would follow, if the same writings were introduced to the jury through the medium of *experts*.[3]

§ 581. But, with respect to the admission of papers irrelevant to the record, for the sole purpose of creating a standard of comparison of handwriting, the *American decisions* are far from being uniform.[4] If it were possible to extract from the conflicting judg-

[1] Bromage *v.* Rice, 7 C. & P. 548; Waddington *v.* Cousins, Id. 595; Doe *v.* Newton, 5 Ad. & El. 514; Hughes *v.* Rogers, 8 M. & W. 123; Griffits *v.* Ivery, 11 Ad. & El. 322; The Fitzwalter Peerage, 10 Cl & Fin. 193; Regina *v.* Barber, 1 Car. & Kir. 434. See also Regina *v.* Murphy, 1 Armstr. Macartn. & Ogle, R. 204; Regina *v.* Caldwell, Id. 324. But where a witness, upon his examination in chief, stated his opinion that a signature was not genuine, because he had never seen it signed R. H., but always R. W. H., it was held proper, on cross-examination, to show him a paper signed R. H., and ask him if it was genuine, though it was not connected with the cause; and he answering that, in his opinion, it was so, it was held proper further to ask him whether he would now say that he had never seen a genuine signature of the party without the initials R. W.; the object being to test the value of the witness's opinion. Younge *v.* Honner, 1 Car. & Kir. 51; 2 M. & Rob. 536, s. c.

[2] Phil. & Am. on Evid. 700, 701. See the Law Review, No. 4, for August, 1845, pp. 285–304, where this subject is more fully discussed.

[3] Experts are received to testify, whether the writing is a real or a feigned hand, and may compare it with other writings already in evidence in the cause. Revett *v.* Braham, 4 T. R. 497; Hammond's case, 2 Greenl. 33; Moody *v.* Rowell, 17 Pick. 490; Commonwealth *v.* Carey, 2 Pick. 47; Lyon *v.* Lyman, 9 Conn. 55; Hubly *v.* Vanhorne, 7 S. & R. 185; Lodge *v.* Phipher, 11 S. & R. 333. And the court will determine whether the witness is or is not an expert, before admitting him to testify. The State *v.* Allen, 1 Hawks, 6. But, upon this kind of evidence, learned judges are of opinion that very little, if any reliance, ought to be placed. See Doe *v.* Suckermore, 5 Ad. & El. 751, per Ld. Denman; Gurney *v.* Langlands, 5 B. & Ald. 330; Rex *v.* Cator, 4 Esp. 117; The Tracy Peerage, 10 Cl. & Fin. 154. In the People *v.* Spooner, 1 Denio, R. 343, it was held inadmissible. Where one writing crosses another, an expert may testify which, in his opinion, was the first made. Cooper *v.* Bockett, 4 Moore, P. C. Cas. 433. The nature of the evidence of experts, and whether they are to be regarded as arbitrators, or *quasi* judges and jurors, or merely as witnesses, is discussed with great acumen by Professor Mittermaier, in his Treatise on Evidence in Criminal Cases (Traité de la Preuve en Matière Criminelle), Ch. XXVI.

[4] In *New York*, *Virginia*, and *North Carolina*, the English rule is adopted, and such testimony is rejected. Jackson *v.* Phillips, 9 Cowen, 94, 112; Titford *v.* Knott, 2 Johns. Cas. 210. The People *v.*

ments a rule, which would find support from the majority of them, perhaps it would be found not to extend beyond this: that such papers can be offered in evidence to the jury, only when no collateral issue can be raised concerning them; which is only where the papers are either conceded to be genuine, or are such as the other party is estopped to deny; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony.[1]

§ 581*a*. A distinction, however, has been recently taken, between the case of collateral writings offered in evidence to prove the general style or character of the party's autograph, and of similar writings, when offered to prove a peculiar mode of spelling another person's name, or other words, in order to show from this fact,

Spooner, 1 Denio, R. 343; Rowt *v.* Kile, 1 Leigh, R. 216. The State *v.* Allen, 1 Hawks, 6; Pope *v.* Askew, 1 Iredell, R. 16. [So, in *Rhode Island*. Kinney *v.* Flynn, 2 R. I. Rep. 319. The weight of authority in *Kentucky* is against the admission of handwritings for the purpose of comparison, even by the jury. Hawkins *v.* Grimes, 13 B. Mon. 258.] In *Massachusetts*, *Maine*, and *Connecticut*, it seems to have become the settled practice to admit any papers to the jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting. Homer *v.* Wallis, 11 Mass. 309; Moody *v.* Rowell, 17 Pick. 490; Richardson *v.* Newcomb, 21 Pick. 315; Hammond's case, 2 Greenl. 33; Lyon *v.* Lyman, 9 Conn. 55. In *New Hampshire* and *South Carolina*, the admissibility of such papers has been limited to cases, where other proof of handwriting is already in the cause, and for the purpose of turning the scale in doubtful cases. Myers *v.* Toscan, 3 N. Hamp. 47; The State *v.* Carr, 5 N. Hamp. 367; Bowman *v.* Plunket, 3 McC. 518; Duncan *v.* Beard, 2 Nott & McC. 401. In *Pennsylvania*, the admission has been limited to papers conceded to be genuine. McCorkle *v.* Binns, 5 Binn. 340; Lancaster *v.* Whitehill, 10 S. & R. 110; or concerning which there is no doubt. Baker *v.* Haines, 6 Whart. 284; 3 Greenl. Ev. § 106, note. [A paper proposed to be used as a standard, cannot be proved to be an original, and a genuine signature, merely by the opinion of a witness that it is so; such opinion being derived solely from his general knowledge of the handwriting of the person whose signature it purported to be. Commonwealth *v.* Eastman, 1 Cush. 189, 217; Martin *v.* Maguire, 7 Gray, 177; Bacon *v.* Williams, 13 Gray, 525. But an expert may testify, whether in his opinion a signature is a genuine one or simulated, although he has no knowledge of the handwriting of the party whose signature it is claimed to be. Withee *v.* Rowe, 45 Maine, 571.]

[1] Smith *v.* Fenner, 1 Gall. 170, 175. See also Goldsmith *v.* Banc. 3 Halst. 87; Bank of Pennsylvania *v.* Haldemand, 1 Penn. R. 161; Greaves *v.* Hunter, 2 C. & P. 447; Clermont *v.* Tullidge, 4 C. & P. 1; Burr *v.* Harper, Holt's Cas. 420; Sharp *v.* Sharp, 2 Leigh, 249; Baker *v.* Haines, 6 Whart. 284; Finch *v.* Gridley, 25 Wend. 469; Fogg *v.* Dennis, 3 Humph. 47; [Depue *v.* Place, 7 Penn. Law Jour. 289; Commonwealth *v.* Eastman, 1 Cush. 189; Hicks *v.* Pearson, 19 Ohio, R. 426. A writing made in the presence of the court and jury by the party whose signature is in dispute may be submitted to the jury for the purpose of comparison. Chandler *v.* Le Barron, 45 Maine, 534.] [*A press copy of a letter might furnish a very unsatisfactory standard of comparison by which to determine whether another paper, the handwriting of which was in controversy, was written by the same person; but, although incompetent as a means of comparison, by which to judge of the characteristics of a handwriting which is in dispute, it might still retain enough of its original character, to be identified by a witness, when its own genuineness was called in question. Bigelow, Ch. J., in Commonwealth *v.* Jeffries, 7 Allen, 562.]

that the principal writing was his own. Thus, where, to an action for a libel, the defendant pleaded that the plaintiff had sent to him a libellous letter, and, to prove this, gave in evidence the envelope, in which the defendant's name was spelt with a superfluous *t*, and then offered in evidence some other letters of the plaintiff, in which he had spelt the defendant's name in the same peculiar manner; which last-mentioned letters Patteson, J., rejected; it was held that the rejection was wrong, and that the letters were admissible.[1]

§ 582. Where the sources of primary evidence of a written instrument are exhausted, *secondary evidence*, as we have elsewhere shown, is admissible; but whether, in this species of evidence, any degrees are recognized as of binding force, is not perfectly agreed; but the better opinion seems to be, that, generally speaking, there are none. But this rule, with its exceptions, having been previously discussed, it is not necessary here to pursue the subject any further.[2]

§ 583. The *effect* of private writings, when offered in evidence, has been incidentally considered, under various heads, in the preceding pages, so far as it is established and governed by any rules of law. The rest belongs to the jury, into whose province it is not intended here to intrude.

§ 584. Having thus completed the original design of this volume, in a view of the principles and rules of the law of evidence, under-

[1] Brookes *v.* Tichborne, 14 Jour. 1122; 2 Eng. Law & Eq. R. 374. In this case, Parke, B., after stating the case, observed as follows: "On showing cause, it was hardly disputed that, if the habit of the plaintiff so to spell the word was proved, it was not some evidence against the plaintiff, to show that he wrote the libel; indeed we think that proposition cannot be disputed, the value of such evidence depending on the degree of peculiarity in the mode of spelling, and the number of occasions in which the plaintiff had used it; but it was objected, that the mode of proof of that habit was improper, and that the habit should be proved as the character of handwriting, not by producing one or more specimens and comparing them, but by some witness who was acquainted with it, from having seen the party write, or corresponding with him. But we think this is not like the case of general style or character of handwriting; the object is not to show similarity of the form of the letters and the mode of writing of a particular word, but to prove a peculiar mode of spelling words, which might be evidenced by the plaintiff having orally spelt it in a different way, or written it in that way, once or oftener, in any sort of character, the more frequently, the greater the value of the evidence. For that purpose, one or more specimens written by him, with that peculiar orthography, would be admissible. We are of opinion, therefore, that this evidence ought to have been received, and not having been received, the rule for a new trial must be made absolute." In Jackson *v.* Phillips, 9 Cowen, 94, where the facts were of a similar character, the collateral deed was offered and rejected, on the sole ground of comparison of hands; the distinction in the text not having been taken or alluded to.

[2] *Supra*, § 84, note (2); Doe *v.* Ross, 7 M. & W. 102; 8 Dowl. 389, s. c.

stood to be common to all the United States, this part of the work is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labor from the manner of treatment; and will rise from the study of its principles, convinced, with Lord Erskine, that "they are founded in the charities of religion — in the philosophy of nature — in the truths of history — and in the experience of common life."[1]

[1] 24 Howell's St. Tr. 966.

INDEX.

A.

B.

D.

E.

F.

I.

J.

K.

L.

N.

O.

P.

Q.

R.

S.

T.

U.

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